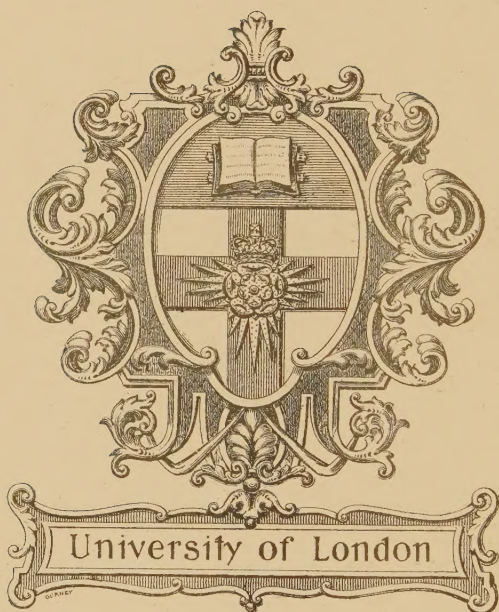


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THE
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LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

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ALL DIVISIONS OF THE SUPREME COURT
AND
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These reports are cited thus :

[1939] 1 All E. R.

CASES REPORTED IN VOLUME 1

	PAGE		PAGE
ABODI MENDI, SPANISH REPUBLICAN GOVERNMENT v. [C.A.]	701	CANADIAN CELANESE, LTD. v. B.V.D. Co., LTD. [P.C.]	410
ADAMS v. UNION CINEMAS, LTD. [K.B.D.]	169	CANTER, ATTORNEY-GENERAL v. [C.A.]	13
ANGFARTYGS A/B HALFDAN v. PRICE & PIERCE, LTD. [K.B.D.]	322	CHADWICK'S TRUSTS, Re, SHAW v. WOODWARD [CH.D.]	850
ANGLO-CONTINENTAL PRODUCE Co., LTD., Re [CH.D.]	99	CLIFFORD, R. v. [C.C.A.]	352
APPLESON v. LITTLEWOOD (H.), LTD. [C.A.]	464	COHEN v. EDGAR, Re EDGAR [CH.D.]	635
ARANTZAZU MENDI, THE [H.L.]	719	COLES v. ENOCH [K.B.D.]	614
ARMOUR v. LIVERPOOL CORPORATION [CH.D.]	363	COLLINS, WHITE AND, APPLICATIONS OF, Re RIPON (HIGHFIELD) HOUSING ORDER, 1938 [K.B.D.]	508
ATTORNEY-GENERAL, BROOKES v., Re HODSON'S SETTLEMENT [C.A.]	196	CONSOLIDATED AFRICAN SELECTION TRUST, LTD., LOWRY v. [C.A.]	353
ATTORNEY-GENERAL v. CANTER [C.A.]	13	CONWAY (PETER), LTD., GRIFFITHS v. [C.A.]	685
ATTORNEY-GENERAL v. GLYN MILLS & Co. [C.A.]	236	COOPER v. LUXOR (EASTBOURNE), LTD. [K.B.D.]	623
ATTORNEY-GENERAL FOR NEWFOUNDLAND, UNITED TOWNS ELECTRIC Co., LTD. v. [P.C.]	423	COOPER, WORSLEY (E.) & Co., LTD. v. [CH.D.]	290
BAILEY (T. D.), SON & Co. AND SMYTH (ROSS T.) & Co., LTD., Re AN ARBITRATION BETWEEN [K.B.D.]	115	CO-OPERATIVE INSURANCE SOCIETY, LTD., MAYER & SHEERATT v. [K.B.D.]	76
BAINBRIDGE, APPLICATION OF, Re SOUTH SHIELDS (D'ARCY STREET) COMPULSORY PURCHASE ORDER, 1937 [K.B.D.]	419	COVENTRY v. WILSON [C.A.]	429
BALDOCK, WESTRIPP v. [C.A.]	279	CRANE v. HEGEMAN-HARRIS Co., INC. [CH.D.]	662
BANKRUPT v. OFFICIAL RECEIVER, Re MUSCOVITCH AND MUSCOVITCH, Ex parte MUSCOVITCH AND MUSCOVITCH [C.A.]	135	CULLINGTON, UNITED STEEL COMPANIES, LTD. v. [C.A.]	454
BANTHAM S.S. Co., LTD., KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. [C.A.]	819	DANN v. HAMILTON [K.B.D.]	59
BARCLAY PERKINS & Co., LTD., WARD v. [K.B.D.]	287	DARK v. WESTERN MOTOR & CARRIAGE Co. (BRISTOL), LTD. [K.B.D. DIVL. CT.]	143
BARCLAYS BANK, LTD., UNITED AUSTRALIA, LTD. v. [C.A.]	676	DAVID, R. v. [C.C.A.]	782
BARKER v. MUMBY [K.B.D. DIVL. CT.]	611	DEBTOR (No. 946 of 1926), Re A, DEBTOR v. OFFICIAL RECEIVER [C.A.]	735
BARRINGTON, UNIVERSITY MOTORS, LTD. v. [C.A.]	630	DEBTOR v. OFFICIAL RECEIVER, Re A DEBTOR (No. 946 of 1926) [C.A.]	735
BEAUMONT-THOMAS v. BLUE STAR LINE, LTD. [K.B.D.]	174	DENYE, LEWIS v. [C.A.]	310
BEEB AND FRANK, Re AN ARBITRATION BETWEEN [C.A.]	253	DURNELL v. SCOTT [K.B.D. DIVL. CT.]	183
BELL, MARRISON v. [C.A.]	745	EDGAR, Re, COHEN v. EDGAR [CH.D.]	635
BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA (COUNTY OF DURHAM), Re [P.C.]	282	EDWARDS v. QUICKENDEN [C.A.]	759
BILLET, R. v. [C.C.A.]	501	ELLERKER v. UNION COLD STORAGE Co., LTD. [K.B.D.]	23
BISHOP, TOWNSEND v. [K.B.D.]	805	ELLIS v. RAINE [C.A.]	104
BLACKBURN BOROUGH COUNCIL, MARGINSON v. [C.A.]	273	EMPIRE MEAT Co., LTD. v. PATRICK [K.B.D.]	606
BLUE STAR LINE, LTD., BEAUMONT-THOMAS v. [K.B.D.]	174	ENOCH, COLES v. [K.B.D.]	614
BORDERS, BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. [CH.D.]	481	FARMER, Re, NIGHTINGALE v. WHYBROW [CH.D.]	319
BORRETT, BULLOCK v. [K.B.D.]	505	FEW v. BYRNE, Re MACLENNAN [CH.D.]	587
BOUNDFOORD, R. v. [C.C.A.]	529	FINDLATER, R. v. [C.C.A.]	82
BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS [CH.D.]	481	FOWLER v. YORKSHIRE ELECTRIC POWER Co., LTD. [K.B.D.]	407
BROADBENT v. MACNAB, Re KAY'S SETTLEMENT [CH.D.]	245	FRANK, BEEB AND, Re AN ARBITRATION BETWEEN [C.A.]	253
BROOKES v. ATTORNEY-GENERAL, Re HODSON'S SETTLEMENT [C.A.]	196	GARVIE, HORLICKS, LTD. v. [K.B.D. DIVL. CT.]	335
BUCKINGHAM COUNTY VALUATION COMMITTEE, METROPOLITAN ELECTRIC SUPPLY Co., LTD. v. [K.B.D.]	36	GEORGE, LLOYDS BANK, LTD. v., Re THOMPSON [CH.D.]	681
BULLOCK v. BORRETT [K.B.D.]	505	GIBBS-SMITH v. GIBBS-SMITH [DIV.]	332
BUTLER, APPLICATION OF, Re CAMBERWELL (WINGFIELD MEWS) No. 2 CLEARANCE ORDER, 1936 [C.A.]	590	GLYN MILLS & Co., ATTORNEY-GENERAL v. [C.A.]	236
B.V.D. Co., LTD., CANADIAN CELANESE, LTD. v. [P.C.]	410	GORHAM'S CHARITY, Re [CH.D.]	600
BYRNE, FEW v., Re MACLENNAN [CH.D.]	587	GRAY v. JONES [K.B.D.]	798
CAMBERWELL (WINGFIELD MEWS) No. 2 CLEARANCE ORDER, 1936, Re, APPLICATION OF BUTLER [C.A.]	590	GRIFFITHS v. CONWAY (PETER), LTD. [C.A.]	685
CAMERON, PRENDERGAST v. [C.A.]	223	GYSIN & HANSON, HIBERNIAN BANK, LTD. v. [C.A.]	166
		HALL BROTHERS S.S. Co., LTD. v. YOUNG, THE TRIDENT [C.A.]	809
		HAMILTON, DANN v. [K.B.D.]	59
		HAMILTON, R. v. [C.C.A.]	469
		HANSON, SLOAN v. [C.A.]	533
		HANSON, GYSIN AND, HIBERNIAN BANK, LTD. v. [C.A.]	166
		HASSAN, NATIONAL REAL ESTATE & FINANCE Co., LTD. v. [K.B.D. LIVERPOOL WINTER ASSIZES]	713
		HEGEMAN-HARRIS Co. INC., CRANE v. [CH.D.]	662
		HEMMINGS, R. v. [C.C.A.]	417

	PAGE
HERBERTIAN BANK, LTD. v. GYSIN & HANSON [C.A.]	166
HODSON'S SETTLEMENT, <i>Re</i> , BROOKES v. ATTORNEY-GENERAL [C.A.]	196
HOMOLKA v. OSMOND [K.B.D. DIVL. CT.]	154
HORLOCKS, LTD. v. GARVIE [K.B.D. DIVL. CT.]	335
HORROCKS, <i>Re</i> , TAYLOR v. KERSHAW [C.A.]	579
HOWARD v. KINNELL (CHARLES P.) & CO., LTD. [C.A.]	34
HUDGELL, NATIONAL ELECTRIC THEATRES, LTD. v. [CH.D.]	567
IARATE, LONDON COUNTY COUNCIL v. [K.B.D. DIVL. CT.]	191
IMPERIAL AIRWAYS, LTD., PHILIPPSON v. [H.L.]	761
INFIELDS, LTD. v. ROSEN [CH.D.]	121
INLAND REVENUE COMMISSIONERS v. KERED, LTD. [C.A.]	45
INLAND REVENUE COMMISSIONERS v. SIGMA	
INLAND REVENUE COMMISSIONERS (LORD ADVOCATE ON BEHALF OF), TENNANT v. [H.L.]	672
INLAND REVENUE COMMISSIONERS v. TRING INVESTMENTS, LTD. [K.B.D.]	148
INLAND REVENUE COMMISSIONERS v. WILLIANT TRUST, LTD. [C.A.]	45
JACKSON v. JACKSON (OTHERWISE PRUDOM) [Div.]	471
JACKSON, PITT v. [K.B.D.]	129
JENKINS v. SHELLEY [K.B.D.]	786
JONES, GRAY v. [K.B.D.]	798
JONES, LLAY MAIN COLLIERIES, LTD. v. [C.A.]	8
JONES, R. v. [C.C.A.]	181
JONES v. MEATYARD [K.B.D. DIVL. CT.]	140
JUDGMENT CREDITOR v. JUDGMENT DEBTOR, <i>Re</i> A JUDGMENT DEBTOR (No. 2176 of 1938) [C.A.]	1
JUDGMENT DEBTOR (No. 2176 of 1938), <i>Re</i> A JUDGMENT CREDITOR v. JUDGMENT DEBTOR [C.A.]	1
JUDGMENT DEBTOR, JUDGMENT CREDITOR v., <i>Re</i> A JUDGMENT DEBTOR (No. 2176 of 1938) [C.A.]	1
KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. CO., LTD. [C.A.]	819
KAY'S SETTLEMENT, <i>Re</i> , BROADBENT v. MACNAB [CH.D.]	245
KEARRY v. PATTINSON [C.A.]	65
KERED, LTD., INLAND REVENUE COMMISSIONERS v. [C.A.]	45
KERSHAW, TAYLOR v., <i>Re</i> HORROCKS [C.A.]	579
KETTER, R. v. [C.C.A.]	729
KILDUFF v. WILSON [C.A.]	429
KING-EMPEROR, SWAMI (PAKALA NARAYANA) v. [P.C.]	396
KINNELL (CHARLES P.) & CO., LTD., HOWARD v. [C.A.]	34
LARGE, R. v. [C.C.A.]	753
LEES, LONDON COUNTY COUNCIL v. [K.B.D. DIVL. CT.]	191
LEONARD, R. v. [C.C.A.]	529
LEWIS v. DENYE [C.A.]	310
LITTLEWOOD (H.), LTD., APPLESON v. [C.A.]	464
LIVERPOOL CORPORATION, ARMOUR v. [CH.D.]	363
LLAY MAIN COLLIERIES, LTD. v. JONES [C.A.]	8
LYDD, WORTHY v. [C.A.]	474
LYDD'S BANK, LTD. v. GEORGE, <i>Re</i> THOMPSON [CH.D.]	681
LONDON COUNTY COUNCIL v. IARATE [K.B.D. DIVL. CT.]	191
LONDON COUNTY COUNCIL v. LEES [K.B.D. DIVL. CT.]	191
LONDON FILM PRODUCTIONS, LTD., NAISMITH v. [C.A.]	794
LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS), TENNANT v. [H.L.]	672
LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD. [C.A.]	353
LUXOR (EASTBOURNE), LTD., COOPER v. [K.B.D.]	623
MCAYVOY (OR TREANOR), R. v. [C.C.A.]	330
MACLENNAN, <i>Re</i> , FEW v. BYRNE [CH.D.]	587
MACNAB, BROADBENT v., <i>Re</i> KAY'S SETTLEMENT [CH.D.]	245
MAHON v. OSBORNE [C.A.]	535
MARGINSON v. BLACKBURN BOROUGH COUNCIL [C.A.]	273
MARRISON v. BELL [C.A.]	745

	PAGE
MARSHALL v. MATTHEWS [K.B.D. DIVL. CT.]	156
MATTHEWS, MARSHALL v. [K.B.D. DIVL. CT.]	156
MAYER & SHERRATT v. CO-OPERATIVE INSURANCE SOCIETY, LTD. [K.B.D.]	76
MAYNE v. SILVERMERE CLEANERS, LTD. [K.B.D. LIVERPOOL MICHAELMAS ASSIZES]	693
MEATYARD, JONES v. [K.B.D. DIVL. CT.]	140
MESSERS, LTD. v. MORRISON'S EXPORT CO., LTD. [K.B.D.]	92
METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. BUCKINGHAM COUNTY VALUATION COMMITTEE [K.B.D.]	36
METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. SURREY (NORTH WESTERN) AREA ASSESSMENT COMMITTEE [K.B.D.]	36
MILNE, R. v. [C.C.A.]	529
MODEL FARM DAIRIES (BOURNEMOUTH), LTD., SQUARE v. [C.A.]	259
MORRISON'S EXPORT CO., LTD., MESSERS, LTD. v. [K.B.D.]	92
MUMBY, BARKER v. [K.B.D. DIVL. CT.]	611
MUSCOVITCH AND MUSCOVITCH, <i>Ex parte</i> , <i>Re</i> MUSCOVITCH AND MUSCOVITCH, BANKRUPTS v. OFFICIAL RECEIVER [C.A.]	135
MUSCOVITCH AND MUSCOVITCH, <i>Re</i> , <i>Ex parte</i> MUSCOVITCH AND MUSCOVITCH, BANKRUPTS v. OFFICIAL RECEIVER [C.A.]	135
NAAR, ULLSTROM v. [C.A.]	164
NAISMITH v. LONDON FILM PRODUCTIONS, LTD. [C.A.]	794
NATIONAL ELECTRIC THEATRES, LTD. v. HUDGELL [CH.D.]	567
NATIONAL REAL ESTATE & FINANCE CO., LTD. v. HASSAN [K.B.D. LIVERPOOL WINTER ASSIZES]	712
NEWS CHRONICLE, LTD., POLIAKOFF v. [C.A.]	390
NIGHTINGALE v. WHYBROW, <i>Re</i> FARMER [CH.D.]	319
NORDBORG, THE, NORDBORG (OWNERS) v. SHERWOOD (C. P.) & CO. [C.A.]	70
OFFICIAL RECEIVER, BANKRUPTS v., <i>Re</i> MUSCOVITCH AND MUSCOVITCH, <i>Ex parte</i> MUSCOVITCH AND MUSCOVITCH [C.A.]	135
OFFICIAL RECEIVER, DEBTOR v., <i>Re</i> A DEBTOR (No. 946 of 1926) [C.A.]	735
OSBORNE, MAHON v. [C.A.]	535
OSMAUGHNESSY, WATKINS v. [C.A.]	355
OSMOND, HOMOLKA v. [K.B.D. DIVL. CT.]	154
OSTER, RIDLEY v. [K.B.D.]	618
PATRICK, EMPIRE MEAT CO., LTD. v. [K.B.D.]	606
PATTINSON, KEARRY v. [C.A.]	65
PEARL ASSURANCE CO., LTD., SMITH v. [C.A.]	95
PHILIPPSON v. IMPERIAL AIRWAYS, LTD. [H.L.]	761
PIERCE, PRICE & LTD., ANGARTYGS A/B HALFAN v. [K.B.D.]	322
PILKINGTON v. PILKINGTON [C.A.]	29
PITT v. JACKSON [K.B.D.]	129
POLIAKOFF v. NEWS CHRONICLE, LTD. [C.A.]	390
POWELL, <i>Ex parte</i> , R. v. WESTON-SUPER-MARE LICENSING JJ. [C.A.]	212
PRATT v. PRATT [C.A.]	503
PRENDERGAST v. CAMERON [C.A.]	223
PRICE & PIERCE, LTD., ANGARTYGS A/B HALFAN v. [K.B.D.]	322
PRUDOM (OTHERWISE JACKSON), JACKSON v. [Div.]	471
PUBLIC TRUSTEE v. SCARR [K.B.D.]	188
QUICKENDEN, EDWARDS v. [C.A.]	759
R. v. BILLER [C.C.A.]	501
R. v. BOUNDFOOT [C.C.A.]	529
R. v. CLIFFORD [C.C.A.]	352
R. v. DAVID [C.C.A.]	782
R. v. FINDLATER [C.C.A.]	82
R. v. HAMILTON [C.C.A.]	469
R. v. HEMMINGS [C.C.A.]	417
R. v. JONES [C.C.A.]	181
R. v. KETTER [C.C.A.]	729
R. v. LARGE [C.C.A.]	753
R. v. LEONARD [C.C.A.]	529
R. v. MILNE [C.C.A.]	529
R. v. SALISBURY [C.C.A.]	250
R. v. TENNET [C.C.A.]	86
R. v. TREANOR (OR MCAYVOY) [C.C.A.]	330
R. v. WESTON-SUPER-MARE LICENSING JJ., <i>Ex parte</i> POWELL [C.A.]	212

	PAGE
RADCLIFFE v. RIBBLE MOTOR SERVICES, LTD. [H.L.]	637
RAINE, ELLIS v. [C.A.]	104
RIBBLE MOTOR SERVICES, LTD., RADCLIFFE v. [H.L.]	637
RIDLEY v. OSTER [K.B.D.]	618
RIPON (HIGHFIELD) HOUSING ORDER, 1938, <i>Re</i> APPLICATIONS OF WHITE AND COLLINS [K.B.D.]	508
ROSEN, INFIELDS, LTD. v. [CH.D.]	121
ROWLES, SCAMMELL (G.) & NEPHEW, LTD. v. [C.A.]	337
ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS, SEDLIGH-DENFIELD v. [C.A.]	725
SALISBURY, R. v. [C.C.A.]	250
SCAMMELL (G.) & NEPHEW, LTD. v. ROWLES [C.A.]	337
SCARB, PUBLIC TRUSTEE v. [K.B.D.]	188
SCOTT, DURNELL v. [K.B.D. DIVL CT.]	183
SEDLIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS [C.A.]	725
SHARPE v. TOPHAMS, LTD. [C.A.]	123
SHAW v. WOODWARD, <i>Re</i> CHADWICK'S TRUSTS [CH.D.]	850
SHELLEY, JENKINS v. [K.B.D.]	786
SHENTON v. TYLER [C.A.]	827
SHERATT, MAYER & v. CO-OPERATIVE INSUR- ANCE SOCIETY, LTD. [K.B.D.]	76
SHERWOOD (C. P.) & CO., NORDBOG (OWNERS) v., THE NORDBOG [C.A.]	70
SHERWOOD COLLIERY CO., LTD., <i>Re</i> [RY. AND CAN. COM.]	88
SIFTON v. SIFTON [DIV.]	109
SIGMA TRUST, LTD., INLAND REVENUE COM- MISSIONERS v. [C.A.]	45
SILVERMERE CLEANERS, LTD., MAYNE v. [K.B.D.]	693
LIVERPOOL MICHAELMAS ASSIZES	333
SLOAN v. HANSON [C.A.]	95
SMITH v. PEARL ASSURANCE CO., LTD. [C.A.]	95
SMYTH (ROSS. T.) & CO., LTD., <i>Re</i> AN ARBITRA- TION BETWEEN BAILEY (T. D.), SON & CO. AND [K.B.D.]	115
SOUTH SHIELDS (D'ARCY STREET) COMPULSORY PURCHASE ORDER, 1937, <i>Re</i> APPLICATION OF BAINBRIDGE [K.B.D.]	419
SOUTH SHIELDS, ST. HILDA (COUNTY OF DURHAM), WESTOE AND, <i>Re</i> BENEFICES OF [P.C.]	282
SPANISH REPUBLICAN GOVERNMENT v. ABODI MENDI [C.A.]	701
SPENCE v. SPENCE [DIV.]	52
SQUARE v. MODEL FARM DAIRIES (BOURNE- MOUTH), LTD. [C.A.]	259
SURREY (NORTH WESTERN) AREA ASSESSMENT COMMITTEE, METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. [K.B.D.]	36
SWAMI (PAKALA NARAYANA) v. KING-EMPEROR [P.C.]	396
SWETTENHAM v. SWETTENHAM [DIV.]	161
TAYLOR v. KERSHAW, <i>Re</i> HORROCKS [C.A.]	579
TENNANT v. LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS) [H.L.]	672

	PAGE
TENNET, R. v. [C.C.A.]	86
THOMAS, <i>Re</i> [CH.D.]	379
THOMPSON, <i>Re</i> , LLOYDS BANK, LTD. v. GEORGE [CH.D.]	681
TILLEY v. WESTER WEMYSS, <i>Re</i> WESTER WEMYSS [CH.D.]	382
TOPHAMS, LTD., SHARPE v. [C.A.]	123
TOWNSEND v. BISHOP [K.B.D.]	805
TREANOR (OR MCAVOY), R. v. [C.C.A.]	330
TRIDENT, THE, HALL BROTHERS S.S. CO., LTD. v. YOUNG [C.A.]	809
TRING INVESTMENTS, LTD., INLAND REVENUE COMMISSIONERS v. [K.B.D.]	148
TYLER, SHENTON v. [C.A.]	827
ULLSTROM v. NAAR [C.A.]	164
UNION CINEMAS, LTD., ADAMS v. [K.B.D.]	169
UNION COLD STORAGE CO., LTD., ELLERKER v. [K.B.D.]	23
UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD. [C.A.]	676
UNITED STEEL COMPANIES, LTD. v. CULLINGTON [C.A.]	454
UNITED TOWNS ELECTRIC CO., LTD. v. ATTORNEY- GENERAL FOR NEWFOUNDLAND [P.C.]	423
UNIVERSITY MOTORS, LTD. v. BARRINGTON [C.A.]	630
UNUS SHIPPING CO. (IN LIQUIDATION), VITA FOOD PRODUCTS, INC. v. [P.C.]	513
VITA FOOD PRODUCTS, INC. v. UNUS SHIPPING CO. (IN LIQUIDATION) [P.C.]	513
WARD v. BARCLAY PERKINS & CO., LTD. [K.B.D.]	287
WATKINS v. O'SHAUGHNESSY [C.A.]	385
WESTER WEMYSS, <i>Re</i> , TILLEY v. WESTER WEMYSS [CH.D.]	382
WESTERN MOTOR & CARRIAGE CO. (BRISTOL), LTD., DARK v. [K.B.D. DIVL CT.]	143
WESTOE AND SOUTH SHIELDS, ST. HILDA (COUNTY OF DURHAM), <i>Re</i> BENEFICES OF [P.C.]	282
WESTON-SUPER-MARE LICENSING JJ., R. v., <i>Ex</i> <i>parte</i> POWELL [C.A.]	212
WESTRIPP v. BALDOCK [C.A.]	279
WHITE AND COLLINS, APPLICATIONS OF, <i>Re</i> RIPON (HIGHFIELD) HOUSING ORDER, 1938 [K.B.D.]	508
WHITTLE v. WHITTLE [DIV. DIVL CT.]	374
WHYBROW, NIGHTINGALE v., <i>Re</i> FARMER [CH.D.]	319
WILLANT TRUST, LTD., INLAND REVENUE COM- MISSIONERS v. [C.A.]	45
WILSON, COVENTRY v. [C.A.]	429
WILSON, KILDUFF v. [C.A.]	429
WOODWARD, SHAW v., <i>Re</i> CHADWICK'S TRUSTS [CH.D.]	850
WORSLEY (E.) & CO., LTD. v. COOPER [CH.D.]	290
WORTHY v. LLOYD [C.A.]	474
YORKSHIRE ELECTRIC POWER CO., LTD., FOWLER v. [K.B.D.]	407
YOUNG, HALL BROTHERS S.S. CO., LTD. v., THE TRIDENT [C.A.]	809

CASES REFERRED TO

	PAGES
Adam v. Ward, [1917] A.C. 369; 32 Digest 129, 1608; 86 L.J.K.B. 849; 117 L.T. 34; <i>affg.</i> (1915), 31 T.L.R. 299	430, 432
Adamson v. A.-G., [1933] A.C. 257; Digest Supp.; 102 L.J.K.B. 129; 148 L.T. 365	197, 198, 199, 200, 202, 203, 205, 206, 207
Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs., [1924] S.C. 231; Digest Supp.; 8 Tax Cas. 671	338, 339
Adelaide S.S. Co. v. A.-G., [1926] A.C. 172; 29 Digest 212, 1701; 95 L.J.K.B. 213; 134 L.T. 258	810, 812
Albert (Prince) v. Strange (1849), 1 Mac. & G. 25; 13 Digest 176, 125; 18 L.J.Ch. 120; 12 L.T.O.S. 441; subsequent proceedings, 2 De G. & Sm. 708	292
Alexander v. Rayson, [1936] 1 K.B. 169; Digest Supp.; 105 L.J.K.B. 148; 154 L.T. 205	514, 515, 516, 550, 553
Aleyn v. Belchier (1758), 1 Eden, 132; 37 Digest 503, 962	224, 225
Allen v. Trehearne (1938) 2 K.B. 464; [1938] 2 All E.R. 698; Digest Supp.; 107 L.J.K.B. 597; 159 L.T. 270	292, 293, 397
Amber Size & Chemical Co., Ltd. v. Menzel, [1913] 2 Ch. 239; 34 Digest 122, 933; 82 L.J.Ch. 573; 109 L.T. 520	515, 516
Ameen Sharif v. Emperor (1934), 1 L.R., 61 Cal. 607	515, 516
Anderson, Ltd. v. Daniel, [1924] 1 K.B. 138; Digest Supp.; 93 L.J.K.B. 97; 130 L.T. 418	515, 516
Angliss (W.) & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co., [1927] 2 K.B. 456; 41 Digest 474, 3054; 96 L.J.K.B. 1084; 137 L.T. 727	515, 516
Anglo-Persian Oil Co., Ltd. v. Dale, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253	338, 339, 340, 341, 351, 66, 67
Anthony v. Haney (1832), 8 Bing. 186; 43 Digest 412, 350; 1 L.J.C.P. 81	701, 703, 707
Arantazazu Mendi, The, [1939] 1 All E.R. 719; Digest Supp.; <i>on appeal from</i> [1938] 4 All E.R. 207	424, 425
Argyll (Duke) v. Inland Revenue Comrs. (1913), 109 L.T. 893; 28 Digest 92, 544; 7 Tax Cas. 225	424, 425, 428
Associated Newspapers, Ltd. v. London Corp., [1916] 2 A.C. 429; 38 Digest 475, 350; 85 L.J.K.B. 1786; 115 L.T. 419	712, 715
Athlumney, Re, <i>Ex p.</i> Wilson, [1898] 2 Q.B. 547; 42 Digest 702, 1191; 67 L.J.Q.B. 935; <i>sub nom.</i> Re Athlumney (Lord), <i>Ex p.</i> Wilson v. Hasluck, 79 L.T. 303	407, 408
Atkinson v. London & North Eastern Ry. Co., [1926] 1 K.B. 313; Digest Supp.; 95 L.J.K.B. 266; 134 L.T. 217	260, 266, 424, 425
Atkinson v. Newcastle Waterworks Co. (1877), 2 Ex.D. 441; 42 Digest 759, 1850; 46 L.J.Ex. 775; 36 L.T. 761; <i>revg.</i> (1871), L.R. 6 Exch. 404	197, 199, 211, 673, 675
A.-G. v. Clarkson, [1900] 1 Q.B. 156; 42 Digest 665, 751; 69 L.J.Q.B. 81; 81 L.T. 617	14, 17
A.-G. v. Dickinson & Baron, [1937] 2 K.B. 574; [1937] 2 All E.R. 485; Digest Supp.; 106 L.J.K.B. 615; 157 L.T. 550	236, 238, 239, 242
A.-G. v. Dobree, [1900] 1 Q.B. 442; 21 Digest 17, 97; 69 L.J.Q.B. 223; 81 L.T. 607	730, 734
A.-G. v. Exeter Corp., [1911] 1 K.B. 1092; 39 Digest 220, 4; 80 L.J.K.B. 636; 104 L.T. 212; 5 Tax Cas. 629	364, 370
A.-G. v. Floyer (1862), 9 H.L. Cas. 477; 21 Digest 86, 622; 31 L.J.Ex. 404; 7 L.T. 47; <i>revg.</i> (1861), 7 H. & N. 238	382, 385
A.-G. v. Goralchswill (1925), McNair's Annual Digest of Public International Law Cases, 1925-1926, p. 47	577, <i>affg.</i> (1934), 151 L.T. 268
A.-G. v. Great Eastern Ry. Co. (1880), 5 App. Cas. 473; 13 Digest 356, 932; 49 L.J.Ch. 545; 42 L.T. 810	197, 198, 202, 207
A.-G. v. Jackson, [1932] A.C. 365; Digest Supp., <i>sub nom.</i> Re Cockell, A.-G. v. Jackson, 101 L.J.Ch. 186; <i>sub nom.</i> Re Cockell, Jackson v. A.-G., 146 L.T. 450; 16 Tax Cas. 681	198, 199, 673, 675
A.-G. v. Lloyds Bank, Ltd., [1935] A.C. 382; Digest Supp.; 104 L.J.K.B. 523; 152 L.T. 577; <i>affg.</i> (1934), 151 L.T. 268	197, 198, 199, 200, 202, 203, 204, 206, 207, 208, 209, 211
A.-G. v. Milne, [1914] A.C. 765; 21 Digest 46, 296; 83 L.J.K.B. 1083; 111 L.T. 343	197, 198, 202, 207
A.-G. v. Pearson, [1924] 2 K.B. 375; 21 Digest 15, 75; 94 L.J.K.B. 139; 132 L.T. 717	198, 199, 673, 676
A.-G. v. Quixley (1929), 98 L.J.K.B. 652; Digest Supp.; 141 L.T. 288	198, 199
A.-G. v. Robinson, [1901] 2 I.R. 67; 21 Digest 15, case q	673, 675
A.-G. v. Selborne (Earl), [1902] 1 K.B. 388; 21 Digest 102, 753; 71 L.J.K.B. 289; 85 L.T. 714	236, 237, 238, 239, 243
A.-G. v. Till, [1910] A.C. 50; 28 Digest 103, 641; 79 L.J.K.B. 141; 101 L.T. 819; 5 Tax Cas. 440	13, 15
Attwood v. Lamont, [1920] 3 K.B. 571; 43 Digest 20, 131; 90 L.J.K.B. 121; 124 L.T. 108	607, 608, 609, 610
Austria (Emperor) v. Day & Kossuth (1861), 3 De G. F. & J. 217; 28 Digest 433, 883; 30 L.J.Ch. 690; 4 L.T. 494	820, 821
Aveson v. Kinnaird (Lord) (1805), 6 East, 188; 22 Digest 98, 686	828, 831
B. v. B. & G., [1937] P. 1; [1936] 2 All E.R. 1254; Digest Supp.; 105 L.J.P. 90; 155 L.T. 322	110, 111
Bailey v. Howard, [1938] 4 All E.R. 827; Digest Supp.	104, 105, 107
Bain v. Pothergill (1874), L.R. 7 H.L. 158; 40 Digest 265, 2306; 43 L.J.Ex. 243; 31 L.T. 387; <i>affg.</i> (1870), L.R. 6 Exch. 59	619
Bainbridge v. Baddeley (1847), 2 Ph. 705; 21 Digest 217, 535	274, 278
Baird v. Lees, [1924] S.C. 83; Digest Supp.	99, 103
Baker v. Adam (1910), 102 L.T. 248; 29 Digest 76, 356	810, 812
Balden v. Shorter, [1933] 1 Ch. 427; Digest Supp.; 102 L.J.Ch. 191; 148 L.T. 471	292, 310
Balfour v. Balfour, [1919] 2 K.B. 571; 27 Digest 210, 1821; 88 L.J.K.B. 1054; 121 L.T. 346	828, 830
Ballam v. Wiltshire, R. v. Hampshire JJ. (1879), 44 J.P. 72; 30 Digest 43, 332	213, 218
Ballard v. North British Ry. Co., [1923] S.C. 43; 36 Digest 88, case 5812ix	536, 541
Banco de Portugal v. Waterlow & Sons, Ltd., Waterlow & Sons, Ltd. v. Banco de Portugal, [1932] A.C. 452; Digest Supp.; 101 L.J.K.B. 417; 147 L.T. 101	354, 355

	PAGES
Bankruptcy Notice, <i>Re A</i> , [1898] 1 Q.B. 383; 4 Digest 89, 810; 67 L.J.Q.B. 308; 77 L.T. 710	2, 3, 4
Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency, [1919] A.C. 304; 32 Digest 113, 1453; 88 L.J.K.B. 194; 120 L.T. 289	391, 392
Barker v. Dixie (1736), <i>Lee temp. Hard</i> , 264	828, 832
Barker v. Herbert, [1911] 2 K.B. 633; 36 Digest 197, 374; 80 L.J.K.B. 1329; 105 L.T. 349	726
Barnes v. Cadogan Developments, Ltd., [1930] 1 Ch. 479; Digest Supp.; 99 L.J.Ch. 274; 142 L.T. 626	619
Barnett v. Cohen, [1921] 2 K.B. 461; 36 Digest 133, 887; 90 L.J.K.B. 1307; 125 L.T. 733	104, 105, 334, 335
Bartonshill Coal Co. v. McGuire (1858), 3 Macq. 300; 34 Digest 126, 972; 31 L.T.O.S. 258	638, 643, 646, 648, 649, 650, 653, 654, 655, 656, 658, 659
Bartonshill Coal Co. v. Reid (1858), 3 Macq. 266; 34 Digest 126, 971; 31 L.T.O.S. 255	638, 642, 646, 647, 648, 650, 652, 653, 654, 656, 658, 659
Beard, <i>Re</i> , Reversionary & General Securities Co., Ltd. v. Hall, <i>Re</i> Beard, Beard v. Hall, [1908] 1 Ch. 383; 44 Digest 453, 2749; 77 L.J.Ch. 265; 98 L.T. 315	635, 637
Beardsley v. Beardsley, [1899] 1 Q.B. 746; 21 Digest 188, 362; 68 L.J.Q.B. 270; 80 L.T. 51	274, 275
Bell v. National Provincial Bank of England, [1904] 1 K.B. 149; 28 Digest 41, 211; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1	454, 457, 462
Belton v. Busby, [1899] 2 Q.B. 380; 25 Digest 445, 390; 68 L.J.Q.B. 859; 81 L.T. 196	529, 532, 533
Benefices of Great Massingham and Little Massingham, <i>Re</i> , [1931] A.C. 328; Digest Supp.; 100 L.J.P.C. 93; 144 L.T. 654	282, 283, 285
Best, <i>Re</i> , Jarvis v. Birmingham Corp., [1904] 2 Ch. 354; 8 Digest 297, 744; 73 L.J.Ch. 808	580, 581, 584
Beveridge v. Minter (1824), 1 C. & P. 364	828, 829
Blackburne v. Thompson (1812), 15 East, 81; 38 Digest 6, 8; <i>affg.</i> (1811), 3 Camp. 61	820, 821
Blackwell v. Blackwell, [1929] A.C. 318; Digest Supp.; 98 L.J.Ch. 251; 140 L.T. 444	828, 829
Blatchford v. Staddon & Foundry, [1927] A.C. 461; 34 Digest 465, 3810; 96 L.J.K.B. 608; 137 L.T. 257; 20 B.W.C.C. 391	77, 80
Boehm, <i>In the Goods of</i> , [1891] P. 247; 23 Digest 137, 1355; 60 L.J.P. 80; 64 L.T. 806	580, 581, 586
Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd., [1909] 1 K.B. 785; 17 Digest 276, 901; 78 L.J.K.B. 596; 100 L.T. 503	820, 821
Bolton Estates Act, 1863, <i>Re</i> , [1904] 2 Ch. 289; 21 Digest 24, 133; 73 L.J.Ch. 688; 91 L.T. 259	237, 239
Bonnard v. Dott, [1906] 1 Ch. 740; 35 Digest 204, 302; 75 L.J.Ch. 446; 94 L.T. 656	514, 515
Boston v. Tatam (1621), Cro. Jac. 623; 32 Digest 56, 774	799, 801
Bottle, <i>Re</i> , Unreported	601, 602
Bourton v. Beauchamp, [1920] A.C. 1001; 34 Digest 303, 2506; 89 L.J.K.B. 1205; 123 L.T. 606; 13 B.W.C.C. 90	311, 316
Bowman, <i>Re</i> , South Shields (Thames Street) Clearance Order, 1931, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150	508, 511
Bowman (or M'Naughton) v. Caledonian Ry. Co. (1858), 21 Dunl. (Ct. of Sess.) 160; 36 Digest 111, case 732 <i>liii</i>	638, 643, 653, 654
Bowron v. Bowron, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773	110, 113
Bradford Corp. v. Myers, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; <i>affg.</i> , [1915] 1 K.B. 417	430, 451
Braybrooke (Lord) v. A-G. (1861), 9 H.L. Cas. 150; 21 Digest 94, 694; 31 L.J.Ex. 177; 4 L.T. 218; <i>varying</i> (1860), 5 H. & N. 488	236, 237, 238, 242
Britain v. Rossiter (1879), 11 Q.B.D. 123; 12 Digest 123, 810; 48 L.J.Q.B. 362; 40 L.T. 240	169, 173
Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool and London War Risks Insurance Assoc., [1921] 1 A.C. 99; 41 Digest 990, 8753; 89 L.J.K.B. 881; 123 L.T. 721	820, 822
British India Steam Navigation Co. v. Inland Revenue Comrs. (1881), 7 Q.B.D. 165; 6 Digest 500, 3172; 50 L.J.Q.B. 517; 44 L.T. 378	83, 85
British Insulated & Helsby Cables v. Atherton, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; <i>affg.</i> , [1925] 1 K.B. 421	338, 339
British Thomson-Houston Co., Ltd. v. Corona Lamp Works, Ltd. (1922), 39 R.P.C. 49	411
Brocklebank, Ltd. v. R., [1925] 1 K.B. 52; Digest Supp.; 94 L.J.K.B. 26; 132 L.T. 166; <i>reversg.</i> , [1924] 1 K.B. 647	430, 451, 677, 678
Brooks v. Brimcome, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417	713, 714
Brown v. Eckes (1916), 160 N.Y. Supp. 489	66, 67
Brunsden v. Humphrey (1884), 14 Q.B.D. 141; 36 Digest 122, 810; 53 L.J.Q.B. 476; 51 L.T. 529	274, 275, 805, 808
Buckland v. Johnson (1854), 15 C.B. 145; 21 Digest 222, 566; 23 L.J.C.P. 204; 23 L.T.O.S. 190	677, 678
Bullivant v. A-G. for Victoria, [1901] A.C. 196; 18 Digest 145, 941; 70 L.J.K.B. 645; 84 L.T. 737; <i>reversg.</i> S.C. <i>sub nom.</i> R. v. Bullivant, [1900] 2 Q.B. 163	828, 829
Burchell v. Gowrie & Blackhouse Collieries, Ltd., [1910] A.C. 614; 1 Digest 495, 1702; 80 L.J.P.C. 41; 103 L.T. 325	615, 617
Burr v. Theatre Royal, Drury Lane, Ltd., [1907] 1 K.B. 544; 34 Digest 210, 1728; 76 L.J.K.B. 459; 96 L.T. 447	639, 657
Burrell & Kinnaird v. A.G., [1937] A.C. 286; [1936] 3 All E.R. 758; Digest Supp.; 106 L.J.K.B. 134; 156 L.T. 36	197, 198, 200, 202, 208
Bushell v. Hammond, [1904] 2 K.B. 563; 30 Digest 44, 342; 73 L.J.K.B. 1005; 91 L.T. 1	213, 214
Butler, <i>Re</i> , Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, [1938] 2 K.B. 210; Digest Supp.; <i>sub nom.</i> <i>Re</i> Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, Application of Butler, [1938] 2 All E.R. 279	419, 421, 422
Cadbury Bros., Ltd. v. Sinclair, [1933] 103 L.J.K.B. 29; Digest Supp.; 149 L.T. 412; 18 Tax Cas. 157	24
Caird v. Moss (1886), 33 Ch.D. 22; 21 Digest 172, 267; 55 L.J.Ch. 854; 55 L.T. 453	663, 669, 670

	PAGES
Caldwell v. Caldwell (1921), 91 L.J.P.C. 95; 8 Digest 297, 745	580, 584
Calland v. Loyd (1840), 6 M. & W. 26; 3 Digest 190, 339; 9 L.J.Ex. 56	677, 678
Galmenson v. Merchants' Warehousing Co. (1921), 90 L.J.P.C. 134; 13 Digest 259, 402; 125 L.T. 129	334, 335
Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd., [1934] A.C. 402; Digest Supp.; 103 L.J.K.B. 289; 151 L.T. 142	685, 690
Cape Brandy Syndicate v. Inland Revenue Comrs., [1921] 2 K.B. 403; 42 Digest 666, 765; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358	424, 425
Carllil v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256; 12 Digest 55, 310; 62 L.J.Q.B. 257; 67 L.T. 837	364, 373
Carslake v. Marledoram (1788), 2 Term Rep. 473; 32 Digest 59, 553	799, 802
Cartwright v. Lilleshall Co. Ltd., [1937] 4 All E.R. 242; Digest Supp.	8, 10
Challis v. Newman (1937), Unreported, Apr. 27	611, 612
Charles v. Taylor, Walker & Co. (1878), 3 C.P.D. 492; 34 Digest 212, 1749; 38 L.T. 773	613, 614
	638, 644, 658
Chatenay v. Brazilian Submarine Telegraph Co., [1891] 1 Q.B. 79; 17 Digest 331, 1424; 60 L.J.Q.B. 295; 63 L.T. 739	515, 516
Chatsworth Estates Co. v. Fewell, [1931] 1 Ch. 224; Digest Supp.; 100 L.J.Ch. 52; 144 L.T. 302	280, 281
Chibbett v. Robinson (J.) & Sons (1924), 132 L.T. 26; 28 Digest 19, 98; <i>sub nom.</i> Chibbett v. Robinson (J.) & Sons, Inland Revenue Comrs. v. Robinson (J.) & Sons, 9 Tax Cas. 48	338, 340
Chisum v. Dewes (1828), 5 Russ. 29; 23 Digest 373, 4426	382, 383, 384, 385
Christie v. Barker (1884), 53 L.J.Q.B. 537; 39 Digest 170, 611	188, 190
City of London Contract Corp'n. v. Styles (1887), 4 T.L.R. 51; 28 Digest 47, 239; 2 Tax Cas. 239	338, 339
Cleghorn v. Oldham (1927), 43 T.L.R. 465; 36 Digest 15, 60	59, 63
Cohen v. West Ham Corp'n., [1933] Ch. 814; Digest Supp.; 102 L.J.Ch. 305; 149 L.T. 271	591, 592
Coldrick v. Partridge, Jones & Co., Ltd., [1910] A.C. 77; 34 Digest 211, 1741; 79 L.J.K.B. 173; 101 L.T. 835	638, 655
Cole v. Meek (1864), 15 C.B.N.S. 795; 41 Digest 343, 1942; 33 L.J.C.P. 183; 9 L.T. 653	323, 327
Coleshill v. Manchester Corp'n., [1928] 1 K.B. 776; Digest Supp.; 97 L.J.K.B. 229; 138 L.T. 537	374, 376
Collie, <i>Re, Ex p.</i> Adamson (1878), 8 Ch.D. 807; 4 Digest 444, 4019; 47 L.J.Bey. 103; 38 L.T. 917	677, 678
Compania Naviera Vascongado v. Cristina, The, The Cristina, [1938] A.C. 485; [1938] 1 All E.R. 719; Digest Supp.; 107 L.J.P. 1; 159 L.T. 394	720, 721
Cooke v. Turner (1846), 15 M. & W. 727; 44 Digest 461, 2320; 17 L.J.Ex. 106	635, 636
Cooper v. Wilson, [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.; 106 L.J.K.B. 728; 157 L.T. 290	429, 430, 433, 434, 436, 438, 440, 443, 444, 446, 450, 453
Copper Export Assn. Incorporated v. Mersey Docks & Harbour Board (1932), 147 L.T. 320; Digest Supp.	430, 451
Couch v. Steel (1854), 3 E. & B. 402; 42 Digest 750, 1739a; 23 L.J.Q.B. 121; 22 L.T.O.S. 271	280, 261
Cowley (Earl) v. Inland Revenue Comrs., [1899] A.C. 198; 21 Digest 7, 27; 68 L.J.Q.B. 435; 80 L.T. 361; <i>varying S.C. sub nom. Re Cowley's (Earl) Estate</i> , [1898] 1 Q.B. 355	197, 198, 205
Craven-Ellis v. Canons, Ltd., [1936] 2 K.B. 403; [1936] 2 All E.R. 1066; Digest Supp.; 105 L.J.K.B. 767; 155 L.T. 376	169, 173
Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd., [1936] 2 All E.R. 1150; Digest Supp.	311, 313, 316, 317
Cuckson v. Stones (1858), 1 E. & E. 248; 34 Digest 71, 433; 28 L.J.Q.B. 25; 32 L.T.O.S. 242	745, 746, 748, 749, 750, 751
Cugny's Will Trusts, <i>Re, Smith v.</i> Freeman, [1931] 1 Ch. 305; Digest Supp.; 100 L.J.Ch. 145; 144 L.T. 525	379, 381
Cullerney v. London & Suburban General Permanent Building Society (1890), 25 Q.B.D. 485; 7 Digest 473, 116; 59 L.J.Q.B. 525; 63 L.T. 511	482, 496
Cunliffe v. Harrison (1851), 6 Exch. 903; 39 Digest 378, 169; 20 L.J.Ex. 325; 17 L.T.O.S. 189	71, 74
Cuthbert v. Cumming (1855), 10 Exch. 809; 41 Digest 338, 1905; 24 L.J.Ex. 198; 25 L.T.O.S. 23	323, 328
Cutler v. United Dairies (London), Ltd., [1933] 2 K.B. 297; Digest Supp.; 102 L.J.K.B. 663; 149 L.T. 436	59, 63
Dallmeyer (1906), <i>Re</i> , [1909] 1 K.B. 105, n.; 4 Digest 575, 5233	136, 137
D'Angibau, <i>Re, Andrews v.</i> Andrews (1880), 15 Ch.D. 228; 40 Digest 527, 717; 49 L.J.Ch. 756; 43 L.T. 135	245, 249
Davies v. Owen (Thomas) & Co., [1919] 2 K.B. 39; 24 Digest 908, 68; 88 L.J.K.B. 887; 121 L.T. 156	407, 408
Davis v. Dinwoody (1792), 4 Term Rep. 678; 14 Digest 450, 4760	828, 831, 832
Davis v. Petrie, [1906] 2 K.B. 786; 5 Digest 1108, 9034; 75 L.J.K.B. 992; 95 L.T. 239	677, 678
Debtor, <i>Re A, Ex p.</i> The Debtor (No. 1088 of 1923), [1924] B. & C.R. 1; Digest Supp.	737, 738
De Trafford v. A.-G., [1935] A.C. 280; Digest Supp.; 104 L.J.K.B. 396; 153 L.T. 17	197, 208
De Vaux v. Salvador (1836), 4 Ad. & El. 420; 29 Digest 212, 1695; 51 L.J.K.B. 134	810, 812
Dew v. United British S.S. Co., Ltd. (1928), 98 L.J.K.B. 88; Digest Supp.; 139 L.T. 628	312, 313, 316
Dobell & Co. v. S.S. Rossmore Co., [1895] 2 Q.B. 408; 41 Digest 429, 2697; 64 L.J.Q.B. 777; 73 L.T. 74	514, 515, 519, 524, 526
Doe d. Wetherell v. Bird (1834), 2 Ad. & El. 161; 43 Digest 6, 12; 4 L.J.K.B. 52	280
Doker v. Hasler (1824), Ry. & M. 198; 22 Digest 420, 4303; <i>subsequent proceedings</i> (1825), 2 Bing. 479	828, 829, 835, 837, 841, 848
Dolder v. Huntingfield (Lord) (1805), 11 Ves. 283; 22 Digest 148, 1256	820, 821
Drake's Settlement Trusts, <i>Re, Wilson v.</i> Drake, [1937] 4 All E.R. 171; Digest Supp.; 157 L.T. 559	237, 239
Duane, <i>In the Goods of</i> (1862), 2 Sw. & Tr. 590; 44 Digest 229, 540; 31 L.J.P.M. & A. 173; 6 L.T. 788	580, 581, 586
Duff Development Co. v. Kelantan Government, [1924] A.C. 797; Digest Supp.; 93 L.J.Ch. 343; 131 L.T. 676	820, 821

	PAGES
Dunbar Magistrates v. Mackersy, [1931] S.C. 160	424, 425
Edwards v. Metropolitan Water Board, [1922] 1 K.B. 291; 38 Digest 111, 795; 91 L.J.K.B. 210; 126 L.T. 300	430, 451
Edwards v. Porter, [1925] A.C. 1; 27 Digest 214, 1857; 94 L.J.K.B. 65; 132 L.T. 496; <i>affg.</i> , [1923] 2 K.B. 538	828, 831
Edwards (Job), Ltd. v. Birmingham Navigations, [1924] 1 K.B. 341; 36 Digest 214, 575; 93 L.J.K.B. 261; 130 L.T. 522	725, 726, 728, 729
Elder Dempster & Co. v. Paterson, Zochonis & Co., Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis & Co., [1924] A.C. 522; 41 Digest 478, 3718; 93 L.J.K.B. 625; 131 L.T. 449; <i>revgg.</i> , [1923] 1 K.B. 420	514, 516, 528
Elderslie S.S. Co. v. Borthwick, [1905] A.C. 93; 41 Digest 446, 2800; 74 L.J.K.B. 336; 92 L.T. 274; <i>affg.</i> , [1904] 1 K.B. 319	762, 770, 778, 779
Electric & Musical Industries, Ltd. v. Lissen, Ltd., [1938] 4 All E.R. 221; Digest Supp.	411, 412
Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co., Ltd., [1932] 1 K.B. 401; Digest Supp.; 101 L.J.K.B. 117; 146 L.T. 153; 24 B.W.C.C. 376	77, 80
Elliott v. Liggins, [1902] 2 K.B. 84; 34 Digest 490, 4063; 71 L.J.K.B. 483; 87 L.T. 29; 4 W.C.C. 11	745, 746, 750, 751
Engelke v. Musmann, [1928] A.C. 433; Digest Supp.; 97 L.J.K.B. 789; 139 L.T. 586; <i>revgg.</i> , [1928] 1 K.B. 90	820, 821
English Crown Spelter Co., Ltd. v. Baker (1908), 99 L.T. 353; 28 Digest 48, 250; 5 Tax Cas. 327	354, 355
Errington v. Minister of Health, [1935] 1 K.B. 249; Digest Supp.; 104 L.J.K.B. 49; 152 L.T. 154	591, 592
Exchange Telegraph Co., Ltd. v. Gregory & Co., [1896] 1 Q.B. 147; 13 Digest 179, 147; 65 L.J.Q.B. 262; 74 L.T. 83	292, 293
Fairman v. Perpetual Investment Building Society, [1923] A.C. 74; 36 Digest 37, 213; 92 L.J.K.B. 50; 128 L.T. 386	130, 133
Falmouth (Well Lane, Sedgmond's Court and Smithwick Hill) Clearance Order, 1936, <i>Re</i> , Halse's Application, [1937] 3 All E.R. 308; Digest Supp.; 157 L.T. 140	591, 593
Farmer v. Hyde, [1937] 1 K.B. 728; [1937] 1 All E.R. 773; Digest Supp.; 106 L.J.K.B. 292; 156 L.T. 403	391, 392
Farwell v. Boston & Worcester Railroad Corpn. (1842), 3 Macq. 316; 4 Metcalf 49	638, 644, 647, 650, 651, 653, 654
Fender v. Mildmay, [1938] A.C. 1; [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340	465, 468
Feret v. Hill (1854), 15 C.B. 207; 12 Digest 290, 2337; 23 L.J.C.P. 185; 23 L.T.O.S. 158	514, 515
Few v. Robinson, [1921] 3 K.B. 504; 25 Digest 128, 495; 91 L.J.K.B. 42; 126 L.T. 94	260, 261
Fitch v. Dewes, [1921] 2 A.C. 158; 43 Digest 34, 276; 90 L.J.Ch. 436; 125 L.T. 744; <i>affg.</i> , [1920] 2 Ch. 159	607, 609
Flight v. Booth (1834), 1 Bing. N.C. 370; 40 Digest 106, 842; 4 L.J.C.P. 66	618, 622
Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd., [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; <i>revid. on other grounds</i> , [1936] A.C. 206 311, 312, 313, 315, 318	820, 821
Foster v. Globe Venture Syndicate, Ltd., [1900] 1 Ch. 811; 22 Digest 149, 1269; 69 L.J.Ch. 375; 82 L.T. 253	799, 800
Fowler v. Dowdney (1838), 2 Mood. & R. 119; 32 Digest 50, 596	260, 267
Frost v. Aylesbury Dairy Co., [1905] 1 K.B. 608; 39 Digest 445, 733; 74 L.J.K.B. 386; 92 L.T. 627	454, 455
Fry v. Burma Corpn., [1930] 1 K.B. 249; Digest Supp.; 98 L.J.K.B. 693; 141 L.T. 361; <i>affd.</i> , [1930] A.C. 321; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113	810, 811, 816
Furness Withy & Co., Ltd. v. Duder, [1936] 2 K.B. 461; [1936] 2 All E.R. 119; Digest Supp.; 105 L.J.K.B. 473; 154 L.T. 663	799, 801
Gainford v. Tuke (1619), Cro. Jac. 536; 32 Digest 58, 831	2, 3
Galbraith v. Grimshaw, [1910] A.C. 508; 21 Digest 618, 2058; 79 L.J.K.B. 1011; 103 L.T. 294; <i>affg.</i> , [1910] 1 K.B. 339	713, 716
Gardner v. Lucas (1878), 3 App. Cas. 582; 42 Digest 697, 1139	713
Gardner & Co. v. Cone, [1928] Ch. 955; 42 Digest 693, 1033; 97 L.J.Ch. 491	828, 829
Gartside v. Outram (1856), 26 L.J.Ch. 113; 18 Digest 143, 326; 28 L.T.O.S. 120	66, 67, 68
Gedge v. Minne (1613), 2 Bulst. 60; 43 Digest 411, 347	354, 356
General Hydraulic Power Co., Ltd. v. Hancock, [1914] 2 K.B. 21; 28 Digest 45, 228; 83 L.J.K.B. 906; 111 L.T. 251; 6 Tax Cas. 445	760
General Steam Navigation Co. v. London & Edinburgh Shipping Co. (1876), Bitt. Prac. Cas. 127; 1 Digest 175, 870	354, 356
Gillatt & Watts v. Colquhoun (1884), 33 W.R. 258; 28 Digest 47, 244; 2 Tax Cas. 76	66, 67
Gledstane v. Hewitt (1831), 1 Cr. & J. 565; 43 Digest 510, 488; 9 L.J.O.S. Ex 145	198, 200
Glegg v. Bromley, [1912] 3 K.B. 474; 8 Digest 432, 94; 81 L.J.K.B. 1681; 106 L.T. 825	713, 714
Gloucester Union v. Woolwich Union, [1917] 2 K.B. 374; 42 Digest 693, 1086; 86 L.J.K.B. 1187; 117 L.T. 250	66, 67
Goff v. Kilts (1836), 15 Wendell, N.Y., 550	735, 737
Gold, <i>Re</i> , <i>Ex p.</i> Gold (1891), 8 Morr. 45; 4 Digest 574, 5279	354, 355
Golden Horse Shoe (New), Ltd. v. Thurgood, [1934] 1 K.B. 548; Digest Supp.; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280	472, 473
Goodright d. Stevens v. Moss (1777), 2 Cowp. 591; 3 Digest 365, 58	155
Gould & Co. v. Houghton, [1921] 1 K.B. 509; 14 Digest 75, 431; 90 L.J.K.B. 369; 124 L.T. 566	838, 339
Granite Supply Assocn., Ltd. v. Kitton (Surveyor of Taxes) (1905), 5 Tax Cas. 168; 28 Digest 44, case <i>h</i>	685, 686, 690
Grant v. Australian Knitting Mills, Ltd., [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18	591, 592
Grant v. Langston, [1900] A.C. 383	725, 726
Graves v. Legg (1854), 9 Exch. 709; 12 Digest 416, 3351; 23 L.J. Ex. 228; 23 L.T.O.S. 254; <i>subsequent proceedings, sub nom.</i> Greaves v. Legg (1856), 11 Exch. 642; <i>sub nom.</i> Graves v. Legg (1857), 2 H. & N. 210	274, 275, 278
Graydon, <i>Re</i> , <i>Ex p.</i> Official Receiver, [1896] 1 Q.B. 417; 13 Digest 505, 554; 65 L.J.Q.B. 328; 74 L.T. 175	

	PAGES
Grayson (H. & C.) v. Ellerman Line, Ltd., [1920] A.C. 466; 36 Digest 116, 780; 89 L.J.K.B. 924; 123 L.T. 65; <i>affg.</i> S.C. <i>sub nom.</i> Ellerman Lines, Ltd. v. Grayson (H. & G.), Ltd., [1919] 2 K.B. 514.	312, 317
Great Western Ry. Co. v. Mostyn (Owners), The Mostyn, [1928] A.C. 57; 29 Digest 105, 706; 97 L.J.P. 8; 138 L.T. 403	810, 812
Green, <i>Re</i> , <i>Ex p.</i> Donnithorne (1879), 40 L.T. 660; 4 Digest 532, 4375	136, 137
Green v. Bartlett (1863), 14 C.B.N.S. 681; 1 Digest 504, 1738; 32 L.J.C.P. 261; 8 L.T. 503	615, 616
Green v. Penzance (Lord) (1881), 6 App. Cas. 657; Digest, Practice, 269, 64; 45 L.T. 353; <i>sub nom.</i> <i>Re</i> Green, 51, L.J.Q.B. 25; <i>affg.</i> S.C. <i>sub nom.</i> <i>Ex p.</i> Green, 7 Q.B.D. 273.	631, 632
Green v. Weatherill, [1929] 2 Ch. 213; Digest Supp.; 98 L.J.Ch. 369; 142 L.T. 216.	274, 275
Grein v. Imperial Airways, Ltd., [1937] 1 K.B. 50; [1936] 2 All E.R. 1258; Digest Supp.; 106 L.J.K.B. 49; 155 L.T. 380	762, 780
Grey v. Pearson (1857), 6 H.L. Cas. 61; 42 Digest 626, 277; 26 L.J.Ch. 473; 29 L.T.O.S. 67; <i>affg.</i> S.C. <i>sub nom.</i> Pearson v. Rutter (1853), 3 De G. M. & G. 398	397, 403
Gricbart v. Morris, [1920] 1 K.B. 659; 18 Digest 212, 1599; 89 L.J.K.B. 397; 122 L.T. 736	334
Groves v. Wimborne (Lord), [1898] 2 Q.B. 402; 42 Digest 759, 1858; 67 L.J.Q.B. 862; 79 L.T. 284	260, 266
Guardhouse v. Blackburn (1866), 1 R. 1 P. & D. 109; 23 Digest 111, 1044; 35 L.J.P. & M. 116; 14 L.T. 69	311, 313
	580, 582
Hagart & Burn-Murdoch v. Inland Revenue Comrs., [1929] A.C. 386; Digest Supp.; 98 L.J.P.C. 113; 141 L.T. 97; 14 Tax Cas. 433	338, 339
Haigh v. Royal Mail Steam Packet Co., Ltd. (1883), 52 L.J.Q.B. 641; 8 Digest 103, 684; 49 L.T. 802	175, 177, 178
Hain S.S. Co., Ltd. v. Tate & Lytle, Ltd., [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177	514, 516
Hammersmith (Berghem Mews) Clearance Order, 1936, <i>Re</i> , Application of Wilmot, [1937] 3 All E.R. 539; Digest Supp.; 157 L.T. 142	591, 592, 593, 597, 598
Hannam v. Mockett (1824), 2 B. & C. 934; 2 Digest 209, 48; 2 L.J.O.S.K.B. 183	66
Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd., [1931] S.C. 722; Digest Supp. 514, 515, 524	
Harman v. Official Receiver, Petitioning Creditors and Trustee, [1934] A.C. 245; Digest Supp.; 103 L.J.Ch. 158; 150 L.T. 501	736, 737, 738
Harper v. Pearson (1860), 3 L.T. 547; Digest Supp.	292, 310
Harriman v. Harriman, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557	53, 57, 58
Harris v. Associated Portland Cement Manufacturers, Ltd., [1938] 4 All E.R. 831; Digest Supp.	77, 80
Harris v. Elder (1893), 57 J.P. 553; 2 Digest 209, case 501	66, 67
Harrison v. Pearce (1858), 1 F. & F. 567; 32 Digest 169, 2078; <i>subsequent proceedings</i> (1859), 32 L.T.O.S. 298	291, 304
Hart v. Mills (1846), 15 M. & W. 85; 39 Digest 366, 58; 15 L.J.Ex. 200	71, 74
Harter v. Harter (1873), L.R. 3 P. & D. 11; 23 Digest 135, 1341; 42 L.J.P. & M. 1; 27 L.T. 858	580, 581
Heddon v. Evans [1919], 35 T.L.R. 642; 39 Digest 331, 158	582, 586
Hedley v. Pinkney & Sons S.S. Co., [1894] A.C. 222; 34 Digest 210, 1726; 63 L.J.Q.B. 4.9; 70 L.T. 630	787, 789
Heginbottom v. Watts, [1936] 2 K.B. 6; [1936] 2 All E.R. 153; Digest Supp.; 105 L.J.K.B. 337; 155 L.T. 14	639, 658
Heilbut v. Nevill (1870), L.R. 5 C.P. 478; 43 Digest 503, 423; 39 L.J.C.P. 245; 22 L.T. 662	619
Heming v. Power (1842), 10 M. & W. 564; 32 Digest 48, 561; 11 L.J.Ex. 323	677, 678
Henry v. Foster (A.), Henry v. Foster (J.), Hunter v. Dewhurst (1932), 16 Tax Cas. 605; Digest Supp.; <i>sub nom.</i> Dewhurst v. Hunter, 146 L.T. 510	799, 801
	224, 225, 226, 229, 230, 232, 233, 235
Herod v. Herod, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 159 L.T. 530	110, 111, 113
Higgins v. Beauchamp, [1914] 3 K.B. 1192; 43 Digest 5, 6; 84 L.J.K.B. 631; 111 L.T. 1103	280
Higgins v. Harrison (1932), 25 B.W.C.C. 113; Digest Supp.	312
Hill v. Ladyshore Coal Co. (1930), Ltd., [1936] 3 All E.R. 299; Digest Supp.; 155 L.T. 567; 29 B.W.C.C. 255	8, 11, 430, 442
Hillen and Pettigrew v. I.C.I. (Alkali), Ltd., [1936] A.C. 65; Digest Supp.; 104 L.J.K.B. 473; 153 L.T. 403	312, 313
Hilliard v. Lenard (1829), Mood. & M. 297	713
Hindle v. Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, 71; 66 L.J.Q.B. 173; 76 L.T. 159	713
Hitchin v. Campbell (1772), 2 Wm. Bl. 779; 21 Digest 208, 489	677, 678, 680
Hoare & Co., Ltd. v. Collyer, [1932] A.C. 407; Digest Supp.; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169	354, 356, 361
Hobbs v. Tinsling, Hobbs v. Nottingham Journal, [1929] 2 K.B. 1; Digest Supp.; 98 L.J.K.B. 421; 141 L.T. 121	391, 392
Holden v. Howard, [1937] 4 All E.R. 483; Digest Supp.	475
Holmes v. Watt, [1935] 2 K.B. 300; Digest Supp.; 104 L.J.K.B. 654; 153 L.T. 58	677, 678
Holroyd v. Marshall (1862), 10 H.L. Cas. 191; 39 Digest 678, 2642; 33 L.J.Ch. 193; 7 L.T. 172	198, 200
Houston v. Burns, [1918] A.C. 337; 8 Digest 297, 739; 87 L.J.P.C. 99; 118 L.T. 462	580, 581
Huggins, <i>Re</i> , <i>Ex p.</i> Huggins (1889), 22 Q.B.D. 277; 4 Digest 574, 5276; 58 L.J.Q.B. 207; 60 L.T. 236	735, 737
Hunt v. Richardson, [1916] 2 K.B. 446; 25 Digest 128, 492; 85 L.J.K.B. 1360; 115 L.T. 114	260, 261
Hunt (Charles), Ltd. v. Palmer, [1931] 2 Ch. 287; Digest Supp.; 100 L.J.Ch. 356; 145 L.T. 630	618, 619
Hunter v. A.-G., [1899] A.C. 309; 8 Digest 291, 687; 63 L.J.Ch. 449; 80 L.T. 732; <i>reversg.</i> S.C. <i>sub nom.</i> <i>Re</i> Hunter, Hood v. A.-G., [1897] 2 Ch. 105	580, 584
Huntington v. Attrill, [1893] A.C. 150; 11 Digest 455, 1118; 62 L.J.P.C. 44; 68 L.T. 326	13, 19
Hussey v. Fiddall (1699), 12 Mod. Rep. 324; Digest Supp.	677, 678

	PAGES
Hutchinson v. York, Newcastle & Berwick Ry. Co. (1850), 5 Exch. 343; 34 Digest 207, 1697; 19 L.J.Ex. 296; 15 L.T.O.S. 230 .. 638, 642, 643, 647, 653, 654	
Hyman v. Elandslaagete Collieries, Ltd. (1921), 42 N.L.R. 43; 9 Digest 287, case p .. 123, 125	
Hott v. Wilkes (1820), 3 B. & Ald. 304; 36 Digest 94, 628	59, 63
Imperatrix v. Pandharinath (1881), I.L.R., 6 Bombay 34	397
Imperial Bank of Canada v. Begley, [1936] 2 All E.R. 367; Digest Supp.	677, 678
Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 28 Digest 10, 51; 61 L.J.Q.B. 265; 65 L.T. 221; 3 Tax Cas. 53; affg. S.C. sub nom. R. v. Income Tax Comrs. (1888), 22 Q.B.D. 296	23, 27, 397, 403
Indermaur v. Dames (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; affd. (1867), L.R. 2 C.P. 311	639, 657, 795, 796, 797
Industrie, The, [1894] P. 58; 41 Digest 652, 4846; 63 L.J.P. 84; 70 L.T. 791	514, 527
Inland Revenue Comrs. v. Forrest (1890), 15 App. Cas. 334; 42 Digest 662, 709; 60 L.J.Q.B. 281; 63 L.T. 36; 3 Tax Cas. 117; affg. S.C. sub nom. Re Duty on Estate of Institution of Civil Engineers (1888), 20 Q.B.D. 621	424, 425
Inland Revenue Comrs. v. Ramsay (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79	354, 355
Inland Revenue Comrs. v. Sneath, [1932] 2 K.B. 362; Digest Supp.; 101 L.J.K.B. 330; 146 L.T. 434; 17 Tax Cas. 149	13, 15
Inman S.S. Co. v. Bischoff (1882), 7 App. Cas. 670; 29 Digest 210, 1684; 52 L.J.Q.B. 169; 47 L.T. 581	810, 818
Inster v. Ascher (Simon) (1930), 282 U.S. Rep. 445	411, 412
Ionides v. Universal Marine Insurance Co. (1863), 14 C.B.N.S. 259; 29 Digest 229, 1854; 32 L.J.C.P. 170; 8 L.T. 705	810, 818
Ivy's (Lady) Trial, Massam v. Ivy (1684), 10 State Tr. 555, 625	828, 839
Jacobs v. Crédit Lyonnais (1884), 12 Q.B.D. 589; 11 Digest 396, 688; 53 L.J.Q.B. 156; 50 L.T. 194	514, 522
Jacobs v. Revell, [1900] 2 Ch. 858; 40 Digest 107, 844; 69 L.J.Ch. 879; 83 L.T. 629	618, 623
James v. Danlop (1931), British Medical Journal, Apr. 25	536, 549, 554, 555, 559, 566
Janson v. Driefontein Consolidated Mines, Ltd., [1902] A.C. 484; 11 Digest 544, 486; 71 L.J.K.B. 857; 87 L.T. 372; affg., [1901] 2 K.B. 419, C.A., and [1900] 2 Q.B. 339	820, 823
Jeavons, Re, Ex p. Mackay (1873), 9 Ch. App. 127; 4 Digest 537, 4945; 43 L.J. Bcy. 105; 29 L.T. 713; subsequent proceedings, sub. nom. Re Jeavons, Ex p. Brown (1874), 9 Ch. App. 304	735, 736
Jebson v. East & West India Dock Co. (1875), L.R. 10 C.P. 300; 17 Digest 125, 340; 44 L.J.C.P. 181; 32 L.T. 321	260, 273
Jogendranath Gorai v. Emperor (1935), I.L.R., 63 Cal. 419	397
Johnson v. Lindsay & Co., [1891] A.C. 371; 34 Digest 215, 1773; 61 L.J.Q.B. 90; 65 L.T. 97	639, 656, 658
Jones, Re, Ex p. Williams (1882), 46 L.T. 242; 4 Digest 532, 4877	136, 137
Jones, Re, Jones v. Jones, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417	588, 590
Jones v. Brown (1848), 2 Exch. 329; 42 Digest 641, 451; 17 L.J.Ex. 163; 11 L.T.O.S. 129	213, 218
Jones v. Jones, [1916] 2 A.C. 481; 32 Digest 28, 177; 85 L.J.K.B. 1519; 115 L.T. 432	391
Jones v. Oceanic Steam Navigation Co., [1924] 2 K.B. 730; 41 Digest 667, 4986; 93 L.J.K.B. 1053; 132 L.T. 207	175, 179
Jones v. Vernon's Pools, Ltd., [1938] 2 All E.R. 626; Digest Supp.	465, 468
Kanhalyalal v. Baljnath, I.L.R., 29 Nagpur 201	397
Kaye Steam Navigation Co., Ltd. v. Barnett (W. & R.), Ltd. (1932), 48 T.L.R. 440; Digest Supp.	323, 329
Kearney v. Whitehaven Colliery Co., [1893] 1 Q.B. 700; 12 Digest 295, 2437; 62 L.J.M.C. 129; 68 L.T. 690	514, 516, 523
Kearns v. Bedford (1934), 50 T.L.R. 348; Digest Supp.	475, 476
Kelantan Government v. Duff Development Co., [1923] A.C. 395; Digest Supp.; 129 L.T. 356; affd., [1924] A.C. 797; previous proceedings, [1923] 1 Ch. 385	720, 721
Kendall v. Hamilton (1879), 4 App. Cas. 504; 21 Digest 218, 540; 48 L.J.Q.B. 705; 41 L.T. 418	677, 678
Kenny v. Cox (1920), 89 L.J.K.B. 1258; 25 Digest 130, 509; 124 L.T. 221	260
Kerrison v. Cole (1807), 8 East, 231; 12 Digest 293, 2420	515, 516
Kilbane v. Whitehaven Colliery Co., Ltd. (1933), 26 B.W.C.C. 76; Digest Supp.	8, 9
King-Emperor v. Azimuddy (1926), I.L.R., 54 Cal. 237	397, 402
King-Emperor v. Haji Sher Mahomed (1921), I.L.R., 46 Bombay 961	397, 398
King-Emperor v. Maung Tha Din (1926), 4 Rangoon 72	397, 398
King-Emperor v. Syano (1932), I.L.R., 55 Mad. 903	397, 398, 402
Kingman v. Seager (1937), 157 L.T. 535; Digest Supp.	183, 185, 186, 187
Kingsland v. Haben (1904), 90 L.T. 449	213, 214
Kingston Union v. Metropolitan Water Board, [1926] A.C. 331; 38 Digest 547, 907; 95 L.J.K.B. 605; 134 L.T. 483; affg. S.C. sub nom. Metropolitan Water Board v. Kingston Union Assessment Committee, [1925] 2 K.B. 509	37, 39, 43, 44
Kingston's (Duchess) Case (1776), 1 East, P.C. 468; 21 Digest 159, 213	274, 278
Knatchbull v. Grueber (1815), 1 Madd. 153; 40 Digest 173, 1420; affd. (1817), 3 Mer. 124	618, 623
Knott v. Knott, [1935] P. 158; Digest Supp.; 104 L.J.P. 50; 153 L.T. 256	374, 377
Knott v. London County Council, [1934] 1 K.B. 126; Digest Supp.; 103 L.J.K.B. 100; 150 L.T. 91	725, 726
Knutsford (S.S.), Ltd. v. Tillmanns & Co., [1908] A.C. 406; 41 Digest 522, 3504; 77 L.J.K.B. 977; 99 L.T. 309	175, 179
Konski v. Peet, [1915] 1 Ch. 530; 43 Digest 49, 497; 84 L.J.Ch. 513; 112 L.T. 1107	607, 609
Lamb v. Evans, [1893] 1 Ch. 218; 34 Digest 121, 927; 62 L.J.Ch. 404; 68 L.T. 131	292, 293
Lambert v. Woolworth (F. W.) & Co., Ltd. (No. 2), [1938] Ch. 883; [1938] 2 All E.R. 664; Digest Supp.; 107 L.J.K.B. 554; 159 L.T. 317	568, 569, 577
Lancashire & Yorkshire Ry. Co. London & North Western Ry. Co. and Graesser, Ltd. v. MacNicol (1918), 88 L.J.K.B. 601; 8 Digest 224, 1435; 118 L.T. 596	71, 73

Langham Skating Rink Co., <i>Re</i> (1877), 5 Ch.D. 669; 10 Digest 845, 5562; 46 L.J.Ch. 345; 36 L.T. 605	99, 102
Langley v. Wood (1926), <i>Estates Gazette Digest</i> 203	475, 477
Larsen v. Sylvester & Co., [1908] A.C. 295; 41 Digest 306, 1682; 77 L.J.K.B. 993; 99 L.T. 94	175, 179
Lassence v. Tierney (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557	197, 199, 200
Lauri v. Renad, [1892] 3 Ch. 402; 42 Digest 696, 1116; 61 L.J.Ch. 580; 67 L.T. 275	713
Lauro v. Dreyfus & Co. (1937), 59 Lloyd L.R. 110	71, 72, 74
Lee v. Rayson, [1917] 1 Ch. 613; 40 Digest 109, 866; 86 L.J.Ch. 405; 116 L.T. 536	618, 622
Leggott v. Great Northern Ry. Co. (1876), 1 Q.B.D. 599; 21 Digest 207, 479; 45 L.J.Q.B. 557; 35 L.T. 334	274, 275, 276, 278, 279
Leir v. Milne (1827), 4 Bing. 195; 32 Digest 10, 4; 5 L.J.O.S.C.P. 153	391, 392, 394
Lemon v. Austin Friars Investment Trust, Ltd., [1926] Ch. 1; Digest Supp.; 95 L.J.Ch. 97; 133 L.T. 790	83, 85
Lilford (Lord) v. A.-G. (1867), L.R. 2 H.L. 63; 21 Digest 106, 780; 36 L.J.Ex. 116; 16 L.T. 184; <i>affg.</i> (1864), 3 H. & C. 239	236, 237, 238
Lindsey County Council v. Marshall, [1937] A.C. 97; [1936] 2 All E.R. 1076; Digest Supp.; 105 L.J.K.B. 614; 155 L.T. 297; <i>affg.</i> , [1935] 1 K.B. 516	536, 556
Liverpool & Great Western Steam Co. v. Phenix Insurance Co., The Montana (1889), 129 U.S. 397	514, 522, 525
Liverpool Borough Bank v. Turner (1860), 2 De G. F. & J. 502; 41 Digest 179, 190; 30 L.J.Ch. 379; 3 L.T. 494	514, 515, 523
Liverpool Corp'n. v. Hope, [1938] 1 K.B. 751; [1938] 1 All E.R. 492; Digest Supp.; 107 L.J.K.B. 694; 158 L.T. 215	188, 190
Liverpool (Portland Street) No. 2 Housing Confirmation Order, 1935, <i>Re</i> , Application of Morris (1935), Unreported	419, 422, 423
Loch v. Blackwood (John), Ltd., [1924] A.C. 783; Digest Supp.; 93 L.J.P.C. 257; 131 L.T. 719	99, 103
Lochgelly Iron & Coal Co., Ltd. v. M'Mullan, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463	312, 639, 656
Lodge v. National Union Investment Co., Ltd., [1907] 1 Ch. 300; 35 Digest 205, 303; 76 L.J.Ch. 187; 96 L.T. 301	514, 515
London & North Western Ry. Co. v. Hudson (Richard) & Sons, Ltd., [1920] A.C. 324; 8 Digest 19, 90; 89 L.J.K.B. 323; 122 L.T. 530	514, 515
London County General Real Property v. Randle (1930), <i>Estates Gazette Digest</i> 126	475
Lord Advocate v. Jamieson (1886), 13 R. (Ct. of Sess.) 737; 21 Digest 85, case f.	237, 238, 239
Lord Advocate v. McLaren (1905), 5 Tax Cas. 110; 28 Digest 104, case f.	13, 14
Lord Advocate v. Scott, [1918] S.C. 720	673, 675
Lyon, <i>Re</i> , <i>Ex p.</i> Lyon (1882), 45 L.T. 768; 4 Digest 532, 4878	136, 137
Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce, [1901] A.C. 79; 24 Digest 916, 118; 70 L.J.K.B. 170; 84 L.T. 65; 3 B.W.C.C. 1	311, 315
Lythgoe v. Vernon (1860), 5 H. & N. 180; 42 Digest 996, 240; 29 L.J.Ex. 164	677, 680
M'Alister (or Donoghue) v. Stevenson, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281	514, 515
McCormick v. Grogan (1869), L.R. 4 H.L. 82; 43 Digest 600, 480	828, 829
McCowan v. Baine & Johnston, The Niobe, [1891] A.C. 401; 29 Digest 213, 1702; 65 L.T. 502; previous proceedings (1888), 13 P.D. 55	810, 812
M'Dougall v. Summerlee Iron Co., Ltd. (1927), 20 B.W.C.C. 419; Digest Supp.	77, 81
McGowan v. Stott (1920), 99 L.J.K.B. 357, n.; Digest Supp.; 143 L.T. 217	536, 541
McManus v. Bowes, [1938] 1 K.B. 98; [1937] 3 All E.R. 227; Digest Supp.; 157 L.T. 385	430, 451
Mahmoud & Ispahani, <i>Re</i> , [1921] 2 K.B. 716; 12 Digest 271, 2220; 90 L.J.K.B. 821; 125 L.T. 161	515, 516
Major v. Canadian Pacific Ry. Co., [1922] 3 W.W.R. 512; Digest Supp.	515, 516
Manchester Corp'n. v. Bolton Area Assessment Committee and Westhoughton Urban District Council (1930), 144 L.T. 618; Digest Supp.	37, 43
Manchester Liners, Ltd. v. Rea, Ltd., [1922] 2 A.C. 74; 39 Digest 445, 744; 91 L.J.K.B. 504; 127 L.T. 405	685, 690, 692
Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown (1883), 8 App. Cas. 703; 8 Digest 63, 423; 53 L.J.Q.B. 124; 50 L.T. 281; <i>reversg.</i> (1882), 10 Q.B.D. 250	175, 178
Marginson v. Blackburn Borough Council, [1939] 1 All E.R. 273; Digest Supp.	805, 807
Marine Transit Corp'n. v. North Western Fire Marine (1933), 67 Federal Reports (2nd Series), 544	810, 812
Marriot v. Hampton (1797), 7 Term Rep. 269; 12 Digest 560, 4650	663, 670
Marshall v. Spicer (1911), 103 L.T. 902; 30 Digest 44, 341	213
Mathews v. Mathews, [1938] 4 All E.R. 377; Digest Supp.	333
Mason v. Provident Clothing & Supply Co., Ltd., [1913] A.C. 724; 43 Digest 22, 143; 82 L.J.K.B. 1153; 109 L.T. 449; <i>reversg.</i> , [1913] 1 K.B. 65	607, 609
May, <i>Re</i> , <i>Ex p.</i> May (1884), 12 Q.B.D. 497; 4 Digest 538, 4947; 50 L.T. 744	735, 736
Mediterranean & New York S.S. Co. v. Mackay, [1903] 1 K.B. 297; 41 Digest 659, 4904; 72 L.J.K.B. 147	71, 72, 74
Members v. Great Western Ry. Co. (1889), 14 App. Cas. 179; 36 Digest 93, 613; 58 L.J.Q.B. 563; 61 L.T. 566; <i>affg.</i> (1888), 4 T.L.R. 504; <i>reversg.</i> , 4 T.L.R. 265	59, 64
Merryweather v. Moore, [1892] 2 Ch. 518; 34 Digest 121, 926; 61 L.J.Ch. 505; 66 L.T. 719	292, 293
Mersey Docks & Harbour Board v. Procter, [1923] A.C. 253; 36 Digest 15, 59; 92 L.J.K.B. 479; 129 L.T. 34	130, 132, 133
Meyer (Montague L.), Ltd. v. Travara A/B H. Cornelius, of Gamleby (1930), 46 T.L.R. 553; Digest Supp.	92, 94
Midland Bank, Ltd. v. Reckitt, [1933] A.C. 1; Digest Supp.; 102 L.J.K.B. 297; 148 L.T. 374	677, 678
Mighell v. Johore (Sultan), [1894] 1 Q.B. 149; 22 Digest 318, 3122; 63 L.J.Q.B. 593; 70 L.T. 64	820, 821
Mikkelsen v. Arcos, Ltd. (1925), 134 L.T. 92; 41 Digest 340, 1920	323, 328
Millar, Son & Co. v. Radford (1903), 19 T.L.R. 675; 1 Digest 505, 1740	615, 616
Milne (William), Ltd. v. Glasgow Assessor, Union Cold Storage Co., Ltd. v. Glasgow Assessor, [1929] S.C. (Ct. of Sess.) 296; Digest Supp.	23, 24, 26

Missouri S.S. Co., <i>Re</i> (1889), 42 Ch.D. 321; 11 Digest 389, 646; 58 L.J.Ch. 721; <i>sub nom.</i> <i>Re</i> Missouri S.S. Co., Monroe's Claim, 61 L.T. 316	514, 515, 516, 522, 523, 525, 526
Mitchell v. Noble (B. W.), Ltd., [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372	338, 340, 350
Monk v. Warbey, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194	260, 265, 266, 269, 386
Monroe v. Twisleton (1802), Peake, Add. Cas. 219; 22 Digest 420, 4307	828, 829, 834, 835, 836, 837, 840, 841, 846, 848
Moorcock, The (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654	288, 289
Moore, <i>Re</i> , Traford v. Maconochie (1888), 39 Ch.D. 116; 44 Digest 438, 2646; 57 L.J.Ch. 936; 59 L.T. 681	682, 683
Moore (A. G.) & Co. v. Donnelly, Fife Coal Co. v. Sharp, Fife Coal Co. v. Fyfe, [1921] 1 A.C. 329; 34 Digest 302, 2501; 90 L.J.P.C. 49; 124 L.T. 578; 13 B.W.C.C. 458	591, 594
Morgan v. Kenyon (1913), 110 L.T. 197; 38 Digest 182, 225	591, 594
Morgan v. Vale of Neath Ry. Co. (1864), 5 B. & S. 570; <i>on appeal</i> (1865), L.R. 1 Q.B. 149; 34 Digest 212, 1750; 35 L.J.Q.B. 23; 13 L.T. 564	638, 645, 647, 650, 657
Morley v. Bevington (1905), 93 L.T. 768; 13 Digest 520, 707	631
Morrell v. Morrell (1882), 7 P.D. 68; 23 Digest 136, 1348; 51 L.J.P. 49; 46 L.T. 485	580, 581, 582
Morris v. Robinson (1824), 3 B. & C. 196; 21 Digest 226, 589	677, 680
Morris (Herbert), Ltd. v. Saxelby, [1918] 1 A.C. 688; 43 Digest 24, 154; 85 L.J.Ch. 210; 114 L.T. 618; <i>aff.</i> , [1915] 2 Ch. 57	292, 293, 309, 607, 608, 610
Murray v. Schwachman, Ltd., [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407	312, 317
National Bank v. Silke, [1891] 1 Q.B. 435; 6 Digest 443, 2846; 60 L.J.Q.B. 199; 63 L.T. 787	166, 167, 168
Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd., [1908] A.C. 16; 41 Digest 474, 3056; 77 L.J.K.B. 82; 97 L.T. 812	762, 770, 778
Newhill Compulsory Purchase Order, 1937, <i>Re</i> , Application of Payne, [1938] 2 All E.R. 163; Digest Supp.	508, 510, 511
Niblett v. Midland Ry Co. (1907), 96 L.T. 462; 34 Digest 86, 639	745, 746, 749, 751
Nicholson, <i>Re</i> , Chadwyck-Healey v. Crawford, [1938] 3 All E.R. 270; Digest Supp.	319, 320
Nokes v. Doncaster Amalgamated Collieries, Ltd., [1939] 1 K.B. 70; [1938] 4 All E.R. 6; Digest Supp.	454, 457
North Britain, The, [1894] P. 77; 29 Digest 214, 1712; <i>sub nom.</i> The North Britain, Roberts & Sons v. Ocean Marine Insurance Co., 63 L.J.P. 33; 70 L.T. 210	810, 812, 813, 815
Northumberland (Duke) v. A.-G., [1905] A.C. 406; 21 Digest 84, 602; 74 L.J.K.B. 734; 93 L.T. 68; <i>aff.</i> , [1904] 1 K.B. 762	237, 238, 239
O'Connor v. Marjoribanks (1842), 4 Man. & G. 435; 22 Digest 420, 4309; 11 L.J.C.P. 267; <i>subsequent proceedings</i> (1843), 12 L.J.C.P. 161	828, 829, 835, 837, 840, 841, 846, 848
Ord v. Ord, [1923] 2 K.B. 432; 21 Digest 152, 140; 92 L.J.K.B. 859; 129 L.T. 605	274, 275, 278
Ormond Investment Co. v. Betts, [1928] A.C. 143; 42 Digest 735, 1584; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400	424, 425
Padstow Total Loss & Collision Assurance Assocn., <i>Re</i> (1882), 20 Ch.D. 137; 29 Digest 433, 3368; 45 L.T. 774; <i>sub nom.</i> <i>Re</i> Padstow Total Loss & Collision Assurance Assocn., <i>Ex p.</i> Bryant, 51 L.J.Ch. 344	364, 371
Paterson Engineering Co., Ltd. v. Candy Filter Co., Ltd. (1932), 50 R.P.C. 1; Digest Supp.	411
Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd., [1934] A.C. 538; Digest Supp.; 103 L.J.P.C. 166; 151 L.T. 549	514, 515
Petrel, The, [1893] P. 320; 34 Digest 213, 1757; 62 L.J.P. 92; 70 L.T. 417	638, 645, 646, 649, 659, 661
Pettit, <i>Re</i> , Le Fevre v. Pettit, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491	588, 589, 590
Phillips v. Batho, [1913] 3 K.B. 25; 11 Digest 458, 1149; 82 L.J.K.B. 882; 109 L.T. 315	738, 738
Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K.B. 832; 42 Digest 870, 197; 93 L.J.K.B. 5; 129 L.T. 777	260
Pickard, <i>Re</i> , <i>Ex p.</i> Official Receiver, [1912] 1 K.B. 397; 5 Digest 1032, 8435; 81 L.J.K.B. 330; 105 L.T. 832	735, 736, 737
Pole-Carew v. Craddock, [1920] 3 K.B. 109; 28 Digest 92, 543; 89 L.J.K.B. 507; 123 L.T. 309; 7 Tax Cas. 488	424, 425, 428
Poulett Peerage, The, [1903] A.C. 395; 3 Digest 366, 76; 72 L.J.K.B. 924	472, 473
Powell v. Kempton Park Racecourse Co., [1899] A.C. 143; 25 Digest 441, 358; 68 L.J.Q.B. 392; 80 L.T. 538; <i>aff.</i> , [1897] 2 Q.B. 242	529, 532, 533
Price & Co. v. Union Lighterage Co., [1904] 1 K.B. 412; 8 Digest 44, 265; 73 L.J.K.B. 222; 89 L.T. 731; <i>aff.</i> , [1903] 1 K.B. 750	175, 178
Priestley v. Fowler (1837), 3 M. & W. 1; 34 Digest 71, 479; 7 L.J.Ex. 42	638, 641, 650, 651, 653
Priestley v. Fernie (1865), 3 H. & C. 977; 21 Digest 223, 573; 34 L.J.Ex. 172; 13 L.T. 208	677, 678
Priestman v. Thomas (1884), 9 P.D. 210; 21 Digest 168, 251; 53 L.J.P. 109; 51 L.T. 843	274, 275
Pryce, <i>Re</i> , Nevill v. Pryce, [1917] 1 Ch. 234; 40 Digest 527, 719; 86 L.J.Ch. 383; 116 L.T. 149	245, 247, 248
Pullan v. Koe, [1913] 1 Ch. 9; 40 Digest 523, 685; 82 L.J.Ch. 37; 107 L.T. 811	245, 249
Putsman v. Taylor, [1927] 1 K.B. 741; 43 Digest 47, 480; 96 L.J.K.B. 726; 137 L.T. 291; <i>on appeal from</i> [1927] 1 K.B. 641	607, 610
Quantrell v. Spragge (1907), 71 J.P.Jo. 425; 2 Digest 209, 50	66, 67
Queen-Empress v. Nana (1889), I.L.R., 14 Bombay 260	397
Quilter v. Mapleson (1882), 9 Q.B.D. 672; 42 Digest 696, 1111; 52 L.J.Q.B. 44; 47 L.T. 561	713, 718
R. v. Bateman (1925), 94 L.J.K.B. 791; Digest Supp.; 133 L.T. 730	754, 757
R. v. Bradford J.J. (1896), 74 L.T. 287; 30 Digest 43, 334	213
R. v. Brennan (1930), 47 T.L.R. 22; Digest Supp.; 22 Cr. App. Rep. 95	250, 252
R. v. Cambridge Gas Light Co. (1838), 8 Ad. & El. 73; 38 Digest 554, 937; 7 L.J.M.C. 50	37, 42
R. v. Cox & Railton (1884), 14 Q.B.D. 153; 18 Digest 144, 933; 54 L.J.M.C. 41; 52 L.T. 25	828, 829
R. v. Davies, [1897] 2 Q.B. 199; 25 Digest 422, 254; 66 L.J.Q.B. 513; 76 L.T. 786	250, 252

	PAGES
R. v. Essex JJ., <i>Ex p. Perkins</i> , [1927] 2 K.B. 475; Digest Supp.; 96 L.J.K.B. 530; 137 L.T. 465	430, 438
R. v. Hendrick (1921), 37 T.L.R. 447; 25 Digest 423, 255; 15 Cr. App. Rep. 149	250, 252
R. v. Income Tax Special Comrs., <i>Ex p. Elmhirst</i> , [1936] 1 K.B. 487; Digest Supp.; 105 L.J.K.B. 759; 154 L.T. 198; 20 Tax Cas. 381	13, 15
R. v. International Trustee for Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236; 156 L.T. 352	514, 521
R. v. Kangal Mall (1905), I.L.R., 41 Cal. 601; 14 Digest 404, case 4245v	397
R. v. Kirby, Parker & Patrick (1927), 20 Cr. App. Rep. 12; Digest Supp.	250, 252
R. v. London County Council, <i>Ex p. Akkersdyk</i> , <i>Ex p. Fermentia</i> , [1892] 1 Q.B. 190; 33 Digest 103, 698; 61 L.J.M.C. 75; 66 L.T. 168	430, 438
R. v. Mile End Old Town (Churchwardens & Overseers) (1847), 10 Q.B. 208; 38 Digest 552, 925; 16 L.J.M.C. 184; 9 L.T.O.S. 312	36, 37, 40, 41, 42
R. v. Minister of Health, <i>Ex p. Villiers</i> , [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp.; 105 L.J.K.B. 792; 154 L.T. 630	13, 14
R. v. Naiman, Soskin and Wilson (1938), Unreported, Apr. 29	83, 84
R. v. New River Co. (1813), 1 M. & S. 503; 38 Digest 548, 907	37, 41
R. v. O.K. Social & Whist Club, Ltd. (1929), 45 T.L.R. 570; Digest Supp.; 21 Cr. App. Rep. 119	250, 252
R. v. Pine (1932), 24 Cr. App. Rep. 10; Digest Supp.	782, 785
R. v. Raffles (1876), 1 Q.B.D. 207; 30 Digest 43, 330; 45 L.J.M.C. 61; 34 L.T. 180	213, 214, 215, 216, 217, 218, 221
R. v. Scoffin, [1930] 1 K.B. 741; Digest Supp.; 99 L.J.K.B. 521; 143 L.T. 121; 22 Cr. App. Rep. 27	352, 353
R. v. Smith (1866), 15 L.T. 178; 30 Digest 42, 329	213, 218
R. v. Southampton JJ., <i>Ex p. Customs and Excise Comrs.</i> (1931), [1939] 1 K.B. 192, n.; Digest Supp.; <i>sub nom. R. v. Isle of Wight JJ.</i> (1931), Br. Tr. Rev. 474	213, 214, 215, 217, 220, 222
R. v. Stringer, [1933] 1 K.B. 704; Digest Supp.; 102 L.J.K.B. 206; 148 L.T. 503; 24 Cr. App. Rep. 30	754, 750
R. v. Taylor R. v. Amendt, [1915] 2 K.B. 593; 30 Digest 35, 272; 84 L.J.K.B. 1489; 113 L.T. 167	213, 214, 216
R. v. Watford Licensing JJ., <i>Ex p. Trust Houses, Ltd.</i> , [1929] 1 K.B. 313; Digest Supp.; 98 L.J.K.B. 198; 140 L.T. 350	213, 214
R. v. West Middlesex Waterworks (1859), 1 E. & E. 716; 38 Digest 548, 908; 28 L.J.M.C. 135; 32 L.T.O.S. 388	37, 40, 41, 42, 43
Radcliffe v. Evans, [1892] 2 Q.B. 524; 32 Digest 170, 2086; 61 L.J.Q.B. 535; 66 L.T. 794	291, 293, 302, 303, 304
Radcliffe v. Holt (1927), 11 Tax Cas. 621; Digest Supp.	224, 225
Ralli Brothers v. Compañia Naviera Sota y Aznar, [1920] 2 K.B. 287; 11 Digest 397, 699; 89 L.J.K.B. 999; 123 L.T. 375	514, 522
Reed v. Nutt (1890), 24 Q.B.D. 669; 13 Digest 502, 524; 59 L.J.Q.B. 311; 62 L.T. 635	631
Rhodes v. Rhodes (1882), 7 App. Cas. 192; 44 Digest 580, 4011; 41 L.J.P.C. 53; 46 L.T. 463	580, 581, 582, 586, 587
Rice v. Reed, [1900] 1 Q.B. 54; 42 Digest 977, 36; 69 L.J.Q.B. 33; 81 L.T. 410	677, 678, 680
Richards v. Goskar, [1937] A.C. 304; [1936] 3 All E.R. 839; Digest Supp.; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C. 357	77, 81, 82
Richards v. Port of Manchester Insurance Co., Ltd., [1934] 152 L.T. 261; Digest Supp.; <i>affd.</i> 152 L.T. 413	386
Richardsons & Samuel (M.) & Co., Re, [1898] 1 Q.B. 261; 41 Digest 306, 1680; 66 L.J.Q.B. 868; 77 L.T. 479	175, 179
Richmond v. White (1879), 12 Ch.D. 361; 23 Digest 373, 4428; 48 L.J.Ch. 798; 41 L.T. 570	382, 383, 384
Rider v. Rolitt (1920), 36 T.L.R. 687; 31 Digest 557, 7038	475
River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; 41 Digest 974, 8643; 47 L.J.Q.B. 193; 37 L.T. 543; <i>affd.</i> (1876), 1 Q.B.D. 546; <i>revers.</i> (1873), 29 L.T. 530	810, 812
Robb v. Green, [1895] 2 Q.B. 315; 34 Digest 121, 928; 64 L.J.Q.B. 593; 73 L.T. 15	292
Robinson v. Robinson (1851), 1 De G.M. & G. 247; 17 Digest 132, 391; 21 L.J.Ch. 111; 18 L.T.O.S. 293	323, 329
Roby, Re, Shubbrook v. Taylor, [1916] W.N. 37; 24 Digest 837, 8692	382, 385
Rose v. Ford, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174	13, 15, 16, 18, 104, 105
Rose & Frank Co. v. Crompton (J.R.) & Brothers, Ltd., [1925] A.C. 445; Digest Supp.; 94 L.J.K.B. 120; 132 L.T. 641	465, 468
Royle v. Orme (1932), 96 J.P. 468; Digest Supp.	336
Rudd v. Elder Dempster & Co., Ltd., [1933] 1 K.B. 566; Digest Supp.; 102 L.J.K.B. 275; 148 L.T. 337; 25 B.W.C.C. 482; <i>on appeal</i> , [1934] A.C. 244	312
Russell v. Russell, [1924] A.C. 687; 27 Digest 297, 2743; 93 L.J.P. 97; 131 L.T. 482	472, 473
Russell v. Town & County Bank (1888), 13 App. Cas. 418; 28 Digest 45, 227; 58 L.J.P.C. 8; 59 L.T. 481; 2 Tax Cas. 321	354, 356
Ryhope Coal Co. v. Foyer (1881), 7 Q.B.D. 485; 28 Digest 40, 208; 45 L.T. 404; 1 Tax Cas. 343	454, 455
Ryland, Re, Roper v. Ryland, [1903] 1 Ch. 467; 8 Digest 267, 292; 72 L.J.Ch. 277; 88 L.T. 456	601, 604
Rylands v. Fletcher (1868), L.R. 3, H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; <i>affd.</i> (1866), L.R. 1 Exch. 265; <i>revers.</i> (1865), 3 H. & C. 774	725, 726
Salmon v. Weight (1935), 153 L.T. 55; Digest Supp.; 19 Tax Cas. 174; 354, 355, 357, 358	359, 360
Samuel v. Adelaide Club, Ltd., [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116	529, 533
Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd., [1913] A.C. 680; 41 Digest 537, 3644; 83 L.J.C.P. 23; 109 L.T. 580	71, 75
Sanders v. Vanzeller (1843), 4 Q.B. 260; 41 Digest 626, 4581; 12 L.J.Ex. 497	71, 75
Sandys v. Small (1878), 3 Q.B.D. 449; 25 Digest 83, 113; 47 L.J.M.C. 115; 39 L.T. 118	260, 269, 270
Saxby v. Manchester & Sheffield Ry. Co. (1869), L.R. 4 C.P. 198; 36 Digest 214, 572; 38 L.J.C.P. 153; 19 L.T. 640	725, 726, 728
Scarff v. Jardine (1882), 7 App. Cas. 345; 21 Digest 224, 577; 51 L.J.Q.B. 612; 47 L.T. 258	677, 678

	PAGES
Scarbrick v. Parkinson (1869), 20 L.T. 175; 12 Digest 166, 1214	169, 173
Scheurman v. Scheurman (1916), 52 S.C.R. 625; 25 Digest 209, case o	515, 516
Schott, <i>In the Goods of</i> , [1901] P. 190; 23 Digest 137, 1357; 70 L.J.P. 46; 84 L.T. 571	580, 582, 587
Scott v. London Dock Co. (1865), 3 H. & C. 596; 36 Digest 91, 601; 34 L.J.Ex. 220; 13 L.T. 148	536, 541
Scott v. Scott (1866), 16 L.T. 143; 43 Digest 290, 1179	292, 310
Scott & Coutts & Co. v. Inland Revenue Comrs., [1937] A.C. 174; [1936] 3 All E.R. 752; Digest Supp.; 106 L.J.Ch. 36; 156 L.T. 33; <i>affg.</i> , [1935] Ch. 246	197, 200, 206, 207, 208
Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes) (1912), 6 Tax Cas. 91; 23 Digest 42, case m	454, 455, 456, 457, 462
Searle v. Cooke (1890), 43 Ch.D. 519; 39 Digest 205, 954; 59 L.J.Ch. 259; 62 L.T. 211	188, 189, 190, 191
Secretary of State in Council of India v. Scoble, [1903] A.C. 299; 28 Digest 65, 337; 72 L.J.K.B. 617; 89 L.T. 1; <i>sub nom.</i> Scoble v. Secretary of State for India, 4 Tax Cas. 618	224, 226
Sessions v. Ramadka (1892), 145 S.C.R. 29	411, 412
Seward v. Vera Cruz, The Vera Cruz (1884), 10 App. Cas. 59; 42 Digest 769, 1959; 54 L.J.P. 9; 52 L.T. 474	13, 14, 15, 16, 22
Sewell v. Burdick (1884), 10 App. Cas. 74; 41 Digest 372, 2186; 54 L.J.Q.B. 156; 52 L.T. 445; <i>reversg.</i> , 13 Q.B.D. 159; <i>restg.</i> (1883), 10 Q.B.D. 363	515, 516
Sheffield & South Yorkshire Permanent Building Society v. Aizlewood (1889), 44 Ch.D. 412; 7 Digest 472, 112; 59 L.J.Ch. 34; 62 L.T. 678	482, 495
Sheffield United Gas Light Co. v. Sheffield Overseers (1863), 4 B. & S. 135; 38 Digest 553, 932; 8 L.T. 692; <i>sub nom.</i> R. v. Sheffield United Gaslight Co., 32 L.J.M.C. 169	37, 41
Shepherd v. Hunter, [1938] 2 All E.R. 587; Digest Supp.	104, 105, 108
Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375, 399; Digest Supp.; 105 L.J.Ch. 225, 232; 154 L.T. 444	663, 664
Short Brothers, Ltd. v. Inland Revenue Comrs. (1927), 12 Tax Cas. 955	338, 340
Sickert v. Sickert, [1899] P. 278; 27 Digest 315, 2930; 68 L.J.P. 114; 81 L.T. 495	53, 57, 58
Sillence, <i>Re, Ex p.</i> Sillence (1877), 7 Ch.D. 238; 4 Digest 532, 4874; 47 L.J.Bcy. 87; 37 L.T. 676	136, 137
Simms, <i>Re, Ex p.</i> Trustee, [1934] Ch. 1; Digest Supp.; 103 L.J.Ch. 67; <i>sub nom.</i> <i>Re</i> Simms, <i>Ex p.</i> Trustee v. Williams, Simms, Ltd., and Gillett, 149 L.T. 463	677, 678
Smart Bros., Ltd. v. Holt, [1929] 2 K.B. 303; Digest Supp.; 98 L.J.K.B. 532; 141 L.T. 268	66, 67
Smith v. Baker (1873), L.R. 8 C.P. 350; 42 Digest 996, 237; 42 L.J.C.P. 155; 28 L.T. 637	677, 678, 680
Smith v. Baker & Sons, [1891] A.C. 325; 36 Digest 95, 633; 60 L.J.Q.B. 683; 65 L.T. 467	59, 62, 63, 64, 638, 642, 651
Smith v. Lion Brewery Co., Ltd., [1911] A.C. 150; 28 Digest 57, 291; 80 L.J.K.B. 566; 104 L.T. 321; 5 Tax Cas. 568	354, 356
Smith v. Portsmouth J.J., [1906] 2 K.B. 229; 30 Digest 45, 343; 75 L.J.K.B. 851; <i>sub nom.</i> Smith v. Couzens, etc., Portsmouth Licensing J.J., 95 L.T. 5	213, 214
Smith v. Steele (1875), L.R. 10 Q.B. 125; 34 Digest 213, 1756; 44 L.J.Q.B. 60; 32 L.T. 195	639, 657
Southam, <i>Re, Ex p.</i> Lamb (1881), 19 Ch.D. 169; 4 Digest 532, 4876; 51 L.J.Ch. 207; 45 L.T. 639	136, 137, 138
Spalding & Brothers v. Gainage (A.W.), Ltd. (1915), 84 L.J.Ch. 449; 43 Digest 264, 1078	192, 293
Stapleton v. Crofts (1852), 18 Q.B. 367; 22 Digest 400, 4066; 21 L.J.Q.B. 247; 19 L.T.O.S. 88	828, 829, 833, 837, 845, 847
Storey v. Fulham Steel Works Co. (1907), 24 T.L.R. 89; 12 Digest 377, 12121	745, 746, 750, 751
Stott v. Hoddinott (1916), 7 Tax Cas. 85; 28 Digest 47, 241	224, 225, 338, 340
Stowel v. Zouch (Lord) (1569), 1 Plowd. 353; 42 Digest 635, 378	397, 404
Strong & Co., Ltd. v. Woodfield, [1906] A.C. 448; 28 Digest 57, 290; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215	338, 339
Sussex Peatrage Case (1844), 11 Cl. & Fin. 85; 42 Digest 650, 569; 3 L.T.O.S. 277	397, 403
Tatham, Bromage & Co. v. Burr, The Engineer, [1898] A.C. 382; 29 Digest 215, 1713; 67 L.J.P. 61; 78 L.T. 473	810, 812, 813, 815
Taubman v. Pacific Steam Navigation Co. (1872), 26 L.T. 704; Digest Supp.	175, 177, 178
Taylor v. Barclay (1828), 2 Sim. 213; 22 Digest 148, 1263; 7 L.J.O.S. Ch. 65	820, 821
Taylor v. Chester (1869), L.R. 4 Q.B. 309; 12 Digest 279, 2289; 38 L.J.Q.B. 225; 21 L.T. 359	514, 515
Taylor v. Dewar (1864), 5 B. & S. 58; 29 Digest 214, 1709; 33 L.J.Q.B. 141; 10 L.T. 267	810, 812
Thelluson v. Cosling (1803), 4 Esp. 266; 22 Digest 319, 3127	820, 821, 824
Thomas v. Metropolitan Housing Corpn., Ltd., [1936] 1 All E.R. 210; Digest Supp.	475
Thomas v. Quartermaine (1887), 18 Q.B.D. 685; 36 Digest 8, 10; 56 L.J.Q.B. 340; 57 L.T. 537	59, 60
Thomas v. Sylvester (1873), L.R. 8 Q.B. 368; 39 Digest 205, 943; 42 L.J.Q.B. 237; 29 L.T. 290	188, 189, 190
Thompson v. Gill, [1903] 1 K.B. 760; 21 Digest 670, 2498; 72 L.J.K.B. 411; 88 L.T. 714	2
Thomson (Archibald) Black & Co., Ltd. v. Inland Revenue, [1919] S.C. 289; 28 Digest 45, case o	338, 339
Thorley, <i>Re, Thorley v. Massam, Re Thorley, Thorley v. Massam</i> , [1891] 2 Ch. 613; 21 Digest 52, 345; 60 L.J.Ch. 537; 64 L.T. 515	197, 199
Thorman v. Dowgate S.S. Co., Ltd., [1910] 1 K.B. 410; 41 Digest 307, 1685; 79 L.J.K.B. 287; 102 L.T. 242	175, 179
Tibbs v. Smith (1661), T. Raym. 33	66
Tipping v. Power (1842), 1 Hare 405; 23 Digest 373, 4427; 11 L.J.Ch. 257	382, 383, 384, 385
Tobacco Pipe Makers' Co. v. Loder (1851), 16 Q.B. 765; 32 Digest 325, 106; 20 L.J.Q.B. 414; 18 L.T.O.S. 34	13, 15
Tobias & Co., <i>Re, Ex p.</i> Tobias, [1891] 1 Q.B. 463; 4 Digest 540, 4976; 60 L.J.Q.B. 244; 64 L.T. 115	735, 736
Todd v. Flight (1860), 9 C.B.N.S. 377; 31 Digest 345, 4879; 30 L.J.C.P. 21; 3 L.T. 325	725, 726
Tolley v. Fry (J.S.) & Sons, Ltd., [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1	292, 293

Tong, <i>Re</i> , Hilton v. Bradbury, [1931] 1 Ch. 202; Digest Supp.; 100 L.J.Ch. 132; 144 L.T. 260	197, 199
Topham v. Portland (Duke) (1863), 1 De G. J. & Sm. 517; 35 Digest 81, 786; 32 L.J.Ch. 257; 8 L.T. 180; on appeal sub nom. Portland (Duke) v. Topham (Lady) (1864), 11 H.L. Cas. 32; subsequent proceedings sub nom. Topham v. Portland (Duke) (1869), 5 Ch. App. 40	850, 853, 855
Torni, The, [1932] P. 78; Digest Supp.; 101 L.J.P. 44; 147 L.T. 208	513, 514, 515, 516, 528, 528
Torrance v. Ilford Urban District Council (1909), 73 J.P. 225; 36 Digest 96, 636	59, 63
Tozeland v. West Ham Union, [1907] 1 K.B. 920; 34 Digest 220, 1823; 76 L.J.K.B. 514; 96 L.T. 519	639, 657
Travers (Joseph) & Sons, Ltd. v. Cooper, [1915] 1 K.B. 73; 8 Digest 44, 266; 83 L.J.K.B. 1787; 111 L.T. 1088	175, 178
Tregaskis, <i>Re</i> , <i>Ex p.</i> Tregaskis (1889), 6 Morr. 309; 4 Digest 543, 5008	735, 737, 738
Tribe v. Taylor (1876), 1 C.P.D. 505; 1 Digest 503, 1729	615, 617
Trinidad Petroleum Development Co., Ltd. v. Inland Revenue Comrs., [1937] 1 K.B. 408; [1936] 3 All E.R. 801; Digest Supp.; 106 L.J.K.B. 635; 156 L.T. 90; 21 Tax Cas. 1	454, 455
Trinidad Shipping Co. v. Alston, [1920] A.C. 888; 41 Digest 621, 4523; 89 L.J.P.C. 185; 123 L.T. 476	514, 526
Triplex Safety Glass Co., Ltd. v. Scorah, [1937] 4 All E.R. 693; Digest Supp.	292, 293
Trollope (George) & Sons v. Caplan, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.; 105 L.J.K.B. 819; 155 L.T. 365	624, 625, 628, 629, 630
Trollope (George) & Sons v. Martyn Bros., [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88	624, 625, 628, 629, 630
Tuck & Sons v. Priestner (1887), 19 Q.B.D. 629; 13 Digest 211, 467; 56 L.J.Q.B. 553	292, 293
Union Cold Storage Co. v. Inland Revenue, [1930] S.C. 337; Digest Supp.	23, 24
Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer), [1931] A.C. 459; Digest Supp.; 100 L.J.K.B. 271; 145 L.T. 73; affg., [1931] 1 K.B. 385	23, 24, 27
United Indigo Chemical Co., Ltd. v. Robinson (1931), 49 R.P.C. 178; Digest Supp.	292, 293, 309
Usher's Wiltshire Brewery, Ltd. v. Bruce, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; <i>reversing</i> , [1914] 2 K.B. 691	338, 340, 354, 355, 356, 361, 362
Vaithinatha Pillai v. King-Emperor (1913), 40 I.A. 193	397
Valpy v. Sanders (1848), 5 C.B. 886; 43 Digest 535, 706; 17 L.J.C.P. 249; 11 L.T.O.S. 201	677, 680
Van den Berghs, Ltd. v. Clark, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390	338, 339, 340, 348, 350
Van Oppen & Co., Ltd. v. Tredegars, Ltd. (1921), 37 T.L.R. 504; 43 Digest 472, 110	71, 72
Van Toll v. Wall (1859), 1 F. & F. 504; 43 Digest 482, 195	66, 67
Van Wyk v. Lewis, [1924] App. D. 438 (South Africa)	536, 549, 560
Vernon v. Findlay, [1938] 4 All E.R. 311; Digest Supp.	169, 173
Verschures Creameries v. Hull & Netherlands S.S. Co., [1921] 2 K.B. 608; 42 Digest 995, 233; 91 L.J.K.B. 39; 125 L.T. 165	677, 678, 680, 681
Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine, [1925] A.C. 354; 34 Digest 463, case r	77, 80, 81
Victorian Daylesford Syndicate, Ltd. v. Dott, [1905] 2 Ch. 624; 35 Digest 204, 307; 74 L.J.Ch. 673; 93 L.T. 627; on appeal, [1906] 1 Ch. 747, n	514, 515
Vitoria, <i>Re</i> , <i>Ex p.</i> Spanish Corp'n., Ltd., [1894] 1 Q.B. 259; 4 Digest 531, 4869; sub nom. <i>Re</i> Vitoria, <i>Ex p.</i> Vitoria, 63 L.J.Q.B. 161; 70 L.T. 141	136, 139, 140
Vose v. Lancashire & Yorkshire Ry. Co. (1858), 2 H. & N. 728; 34 Digest 208, 1706; 27 L.J.Ex. 249; 30 L.T.O.S. 289	638, 642
Vowles v. Armstrong-Siddeley Motors, Ltd., [1938] 4 All E.R. 796; Digest Supp.	312
Walker v. Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; Digest Supp.	312
Walker v. Clyde (1861), 10 C.B.N.S. 381; 43 Digest 483, 198	66, 67
Wallens Riederij A./S. v. Muller (W. H.) & Co., Batavia, [1927] 2 K.B. 99; 41 Digest 461, 2925; 96 L.J.K.B. 819; 137 L.T. 154	323, 324
Walton v. Walton, [1938] 4 All E.R. 382; Digest Supp.	333
Wansborough v. Maton (1835), 4 L.J.K.B. 154; 43 Digest 482, 194	66, 67
Warburton v. Co-operative Wholesale Society, Ltd., [1917] 1 K.B. 663; 12 Digest 378, 3122; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93	745, 746, 750
Ward v. Hobbs (1878), 4 App. Cas. 13; 39 Digest 464, 902; 48 L.J.Q.B. 281; 40 L.T. 73	260, 261
Ward v. Ward (1858), 1 Sw. & Tr. 185; 27 Digest 310, 2381; 27 L.J.P. & M. 63; 31 L.T.O.S. 238	53, 57
Warren v. Whittingham (1902), 18 T.L.R. 508; 34 Digest 86, 634	745, 746, 749
Watson, <i>Re</i> , Johnston, <i>Ex p.</i> , Johnston v. Watson, [1893] 1 Q.B. 21; 5 Digest 1035, 8466; 62 L.J.Q.B. 85; 67 L.T. 519	2, 4
Weigall v. Westminster Hospital, [1936] 1 All E.R. 232; Digest Supp.	129, 130, 135
Welby v. Parker, [1916] 2 Ch. 1; 42 Digest 700, 1159; 85 L.J.Ch. 564; 114 L.T. 876	713, 718
Wells v. Fisher (1831), 1 Mood. & R. 99; 22 Digest 420, 4310	828, 830
Wennhak v. Morgan (1888), 20 Q.B.D. 635; 17 Digest 158, 591; 57 L.J.Q.B. 241; 59 L.T. 28	828, 830, 831
Wessex Dairies, Ltd. v. Smith, [1935] 2 K.B. 80; Digest Supp.; 104 L.J.K.B. 484; 153 L.T. 185	292, 293
Westlake v. Page, [1926] 1 K.B. 290; Digest Supp.; 95 L.J.K.B. 456; 134 L.T. 612	253, 255
Westover Garage, Ltd. v. Deacon (1931), 145 L.T. 357; Digest Supp.	143, 144, 147
White v. Bembridge, [1935] 1 K.B. 244; Digest Supp.; 104 L.J.K.B. 256; 152 L.T. 62	618, 619
White & Co. v. Furness, Withy & Co., [1895] A.C. 40; 41 Digest 553, 3801; 64 L.J.Q.B. 161; 72 L.T. 157; <i>reversing</i> S.C. sub nom. Furness, Withy & Co. v. White (W. N.) & Co., [1894] 1 Q.B. 483	71, 75
White Sea Timber Trust, Ltd. v. North (W. W.), Ltd. (1932), 148 L.T. 263; Digest Supp.	92, 94
Whitehead v. Clifford (1814), 5 Taunt. 518; 31 Digest 522, 6689	475
Whitehead & Co., Ltd. v. Edinburgh Assessor, [1928] S.C. 425; Digest Supp.	23, 24, 26, 27
Williams v. Rees (1918), 87 L.J.K.B. 639; 25 Digest 129, 501; 118 L.T. 356	260, 261

	PAGES
Willis v. Rentals, Ltd. (1933), <i>Times</i> Newsp., Nov. 15, 16	685, 686, 690
Wilson v. Merry (1868), L.R. 1 Sc. & Div. 326; 34 Digest 211, 1747; 19 L.T. 30	689, 658
Wilsons & Clyde Coal Co., Ltd. v. English, [1938] A.C. 59; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406	407, 409, 638, 655, 656, 795, 796, 797
Winsford Urban District Council v. Cheshire Lines Committee (1931), 21 Ry. & Can. Tr. Cas. 10; Digest Supp.	736, 737
Wolverton v. A.-G., [1898] A.C. 535; 21 Digest 90, 660; 67 L.J.Q.B. 829; 79 L.T. 58; <i>revers.</i> , [1897] 1 Q.B. 231	237
Woodley v. Metropolitan District Ry. Co. (1877), 2 Ex. D. 385; 36 Digest 92, 610; 46 L.J.Q.B. 521; 36 L.T. 419	59, 64
Woolworth (F. W.) & Co., Ltd. v. Lambert, [1937] Ch. 37; [1936] 2 All E.R. 1523; Digest Supp.; 155 L.T. 236	568, 577
Ydun, The, [1899] P. 236; 42 Digest 699, 1156; 68 L.J.P. 101; 81 L.T. 10	713, 719
Yukon Consolidated Gold Corp., Ltd. v. Clark, [1938] 2 K.B. 241; [1938] 1 All E.R. 366; Digest Supp.; 107 L.J.K.B. 240; 158 L.T. 330	2, 3
Xenos v. Fox (1869), L.R. 4 C.P. 665; 29 Digest 214, 1710; 38 L.J.C.P. 351	810, 812

CORRIGENDA.

- P. 536. **MAHON v. OSBORNE.** *H. H. Kingsley* was also briefed for the respondent.
- P. 681. **UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD.** The solicitor for the appellants was *A. King-Hamilton*.
- P. 735. **Re A DEBTOR** (No. 946 of 1926). Substitute for l. 9 of the headnote thus: "The statutory form of order included the words 'during the bankruptcy', and as a result the order ceased . . ."
- In the Editorial Note substitute for "By an error in the wording of the order," the words: "By reason of the wording of the statutory form of order, . . ."

INDEX

	PAGE
Abatement, annuity, fund appropriated, gift over	319
—, nuisance, created by trespasser, failure of occupier to abate	725
Action, of debt, recovery of annuity in commutation of tithe rentcharge ..	188
—, referring to official referee, accounts	164
Actions, same plaintiff in different capacities, <i>res judicata</i>	273
Administration action, costs, right of retainer of executor	382

ADMIRALTY.

<i>Jurisdiction—Collision—Collision of rowing boats on tidal river</i> [EDWARDS v. QUICKENDEN]	759
<i>Release—Arrest of vessel—Plaintiffs subsequently obtaining possession and taking out summons for release—Contempt of court—Form of order for release—R.S.C., Ord. 29, r. 1</i> [SPANISH REPUBLICAN GOVERNMENT v. ABODI MENDI] ..	701
Advertisement, hoarding, height of, hoarding built in sections	335

AGENCY.

<i>Remuneration of agent—Commission—Contract to let premises—Prospective tenant—Communication by him to second prospective tenant—Causa causans—Chain of causation—Novus actus interveniens</i> [COLES v. ENOCH]	614
—, —, Contract to pay commission on completion of sale of property—Willing purchaser found—Justification of refusal to complete—Sale of company's property ultra vires the company—Directors with conflicting interests [COOPER v. LUXOR (EASTBOURNE), LTD.]	623
Aggregation, estate duty, accumulation fund	196
—, —, property in which deceased never had an interest	672

AGRICULTURE.

<i>Agricultural holding—Compensation—Disturbance—Amount of compensation—Minimum compensation—Tenant of two holdings—Agricultural Holdings Act, 1923 (c. 9), s. 12 (6), (8)</i> [Re AN ARBITRATION BETWEEN BEBB AND FRANK] ..	253
Aiding and abetting, principal offender, motor offence, limitation of time ..	154
Air, carriage by, international, construction of contract	761

ALIENS.

<i>Acquisition of British nationality—Mandated territory—Turkish subject resident in Palestine—In possession of passport marked "British passport, Palestine"—British Nationality and Status of Aliens Act, 1914 (c. 17), s. 27—Treaty of Peace with Turkey signed at Lausanne on July 24, 1923, art. 30—Palestinian Citizenship Order, 1925 (S.R. & O., 1925, No. 777) [R. v. KETTER]</i>	729
Alterations, licensed premises, extension, jurisdiction of justices	212

ANIMALS.

<i>Property in animals—Bees—Swarming and escaping on to a stranger's land—Right to pursue—When bees are ferae naturae</i> [KEARRY v. PATTINSON]	65
Annuity, abatement, fund appropriated, gift over	319

—, deduction of tax, reference to standard rate	587
—, in commutation of tithe rentcharge, action of debt	188
Appeal, bankruptcy, delivery of notice to registrar, "forthwith"	135
Appointment, special power, fraudulent exercise, severance	850

ARBITRATION.

<i>Staying proceedings—Action for damages for negligence—Insolvency of defendant—Action by successful plaintiff against defendant's insurers—Arbitration clause in insurance contract—Poverty of plaintiff—Whether such poverty a ground for refusing to stay action brought under the Poor Persons Rules—Third Parties (Rights against Insurers) Act, 1930 (c. 25), s. 1 (1)—Arbitration Act, 1934 (c. 14), s. 3 (4)</i> [SMITH v. PEARL ASSURANCE CO., LTD.]	95
Arbitration, rectification of agreement after award	662
Assurance, for charitable purpose, land, vested in Official Trustee, extension of time for sale	600

BANKERS.

<i>Cheque—Conversion—Previous action against indorsee—Waiver of tort</i> [UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD.]	676
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BANKRUPTCY.

<i>Appeal—Appeal from county court—Notice of appeal—Delivery of copy to registrar—"Forthwith"—Bankruptcy Rules, 1915, r. 132</i> [Re MUSCOVITCH AND MUSCOVITCH, Ex parte MUSCOVITCH AND MUSCOVITCH, BANKRUPT v. OFFICIAL RECEIVER]	135
<i>Discharge—Order for payment from income for benefit of creditors—Order intended to be operative after discharge but in error made to cease on discharge becoming effective—Jurisdiction of court to vary order—Bankruptcy Act, 1914 (c. 59), ss. 26 (8), 108 (1)</i> [Re A DEBTOR (No. 946 of 1926), DEBTOR v. OFFICIAL RECEIVER]	735
Bankruptcy notice, in respect of registered foreign judgment	1
Bees, property in, escaping from hive on to stranger's land	65
Benefices, union of, principles to be applied	282
Betting house, user of club by book-maker	529
Bigamy, defence, absence for 7 years, second or subsequent marriage	330

BILLS OF EXCHANGE.

<i>Bill payable to order of payee only—Crossed "not negotiable"—Negotiability—Bills of Exchange Act, 1882 (c. 61), ss. 8 (1), 81</i> [HIBERNIAN BANK, LTD. v. GYSIN & HANSON]	166
Borstal treatment, only previous conviction dealt with by probation order ..	501
—, prisoner sentenced on twenty-third birthday	352
Bread, sale of, by weight, precaution to secure correct weight	156
Builder, covenant against trade, breach of covenant	279

BUILDING SOCIETIES.

<i>Advances—Security on which advances can be made—Mortgage of freeholds—Collateral charge on fund—“Pooling agreement”—Validity—Injunction—Execution of mortgage—Estoppel—Fraudulent statements by third party—Building Societies Act, 1874 (c. 42), ss. 12, 13, 25—Building Societies Act, 1894 (c. 47), ss. 13 (1), 17 [BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS]</i> .. .	481
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Captain, naval, summary jurisdiction, officer disobeying orders .. .	786
Cargo, full and complete, stowage in bundles .. .	322
Carriage, international, by air, construction of contract .. .	761

CARRIERS.

<i>Carriage of passengers—Passenger ticket—Conditions—Exclusion of liability—All risks whatever of the passage—Risk arising from negligence of servant—“From any cause whatsoever”—Ejusdem generis rule [BEAUMONT-THOMAS v. BLUE STAR LINE, LTD.]</i> .. .	174
--	-----

Certificate, of insurance, false statement to obtain .. .	140
---	-----

CHARITIES.

<i>Assurances for charitable purposes—Assurance by will—Land—Extension of time for sale—Land vested in Official Trustees—Mortmain and Charitable Uses Act, 1891 (c. 73), ss. 5, 6 [Re GORHAM'S CHARITY]</i> .. .	600
--	-----

Charterparty, exceptions, liberty to cancel in case of war involving Japan, “war” .. .	819
Cheque, conversion, previous action against indorsee, waiver of tort .. .	676
Cinemas, controller, contract of service, determination, reasonable notice .. .	169
Cleaners, liability for disease contracted after wearing cleaned clothes, interval before wearing .. .	693
Clearance area, compulsory purchase of shops with living rooms over .. .	419
Clearance order, garages with dwelling-houses over, “houses” .. .	590
Club, user by bookmaker, betting house .. .	529
Coach driver, accident to, common employment .. .	638
Coal Commission, position with regard to working facilities .. .	88
Collateral, building society mortgage, pooling agreement .. .	481
Collision clause, sum payable by way of damages, indemnity to French pilot-boat .. .	809
Collusion, conversation between spouses on telephone .. .	29
Commission, refusal of vendor to proceed with sale, justification .. .	623
—, when agent effective cause of letting .. .	614
Common employment, accident to coach driver .. .	638

COMPANIES.

<i>Shares—Share certificate—Right of shareholder to certificates for altered subdivision of his shares [SHARPE v. TOPHAMS, LTD.]</i> .. .	123
<i>Winding up—Just and equitable—Company's petition—Majority of shareholders desirous of being repaid their capital—Company earning little or no profit—Suggested friction or deadlock in management—Companies Act, 1929 (c. 23), s. 163 (6) [Re ANGLO-CONTINENTAL PRODUCE CO., LTD.]</i> .. .	99

Company, director, payment for retaining office, liability to tax .. .	223
--	-----

Compensation, disturbance, agricultural holding, minimum compensation .. .	253
Condition, validity, future separation of spouses, annuity increased upon separation .. .	681
—, —, restraint on accepting commission in Territorial Army .. .	635
Consent, defence to action for negligence, passenger in car, driver intoxicated .. .	59

CONTRACT.

<i>Express exclusion of legal liability—Football pool—Action in respect of alleged successful coupon [APPLESON v. H. LITTLEWOOD, LTD.]</i> .. .	464
Contract, construction, international carriage by air .. .	761
—, of service, duration, admission to pension scheme .. .	287
—, —, necessity for writing, modification of previous employment .. .	169
—, —, restrictions, radius agreement .. .	606
—, —, scheme for superannuation .. .	363
Contributory negligence, availability as defence, breach of statutory duty, unfenced machinery .. .	310
Controlled houses, misdescription in contract of sale .. .	618
Conversion, action for refusing entry upon defendant's land, pursuit of bees .. .	65
Costs, payment in of precise sum awarded as damages in slander action .. .	798
—, special allowances, county court, what is a hearing .. .	630

COUNTY COURTS.

<i>Costs—Special allowances—Only to be allowed at hearing—What is a “hearing”—C.C.R., Ord. 18, rr. 1, 2—C.C.R., Ord. 47, r. 21 [UNIVERSITY MOTORS, LTD. v. BARRINGTON]</i> .. .	630
Covenant against trade, jobbing builder .. .	279
Credit betting, scheme providing for, lottery .. .	611

CRIMINAL LAW.

<i>Bigamy—Defences—Absence for 7 years—Availability of defence—Second or subsequent marriage—Offences against the Person Act, 1861 (c. 100), s. 57 [R. v. TREANOR (OR MCAVOY)]</i> .. .	330
<i>Evidence—Admissibility—Similar offences—Charge involving fraud—Charge of false pretences—Question as to previous offence of obtaining overdraft by misrepresentation—Criminal Evidence Act, 1898 (c. 36), s. 1 (f) [R. v. HAMILTON]</i> .. .	469
<i>Habitual criminal—Numerous efforts to obtain work since release from prison—Facts not fully put before the jury—Onus of proof—Insufficiency of direction to jury [R. v. JONES]</i> .. .	181
<i>Incest—Stepdaughter—Suggested adultery during lifetime of mother's first husband—Necessity for evidence of non-access [R. v. HEMMINGS]</i> .. .	417
<i>Manslaughter—Ill-treatment of young person—Judge's direction to jury—Substitution of verdict—Joinder of offences—Undesirability—Criminal Appeal Act, 1907 (c. 23), s. 5 (2)—Children and Young Persons Act, 1933 (c. 12), s. 1 (4) [R. v. LARGE]</i> .. .	753
<i>Offer for sale of shares—“Share”—“Debenture”—Founders unit guarantee certificate—Companies Act, 1929 (c. 23), ss. 356 (1), (7), 380 (1) [R. v. FINDLATER]</i> .. .	82
<i>Punishment—Borstal treatment—“Not more than 23 years of age”—Prisoner sentenced on twenty-third birthday—Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1) (a)—Criminal Justice Act, 1925 (c. 86), s. 46 (1)—Borstal (Extension of Age) Order, 1936 (S.R. & O., 1936, No. 839) [R. v. CLIFFORD]</i> .. .	352

	PAGE
Prisoner's only previous conviction dealt with by probation order— <i>Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1) [R. v. BILDER]</i>	501
Receiving stolen property—Misdirection as to time when knowledge of theft necessary [R. v. TENNET]	86
Recognition to come up for sentence if called upon—Conviction for libel—Undertaking not to repeat libel—Breach of undertaking—Whether right to trial by jury— <i>Crown Office Rules, 1906, r. 115 [R. v. DAVID]</i>	782
Criminal offence, slander imputing, no danger of prosecution, whether proof of special damage necessary	798
Damage, special, passing off, malice	290
Damages, marine insurance policy, collision clause, indemnity to French pilot-boat	809
—, payment in of precise sum awarded, costs	798
Dangerous machinery, absolute duty to fence, liability for breach of statutory duty	407
—, unfenced, breach of statutory duty, defence of contributory negligence, availability	310
Debenture, instruments included within definition	82
Deck, cargo loaded on, more cargo so loaded than stipulated in contract	92
Declaration, statutory, admissibility under Evidence Act, 1938	121
Decontrol, part of house, effect on letting of whole house	474
—, sale of decontrolled house, misdescription in contract of sale	618
Deficiency, weight, bread, precautions to secure correct weight	156
Delivery, over-delivery, effect as between shipowners and consignees	70
Demolition, demised premises, improvement within Landlord and Tenant Act, 1927	567
Deposit, return of, misdescription, controlled houses	618
Deposition, given on oath, not signed, admissibility under Evidence Act, 1938	505
Dermatitis, cleaners using best methods and best machinery	693
—, idiosyncrasy of buyer	685
Desertion, currency, not affected by previous petition on ground of adultery not served	332
—, departure of wife from home, husband's tacit consent	52
—, materiality of attitude of deserted spouse towards resumption of cohabitation	109
—, request for resumption of cohabitation, necessity to give opportunity for discussion	503
Dilapidations, retrospective operation of Act	712
Director, company, payment for retaining office, income or capital	223
Discharge, bankruptcy, jurisdiction to vary order	735
Discipline, Navy, summary jurisdiction of captain	786

DISCOVERY.

Interrogatories—Defendant previously witness at inquest—Coroner's notes of his deposition appended to interrogatory—Defendant asked whether he made statements attributed to him by coroner—Whether interrogatory allowed [SLOAN v. HANSON]	333
—, Privilege—Communications between spouses—Privilege claimed by widow in respect of communication during the marriage—Evidence Amendment Act, 1853 (c. 83), s. 3—Criminal Evidence Act, 1898 (c. 36), s. 1 (b) [SHEXTON v. TYLER]	827

Discretion statement, whether petition can be founded on	109
Disturbance, minimum compensation for	253

DIVORCE.

Collusion—Offer by husband of evidence by telephone—Wife's answers not amounting to acceptance—Absence of bargain [PILKINGTON v. PILKINGTON]	29
Cross-petition—Founded on adultery disclosed in discretion statement—Availability to respondent—Matrimonial Causes Rules, 1937, r. 28 (5) [SIFTON v. SIFTON]	109
Desertion—Acts of husband not amounting to legal cruelty—Departure of wife from matrimonial home—Tacit consent of husband [SPENCE v. SPENCE]	52
—, Agreement for temporary separation—Wife's refusal to return—Husband continuing payment of separation allowance—Materiality of attitude of deserted spouse towards resumption of cohabitation [SIFTON v. SIFTON]	109
—, Letter by deserting spouse asking for meeting to discuss resumption of cohabitation—No reply by other spouse—Whether period of desertion interrupted [PRATT v. PRATT]	503
—, Previous petition on ground of adultery not served—No effect on currency of desertion [GIBBS-SMITH v. GIBBS-SMITH]	332
Maintenance—Lunatic spouse—Principles to be applied—Purchase of annuity out of patient's capital—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Matrimonial Causes Act, 1937 (c. 57), s. 10 (2) [SWETTENHAM v. SWETTENHAM]	161
Nullity—Respondent's pregnancy alleged to be by someone other than petitioner—Birth of child—Admissibility of evidence of non-access before marriage ceremony—Rule in Russell v. Russell—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (d) [JACKSON v. JACKSON (OTHERWISE PRUDOM)]	471
Summary jurisdiction—Maintenance order—Procedure—Absence of one justice during part of hearing—Evidence subsequently read over—Matrimonial Causes Rules, 1937, r. 67 (6) [WHITTLE v. WHITTLE]	374
Driver, of car, intoxicated, injury to passenger, <i>volens non fit injuria</i>	59
Duties, of servant, termination of service, setting up business in competition, use of knowledge honestly and properly acquired	200

ECCLESIASTICAL LAW.

Union of benefices—Scheme made by the Ecclesiastical Commissioners—Opposition—Union entailing a measure of loss to the parishioners without any corresponding benefit—Principles to be applied—Union of Benefices Measure, 1923 (No. 2), s. 2 (6)—Union of Benefices (Amendment) Measure, 1936 (No. 2), s. 2 (1) [RE A SPECIAL REFERENCE IN THE MATTER OF THE UNION OF THE BENEFICES OF WESTON AND SOUTH SHIELDS, ST. HILDA (COUNTY OF DURHAM)]	282
Effective cause of letting, agent's commission	614
<i>Ejusdem generis</i> rule, carriage of passengers, conditions, exclusion of liability	174
Employee, commencing similar business on own account, representation that former employers have gone out of business, passing off, malice	290
—, dangerous employment, master's duty to minimise danger	794

Employment, modification, request and promise to reduce contract into writing	PAGE 169
---	-------------

ESTATE AND OTHER DEATH DUTIES.

Property deemed to pass on death—Accumulations—Life tenant's income during settlor's life if below stated amount to be made up to that amount out of accumulations—Income of accumulations to go to life tenant upon death of settlor—Liability to duty on death of settlor—Aggregation—Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4 [Re HODSON'S SETTLEMENT, BROOKES v. ATTORNEY-GENERAL]	196
—, Aggregation of property—Policy of assurance assigned to trustees during deceased's lifetime in trust for payment of death duties—Deceased's interest in policy's proceeds—Whether "an estate by itself"—Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4 [TENNANT AND OTHERS v. LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS)]	672
Succession duty—Succession—Private Act of Parliament avoiding restraint upon alienation—Whether succession destroyed—Succession Duty Act, 1853 (c. 51), ss. 2, 12, 15 [ATTORNEY-GENERAL v. GLYN MILLS & CO.]	236

ESTOPPEL.

Res judicata—Two actions depending on same facts—Actions for damage to property and for personal injuries due to collision—Different causes of action—Plaintiff in second action third party in first—Plaintiff in second action suing in representative capacity [MARGINSON v. BLACKBURN BOROUGH COUNCIL]	273
—, Second action by agent of plaintiff in former action—Son driving father's motor car [TOWNSEND v. BISHOP]	805
Estoppel, award of arbitrator, claim for rectification of agreement	662

EVIDENCE.

Admissibility—Documents—Evidence of deceased witness—Statement made to police officer and signed by deceased—Deposition of evidence given on oath in police court but not signed by the deceased—Evidence Act, 1938 (c. 28), s. 1 [BULLOCK v. BORRETT]	505
Evidence of person beyond the seas—Not reasonably practicable to secure attendance—Available for cross-examination under letters of request—Document prepared expressly for being tendered in evidence—Admissibility—Evidence Act, 1938 (c. 28), s. 1 [INFIELDS, LTD. v. ROSEN]	121
Evidence, communications between spouses	827
—, non-access, before marriage, admissibility	471
—, similar offences, admissibility	469

EXECUTORS.

Legacies — Abatement — Annuity — Direction to appropriate fund—Gift over of fund subject to annuity—Rights of annuitant [Re FARMER, NIGHTINGALE v. WHYBROW]	319
Liability of representative—Survival of action—Action for penalties—Whether action in tort—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1), (3), 4 (2) [ATTORNEY-GENERAL v. CANTER]	13
Probate—Grant—Omissions for will—Omission altering sense of what remains Re HORROCKS, TAYLOR v. KERSHAW]	579

Right of retainer—Against costs of administration action—Discretion of court—Administration of Estates Act, 1925 (c. 23), s. 34—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50 [Re WESTER WEMYSS, TILLEY v. WESTER WEMYSS]	PAGE 382
--	-------------

Exemption from taxation, by public Act, extent of exemption	423
Expectation of life, loss of, assessment of damages for personal injuries, overlapping of damages, new trial	104
Extension, of licensed premises, alterations involving, jurisdiction of justices —, of time of sale, charity land, vested in Official Trustee	212 600
Factories, what premises within definition of mills, factories, etc.	25

FACTORIES AND SHOPS.

Dangerous machinery—Failure to fence—Contributory negligence—Failure of boy to use push-stick in accordance with statutory regulations—Boy ignorant of regulations—Factory and Workshop Act, 1901 (c. 22), ss. 10, 79—Woodworking Machinery, Use of, Regulations, 1922 (S.R. & O., 1922, No. 1196), regs. 11, 23 (4) [LEWIS v. DENYER]	310
—, Unfenced travelling crane—Injury to subcontractors' workman—Liability in damages of factory owner—Breach of statutory duty—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c) [FOWLER v. YORKSHIRE ELECTRIC POWER CO., LTD.]	407
Shops — Closing — Sunday trading—Restriction—Sale of chocolate eclairs, jam tarts, fruit cake, Swiss roll and veal-and-ham pies—Whether "meat or refreshment"—Shops (Sunday Trading Restriction) Act, 1936 (c. 53), s. 1, Scheds. I, II [LONDON COUNTY COUNCIL v. LEES, LONDON COUNTY COUNCIL v. IAFRATE]	191

Fatal accident, interrogatory as to evidence at inquest	333
Fitness, condition, idiosyncrasy of buyer	685
Floor, guest slipping on, trap	129

FOOD AND DRUGS.

Milk—Breach of warranty — Fraudulent misrepresentation — Breach of statutory duty—Action for damages—Whether remedy restricted to penalty—Infected milk—Sale of Goods Act, 1893 (c. 71), ss. 13, 14—Food and Drugs (Adulteration) Act, 1928 (c. 31), s. 2 [SQUARE v. MODEL FARM DAIRIES (BOURNEMOUTH), LTD.]	259
Football pool, exclusion of legal liability	464
Foreign judgment, registration, bankruptcy notice	1

GAMING AND WAGERING.

Betting houses—Club—User by bookmaker—Special user — Betting Act, 1853 (c. 119), s. 3 [E. v. MILNE, B. v. LEONARD, R. v. BOUNDFORD]	529
Lottery—Alternative methods of betting—Optional bet—Scheme with provision for credit betting—Betting and Lotteries Act, 1934 (c. 58), s. 22 [BARKER v. MUMBY]	611
Unlawful gaming — Premises used for unlawful gaming—Whether legality of game a question for the judge or for the jury [R. v. SALISBURY]	250
Garages, with dwelling-houses over, "houses," clearance order	590
Guest, slipping on polished linoleum	129
Habitual criminal, efforts to obtain work since release	181

	PAGE
Hearing, what is, costs	630
High contracting parties, Convention of Warsaw, definition	761
Hoarding, height of, built in sections	335
Housing, clearance order, garages with dwelling-houses over, "houses"	590
—, compulsory purchase order, grounds of large house	508
Idiosyncrasy, of buyer, implied condition of fitness	685
Illegality, bill of lading, failure to incorporate Hague Rules as required by statute	513
Illness, wages, deduction of National Health Insurance benefit	745
Impleading foreign government, requisitioned ship	719
Improvements, Landlord and Tenant Act, 1927, demolition of demised premises	567
Incest, suggested adultery by mother, proof of non-access	417
Indemnity, to French pilot-boat, sum payable by way of damages, collision clause in marine insurance policy	809

INCOME TAX.

<i>Deductions against profits—Payments made in compromise of action—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3 [G. SCAMMELL & NEPHEW, LTD. v. ROWLES]</i>	337
—, <i>Remuneration of employees—Issue of shares of nominal value [LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD.]</i>	353
—, <i>Wear and tear—Annual value of premises—"Mills, factories, or other similar premises"—Cold storage—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 5 (2) [ELLERKER v. UNION COLD STORAGE CO., LTD.]</i>	23
—, <i>Trading losses—Carrying forward deductions—Amalgamation of companies—Right of new company to accrued deductions of constituent companies—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, rr. 6, 11—Finance Act, 1926 (c. 22), ss. 32, 33 [UNITED STEEL COMPANIES, LTD. v. CULLINGTON (INSPECTOR OF TAXES)]</i>	454
<i>Executors—Penalties for inaccurate return—Liability of estate—Income Tax Act, 1918 (c. 40), s. 30 (1) [ATTORNEY-GENERAL v. CANTER]</i>	13
<i>Profit from employment—Company director—Payment for retaining office—Whether payment in discharge of a contingent liability of the company—Income or capital sum—Income Tax Act, 1918 (c. 40), Sched. E [PRENDERGAST v. CAMERON]</i>	223
<i>Undistributed income—Company of limited membership—Apportionment of income—Loan repayable by stated instalments—Option to redeem larger sum upon notice—Finance Act, 1922 (c. 17), s. 21, Sched. I—Finance Act, 1936 (c. 34), s. 20 [INLAND REVENUE COMMISSIONERS v. KERED, LTD., KERED, LTD. v. INLAND REVENUE COMMISSIONERS, INLAND REVENUE COMMISSIONERS, v. SIGMA TRUST, LTD., INLAND REVENUE COMMISSIONERS v. WILLANT TRUST, LTD.]</i>	45
—, <i>"Member"—Permanent director with option to take up shares—Finance Act, 1922 (c. 17), s. 21 (7) [INLAND REVENUE COMMISSIONERS v. TRING INVESTMENTS, LTD.]</i>	148
Income tax, deductions, no reference to standard rate	587
Indorse, action against, subsequent action against bank for conversion	676
Insanity, divorce, maintenance	161

INSURANCE.		PAGE
<i>Marine insurance—Collision clause—Sum payable by way of damages—Indemnity to French pilot-boat [HALL BROTHERS S.S. CO., LTD. v. YOUNG, THE TRIDENT]</i>	809	
<i>Motor insurance—Duty to insure—Causing or permitting the user of an uninsured car—Breach of statutory duty—Road Traffic Act, 1930 (c. 43), s. 35 (1) [WATKINS v. O'SHAUGHNESSY]</i>	385	
Insurance, arbitration clause, poor person desiring to proceed by action instead of arbitration	95	
—, certificate of, false statement to obtain	140	
International carriage by air, construction of contract	761	
Interrogatories, fatal accident, evidence at inquest	333	
—, privilege, communications between spouses, whether available to widow	827	

INTOXICATING LIQUORS.

<i>Licensed premises—Alterations—Alterations involving extension of licensed premises—Jurisdiction of justices—Licensing Act, 1902 (c. 28), s. 11—Licensing (Consolidation) Act, 1910 (c. 24), s. 71 [R. v. WESTON-SUPER-MARE LICENSING JJ., Ex parte POWELL]</i>	212
---	-----

JUDGMENTS.

<i>Registration—Foreign judgment—Judgment of French court—Power to issue bankruptcy notice—Bankruptcy Act, 1914 (c. 59), s. 1—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13) [Re A JUDGMENT DEBTOR (No. 2176 of 1933), JUDGMENT CREDITOR v. JUDGMENT DEBTOR]</i>	1
Jurisdiction, bankruptcy, to vary order after discharge	735
—, justices, alterations involving extension of licensed premises	212
—, summary, naval captain, officer disobeying orders	786
Jury, communication from, desirability of recording	794
Just and equitable, ground for winding up	99
Justices, absence of one during hearing, irregularity	374
—, jurisdiction of, alterations involving extension of licensed premises	212
Justification, refusal by vendor to proceed with sale, agent's commission	623

LANDLORD AND TENANT.

<i>Improvements—Business premises—Demolition of all buildings demised and rebuilding—Declaratory judgment—Jurisdiction of Chancery Division—Landlord and Tenant Act, 1927 (c. 36), ss. 1, 2, 3, 16, 17, 21 [NATIONAL ELECTRIC THEATRES, LTD. v. HUGGELL]</i>	567
<i>Rent restriction—House let in two parts—One part decontrolled—Subsequent letting of whole house—Whether subsequent letting within the Acts—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2 (1) [WORTHY v. LLOYD]</i>	474
<i>Repairs—Forfeiture—Notice of forfeiture—Retrospective operation of statute—Leasehold Property (Repairs) Act, 1938 (c. 34), ss. 1, 5 [NATIONAL REAL ESTATE & FINANCE CO., LTD. v. HASSAN]</i>	712
Leasehold property, repairs, retrospective operation of Act	712

LIBEL AND SLANDER.

<i>Slander—Words actionable per se—Words imputing a criminal offence—"You have a conviction"—Words not putting defamed person in jeopardy of prosecution—Payment in of precise sum awarded as damages—Costs [GRAY v. JONES]</i>	798
---	-----

	PAGE
Licence, general trade, motor vehicle used to tow trailer laden with motor-boat ..	143
Licensed premises, alterations involving extension, jurisdiction of justices ..	212
Limitation of time, aiding and abetting, principal offender, motor offence ..	154
Linoleum, guest slipping on ..	129

LOCAL GOVERNMENT.

<i>Superannuation—Scheme apart from superannuation Acts—Powers of local authority—Contract—Registration—Superannuation and Other Trusts Funds (Validation) Act, 1927 (c. 41) [ARMOUR v. LIVERPOOL CORPORATION] ..</i>	363
Lottery, betting scheme, provision for credit betting ..	611
Lunatic, divorce, maintenance ..	161

MAGISTRATES.

<i>Procedure—Limitation of time—Misdemeanour—Aiding and abetting—Accessory before fact a principal offender—Whether information out of time—Summary Jurisdiction Act, 1848 (c. 43), s. 5—Road Traffic Act, 1930 (c. 43), s. 7 (5) [HOMOLKA v. OSMOND] ..</i>	154
Maintenance (divorce), lunatic spouse, purchase of annuity out of lunatic's capital ..	161
Malice, passing off, employee commencing similar business on own account, representation that employers had gone out of business ..	290
Mandated territory, Turkish subject resident in Palestine, nationality ..	729
Manslaughter, adding other offence to indictment ..	753
Master, liability at common law, safety of employee, dangerous employment, duty to minimise danger ..	794

MASTER AND SERVANT.

<i>Common employment—Liability in case of accident—Defences—Coach driver driving one of 6 coaches returning to garage—Death caused by another coach belonging to same company [RADCLIFFE v. RIBBLE MOTOR SERVICES, LTD.] ..</i>	638
<i>Contract of service—Determination—Notice—Reasonable notice—Controller of cinemas [ADAMS v. UNION CINEMAS, LTD.] ..</i>	169
<i>Duration—Endowment and pension scheme for permanent staff—Right of dismissal of persons admitted to the scheme [WARD v. BARCLAY PERKINS & CO., LTD.] ..</i>	287
<i>Necessity for writing—Modification of previous employment—Request and promise to reduce contract into writing—Statute of Frauds, 1677 (c. 3), s. 4 [ADAMS v. UNION CINEMAS, LTD.] ..</i>	169
<i>Restrictive covenant—Covenant against solicitation—Radius agreement—Validity—Manager of butcher's shop [EMPIRE MEAT CO., LTD. v. PATRICK] ..</i>	606
<i>Duty of servant—After termination of service—Setting up competing business—Use of knowledge honestly and properly acquired [E. WORSLEY & CO., LTD. v. COOPER] ..</i>	290
<i>Liability of master at common law—Safety of employee—Dangerous employment—Duty of master to insure that danger is minimised [NAISMITH v. LONDON FILM PRODUCTIONS, LTD.] ..</i>	794
<i>Remuneration—Wages—Illness—Deduction of benefits received under National Health Insurance Act, 1936 [MARRISON v. BELL] ..</i>	745

MEDICINE.

<i>Negligence—Surgical operation—Swab left in patient—Res ipsa loquitur—Difficulty of operation—Condition of patient—Counting of swabs [MAHON v. OSBORNE] ..</i>	535
--	-----

	PAGE
Milk, typhoid germs, breach of warranty, breach of statutory duty ..	259
Mills, what premises are ..	23

MINES.

<i>Working facilities—Land vested in large number of owners having varied interests—Practicability of obtaining sufficient and enforceable rights from owners—Effect of Coal Act, 1938—Position of Coal Commission—Coal Act, 1938 (c. 52), ss. 18, 22 (5) [Re SHERWOOD COLLIERY CO., LTD.] ..</i>	88
Misdescription, sale of property, controlled houses ..	618

MISTAKE.

<i>Rectification—Agreement containing arbitration clause—Parties proceeding to arbitration and award made—Claim for rectification of agreement in action to enforce award—Estoppel [CRANE v. HEGEMAN-HARRIS CO., INC.] ..</i>	662
Mortgage, building society, validity, pooling agreement ..	481
Motor car, son driving father's, estoppel, res judicata, actions founded upon same negligent acts ..	805
Motor insurance, causing or permitting user of uninsured car ..	385
National Health Insurance, deduction of benefit from wages ..	745
Nationality, Turkish subject resident in Palestine ..	729
Navy, discipline, summary jurisdiction of captain ..	786

NEGLIGENCE.

<i>Defences—Volenti non fit injuria—Passenger in motor car with knowledge of intoxication of driver—Opportunity of leaving car [DANN v. HAMILTON] ..</i>	59
<i>Licensee—Guest—Concealed trap or danger—Polished linoleum—Injury by slipping [PITT v. JACKSON] ..</i>	129
Negligence, contributory, availability as defence, breach of statutory duty, unfenced machinery ..	310
—, servant, carriage of passengers, exclusion of liability ..	174
Negotiability, bill of exchange payable to order of payees only, crossed "not negotiable" ..	166
New trial, verdict clearly wrong, payment in ..	290
Non-access, before marriage, evidence of, admissibility ..	471
—, proof of, incest ..	417
Notice, of appeal, delivery "forthwith" ..	135
—, reasonable, contract of service, controller of cinemas ..	169

NUISANCE.

<i>Private nuisance—Created by trespasser—Creation unknown to occupier—Right of stranger to abate—Whether occupier liable for failure to abate [SEDLIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS] ..</i>	725
Officer, petty, naval, disobeying orders, summary jurisdiction of captain ..	786
Official referee, when action referred to ..	164
Official Trustee, charity land, vesting in, extension of time for sale ..	600
Omission, from will, on grant of probate ..	579
Park, garden or pleasure ground, meaning of, housing ..	508
Passengers, carriage by sea, conditions, exclusion of liability, risk arising from negligence of servant ..	174

	PAGE
Passing off, representation that employers have gone out of business, employee commencing similar business on own account, malice	290
Passport, marked "British" passport, Palestine," nationality of resident . .	729
Penalties, action for, survival of action against personal representative . . .	13
Permanent, contract of service, admission to pension scheme with permanent staff .	287
Personal representative, liability for penalties for wrong income tax return, .	13
Plaintiff, different capacities, <i>res judicata</i>	273

POLICE.

Borough police force—Constable—Dismissal—Confirmation by watch committee—Right of member dismissed—Policeman acting as fireman—Public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1—Police Act, 1919 (c. 46), s. 4 (1)—Police Regulations, 1920 (S.R. & O., 1920, No. 1484), regs. 15, 16, 18, 94 [KILDUFF v. WILSON AND OTHERS, COVENTRY v. WILSON AND OTHERS]	429
---	-----

Police officer, statement to, signed by deceased, admissibility	505
Pool, football, exclusion of legal liability	464
Pooling agreement, building society, validity of mortgage	481
Poor person, Poor Persons Rules, whether party may proceed with action under, arbitration made a condition precedent	95

POWERS.

Special power of appointment—Fraudulent exercise of power in favour of two appointees—Severance—Subsequent appointment to same appointee—Freedom from taint of second appointment—Onus of proof [Re CHADWICK'S TRUSTS, SHAW v. WOODWARD]	850
--	-----

PRACTICE.

New trial—Claims under Fatal Accidents Acts and for loss of expectation of life—Nil assessment for loss of expectation of life—New trial in respect of both sets of damages [ELLIS v. RAINE]	104
—, When granted—Verdict clearly given for wrong party—Payment in—No miscarriage of justice—R.S.C., Ord. 39, r. 6 [POLIAKOFF v. NEWS CHRONICLE, LTD.]	390
Jury—Communication from jury—Desirability of recording on judge's note or shorthand note [NAISMITH v. LONDON FILM PRODUCTIONS, LTD.]	794
Reference to referee—Claim based on conspiracy to defraud—Some accounts involved—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 89 [ULLSTROM v. NAAR]	164

Privilege, communications between spouses, whether extending to widow .	827
---	-----

PRIVY COUNCIL.

Canada—Patent—Validity—Patent declared invalid—Disclaimer subsequently filed limiting scope of claims—Discretion of Supreme Court to refuse a rehearing—Whether Privy Council will consider patent as amended—Canadian Patent Act, 1935 (c. 32), s. 50 [CANADIAN CELANESE, LTD. v. B.V.D. CO., LTD.]	410
India—Criminal Law—Murder—Statement made to police by accused while in custody—Admissibility in evidence—Code of Criminal Procedure, s. 162 (1)—Code of Criminal Procedure Amendment Act, 1923, s. 34 [PAKALA NARAYANA SWAMI v. KING-EMPEROR]	396

	PAGE
Newfoundland—Statutes—Statutory exemption from taxation except water rates—Subsequent imposition of income tax in Newfoundland—Whether company liable—Ejusdem generis rule—United Towns Electrical Company Act, 1902 (c. 8), s. 30 [UNITED TOWNS ELECTRIC CO., LTD. v. ATTORNEY-GENERAL FOR NEWFOUNDLAND]	423
Nova Scotia—Shipping—Bill of lading—Omission to incorporate Hague Rules—Act of country of port of shipment requiring incorporation—Consignees and ship of another country—Illegality—Law governing contract—Newfoundland Carriage of Goods by Sea Act, 1932 (c. 18), ss. 1, 3 [VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO., LTD. (IN LIQUIDATION)]	513

Proof, onus of, habitual criminal	181
Proof, onus, special power of appointment, fraudulent exercise, subsequent appointment to same appointee	850
Property, in animals, bees, <i>feræ naturæ</i> . .	65
Public authority, watch committee	429

PUBLIC HEALTH.

Advertisements—Erected without submitting plans and sections to local authority—Advertisement separated into a number of smaller pieces—Whether constituted a "hoarding"—Infringement of byelaw—Advertisements Regulation Act, 1907 (c. 27), s. 2 (1) [HORLICKS, LTD. v. GARVIE]	335
Housing—Clearance order—Buildings consisting of dwelling-houses on first floor and garages and stores on ground floor—Separate occupations—Whether garages and stores should be included in clearance order—"Houses"—Housing Act, 1936 (c. 51), s. 25, Sched. III, para. 2 [Re CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936, APPLICATION OF BUTLER]	590
—, Compulsory purchase—Clearance area—House—Premises consisting of shops with living rooms over—Housing Act, 1936 (c. 51), s. 25 [Re SOUTH SHIELDS (D'ARCY STREET) COMPULSORY PURCHASE ORDER, 1937, APPLICATION OF BAINBRIDGE]	419
—, Park, garden or pleasure ground—Required for the amenity or convenience of any house—Finality of Minister's decision—Housing Act, 1936 (c. 51), s. 75 [Re RIPON (HIGHFIELD) HOUSING ORDER, 1938, APPLICATIONS OF WHITE AND COLLINS]	508

Public policy, acceptance of commission in Territorial Army	635
---	-----

RATES AND RATING.

Basis of assessment—Special classes of property—Electricity undertaking—Ring main—Apportionment of annual value between areas where tapped and not tapped [METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. BUCKINGHAM COUNTY VALUATION COMMITTEE, METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. SURREY (NORTH WESTERN) AREA ASSESSMENT COMMITTEE]	36
Rebuilding, premises, improvement, Landlord and Tenant Act, 1927	567
Receiving stolen property, time at which knowledge essential	86
Recognisance to come up for sentence if called upon, breach of undertaking . .	782
Rectification, claim for, in action to enforce an award	662
Registration, foreign judgment, bankruptcy notice	1
—, scheme for superannuation	363
Release, of vessel, contempt of court . .	701

	PAGE
Rent, restriction, decontrol, part of house, house let in two parts, one part decontrolled, whether whole house decontrolled	474

RENTCHARGES AND ANNUITIES.

<i>Annuitant entitled to relief—Recovery of tax—Action of debt—Annuity in commutation of tithe rentcharge—Tithe Act, 1918 (c. 54), s. 4—Law of Property Act, 1925 (c. 20), s. 121 [PUBLIC TRUSTEE v. SCARR]</i>	188
<i>Annuity of clear sum after "deduction of income tax"—No reference to standard or current rate of tax—Rate computed in relation to reliefs and allowances [RE MACLENNAN, FEW v. BYRNE]</i>	587
Repairs, leasehold property, retrospective operation of statute	712
<i>Res ipsa loquitur</i> , surgical operation, swab left in patient	535
<i>Res judicata</i> , two actions depending on same facts, different causes of action, same plaintiff in different capacities	273
—second action by agent	805
Restraint on alienation, private Act avoiding, whether succession destroyed	236
Restrictive covenant, against trade, jobbing builder	279
—, competition, servant, radius agreement	606
Retainer, executor's right of, against costs of administration action	382
Ring main, basis of assessment for rats	36

ROYAL FORCES.

<i>Navy—Discipline—Summary jurisdiction of captain—Naval officer disobeying orders—"Wilful disobedience"—"Highly insubordinate conduct"—Meaning of terms—Naval Discipline Act, ss. 17, 56 (2)—King's Regulations and Admiralty Instructions, arts. 540, 552 [JENKINS v. SHELLEY]</i>	786
---	-----

SALE OF GOODS.

<i>Implied condition of fitness—Abnormal circumstance—Idiosyncrasy of buyer—Duty of buyer—Sale of Goods Act, 1893 (c. 71), s. 14 (1) [GRIFFITHS v. PETER CONWAY, LTD.]</i>	685
<i>Rejection—Sale of 15,000 units of corn—"Separate documents for each 1,000 units, and each 1,000 units to be considered a separate contract"—Notice of appropriation for about 15,444 units—First provisional invoice for 15,444 units—Amended provisional invoice for 15,000 units—Validity of first tender—Whether withdrawn by amended provisional invoice—Validity of second tender [RE AN ARBITRATION BETWEEN T. D. BAILEY, SON & CO. AND ROSS T. SMYTH & CO., LTD.]</i>	115
—, <i>Stipulation in contract—Timber—"to be loaded on deck one-third"—More than one-third loaded on deck—Whether buyers entitled to reject [MESSERS, LTD. v. MORRISON'S EXPORT CO., LTD.]</i>	92

SALE OF LAND.

<i>Error in description—Freehold decontrolled properties—Small part controlled—Recovery of deposit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 [RIDLEY v. OSTER]</i>	618
<i>Restrictive covenants—Covenant against trade—Jobbing builder [WESTRIPP v. BALDOCK]</i>	270
<i>Servant, duties after termination of service, setting up business in competition, use of knowledge honestly and properly acquired</i>	290

	PAGE
Service contract, necessity for writing, modification of previous employment	169
Settled land, where property ceases to be, remainder in undivided shares	379

SETTLEMENTS.

<i>Settled land—Persons entitled in undivided shares on death of tenant for life—Right of trustee of the settlement to call for legal estate—Personal representative of testator as trustee of settlement—Settled Land Act, 1925 (c. 18), ss. 30 (3), 36 (1) [RE THOMAS]</i>	379
Severance, fraudulent exercise of special power, two appointees	850
Shares, certificate, right of shareholder to certificates for altered subdivision of his shares	123
—, offer for sale, canvassing from door to door	82
Ship, release of, contempt of court	701

SHIPPING.

<i>Charterparty—Construction—"Full and complete cargo"—Timber shipped in bundles—Custom to bundle—Stowage place completely filled but cargo short of carrying capacity—Dead freight [ANGPARTYGS A/B HALEFAN v. PRICE & PIERCE, LTD.]</i>	332
—, <i>Exceptions—Liberty to cancel "if war breaks out involving Japan"—Meaning of "war" [KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. CO., LTD.]</i>	819
<i>Delivery—Over-delivery by shipowners to consignees—Whether consignees to be charged with goods over-delivered [THE NORDBOG, NORDBOG (OWNERS) v. C. P. SHERWOOD & CO.]</i>	70
<i>Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government [THE ARANTZAZU MENDI]</i>	719
Shipping, bills of lading, omission to incorporate Hague Rules, legality of contract	513
Shop, Sunday trading, restriction, "meal or refreshment"	191
Similar offences, evidence of, admissibility	469
Slander, words imputing a criminal offence, no danger of prosecution, whether proof of special damage necessary	798
Special allowances, costs, what is a hearing	630
Speed limit, "dangerous to the public"	183
Spouses, communications between, privilege, whether extending to widow	827
—, future separation, annuity increased on separation	681
Statement, to police, admissibility under Evidence Act, 1938	505
Statute, retrospective operation, leasehold repairs	712
Statutory duty, breach of, infected milk, action for damages	259
Stay, of action, discretion to refuse, plaintiff desiring to proceed as a poor person	95

STREET AND AERIAL TRAFFIC.

<i>Carriage by air—International carriage—Construction of contract—"High contracting parties"—to Convention of Warsaw—Carriage by Air Act, 1932 (c. 36), s. 1 (2) [PHILIPPSON v. IMPERIAL AIRWAYS, LTD.]</i>	761
<i>Motor vehicle—Insurance certificate—False statement to obtain—Gain or advantage unnecessary—Road Traffic Act, 1930 (c. 43), s. 112 (2) [JONES v. MEATYARD]</i>	140

	PAGE
—, <i>Licence—General trade licence—</i>	
Motor ambulance—Used for towing trailer laden with motor-boat—Whether vehicle used for unauthorised purpose—Roads Act, 1920 (c. 72), s. 12—Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29 D [DARK v. WESTERN MOTOR AND CARRIAGE CO. (BRISTOL), LTD.]	143
Speed-limit—Driving at speed "dangerous to the public"—Motor van—Dangerous in circumstances of the case—Road Traffic Act, 1930 (c. 43), s. 11 (1) [DURNELL v. SCOTT]	183
Subdivision, share certificate	123
Succession duty, private Act avoiding restraint upon alienation, whether succession destroyed	236
Summary jurisdiction, absence of justice during hearing	374
—, limitation of time, aiding and abetting, principal offender, motor offence	154
—, naval captain, petty officer disobeying orders	786
Sunday trading, "meal or refreshment"	191
Superannuation, scheme apart from Acts, power of local authority	363
Surgeon, swab left in patient, negligence, <i>res ipsa loquitur</i>	535
Survival of action, income tax penalties	13
Swab, left in patient, surgical operation, negligence, <i>res ipsa loquitur</i>	535
Telephone conversations, collusion	20
Tenant, two agricultural holdings, disturbance, minimum compensation	253
Timber, cargo, more loaded on deck than stipulated in contract	92
Tithe rentcharge, annuity in commutation, recovery, action of debt	188
Title, question of, controlled houses described as decontrolled, contract of sale	618
TORT.	
Waiver—Action on same facts based on contract—Action not proceeding to judgment [UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD.]	676
Trade, covenant against, jobbing builder	279
TRADE MARKS AND TRADE NAMES.	
Passing off—Representation that employers have gone out of business—Employee commencing similar business on own account—Malice—Special damage [E. WORSLEY & CO., LTD. v. COOPER]	290
Trespasser, nuisance created by, failure to abate	725
TROVER AND DETINUE.	
Conversion—Refusal to allow entry on land to recover property—Bees swarming and escaping on to defendant's land [KEARRY v. PATTINSON]	65

	PAGE
Uninsured car, causing or permitting user of	385
Verdict, clearly wrong, refusal to order new trial	390
Volenti non fit injuria, defence to accident to passenger in car when driver intoxicated	59
Wages, recoverable during sickness, National Health Insurance benefit	745
WEIGHTS AND MEASURES.	
Sale of bread—Weight—Whether every precaution taken to ensure that loaves of bread of correct weight—Whether deficiency of weight due to bona fide mistake or accident—Sale of Food (Weights and Measures) Act, 1926 (c. 63), s. 6 (2) [MARSHALL v. MATTHEWS]	156
Widow, privilege, communications between spouses, whether available	827
Will, omission from, on grant of probate	579
WILLS.	
Condition—Validity—Public policy—Acceptance of public office—Commission in Territorial Forces [Re EDGAR, COHEN v. EDGAR]	635
—, —, Condition inducing future separation of spouses—Construction of condition [Re THOMPSON, LLOYDS BANK, LTD. v. GEORGE]	681
WORK AND LABOUR.	
Fitness—Cleaning suit of clothes—Dermatitis—Proof [MAYNE v. SILVERMERE CLEANERS, LTD.]	693
WORKMEN'S COMPENSATION.	
Incapacity—Compensation paid on footing of total incapacity—Employers offering to continue payments only at reduced rate on footing of partial incapacity—Claim by workman for arbitration—Answer by employers admitting liability at reduced rate—Form of award—Workmen's Compensation Act, 1925 (c. 84), s. 21 [HOWARD v. CHARLES P. KINNEIL & CO., LTD.]	34
Industrial disease—Injury by accident—Date of accident—Death of workman without obtaining certificate and not in receipt of compensation—Whether date of accident date of death—Workmen's Compensation Act, 1925 (c. 84), ss. 41 (1) (iii) (a), 42 (2) (b) [MAYER & SHERRATT v. CO-OPERATIVE INSURANCE SOCIETY, LTD.]	76
Medical referee—Application for medical reference—Consideration by registrar of medical reports not submitted to other side—Whether registrar can consider such reports—Workmen's Compensation Act, 1931 (c. 18), ss. 12 (3), 19 (2)—Workmen's Compensation Rules, 1926, r. 57 (2)—C.C.R., Ord. 13, r. 1 [LLAY MAIN COLLIERIES, LTD. v. JONES]	8

STATUTES, ETC., REFERRED TO

	PAGE
Statute of Frauds, 1677 (c. 3), s. 4	109
Summary Jurisdiction Act, 1848 (c. 43), s. 5	154
Suocession Duty Act, 1853 (c. 51), ss. 2, 12, 15	236
Evidence Amendment Act, 1853 (c. 83), s. 3	827
Betting Act, 1853 (c. 119), s. 3	529
Offences against the Person Act, 1861 (c. 100), s. 57	330
Naval Discipline Act, 1866 (c. 109), s. 17	786
Building Societies Act, 1874 (c. 42), ss. 12, 13, 25	481
Bills of Exchange Act, 1882 (c. 61), ss. 8 (1), 81	166
Mortmain and Charitable Uses Act, 1891 (c. 73), ss. 5, 6	600
Public Authorities Protection Act, 1893 (c. 61), s. 1	429
Sale of Goods Act, 1893 (c. 71), ss. 13, 14	259
—, s. 14 (1)	685
Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4	196, 672
Building Societies Act, 1894 (c. 47), ss. 8 (1), 17	481
Criminal Evidence Act, 1898 (c. 36), s. 1 (b)	827
—, s. 1 (f)	460
Factory and Workshop Act, 1901 (c. 22), ss. 10, 79	310
—, s. 10 (1) (c)	407
Licensing Act, 1902 (c. 28), s. 11	212
Criminal Appeal Act, 1907 (c. 23), s. 5 (2)	753
Advertisements Regulation Act, 1907 (c. 27), s. 2 (1)	335
Licensing (Consolidation) Act, 1910 (c. 24), s. 71	212
British Nationality and Status of Aliens Act, 1914 (c. 17), s. 27	729
Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1)	501
—, s. 10 (1) (a)	352
Bankruptcy Act, 1914 (c. 59), s. 1	1
—, ss. 26 (8), 108 (1)	735
Income Tax Act, 1918 (c. 40), s. 30 (1)	13
—, Sched. D., Cases I and II, r. 3	337
—, —, r. 5 (2)	23
—, —, rr. 6, 11	454
—, Sched. E	223
Tithe Act, 1918 (c. 54), s. 4	188
Police Act, 1919 (c. 46), s. 4 (1)	429
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i)	618
Roads Act, 1920 (c. 72), s. 12	143
Finance Act, 1922 (c. 17), s. 21, Sched. I	45
—, s. 21 (7)	148
Agricultural Holdings Act, 1923 (c. 9), s. 12 (6), (8)	253
Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2 (1)	474
—, s. 10	618
Settled Land Act, 1925 (c. 18), ss. 30 (3), 36 (1)	379
Law of Property Act, 1925 (c. 20), s. 121	188
Administration of Estates Act, 1925 (c. 23), s. 34	382
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50	382
—, s. 89	164
—, s. 190	161
Workmen's Compensation Act, 1925 (c. 84), ss. 12 (3), 19 (2)	8
—, s. 21	34
—, ss. 41 (1) (iii) (a), (2) (b)	76
Criminal Justice Act, 1925 (c. 86), s. 46 (1)	352
Finance Act, 1926 (c. 22), ss. 32, 33	454
Sale of Food (Weights and Measures) Act, 1926 (c. 63), s. 6 (2)	156
Landlord and Tenant Act, 1927 (c. 36), ss. 1, 2, 3, 16, 17, 21	567
Superannuation and other Trusts Funds (Validation) Act, 1927 (c. 41)	363
Food and Drugs (Adulteration) Act, 1928 (c. 31), s. 2	250
Companies Act, 1929 (c. 23), ss. 153, 154 (1)	454
—, s. 168 (6)	99
—, ss. 356 (1), (7), 380 (1)	82
—, s. 357	363
Third Parties (Rights against Insurers) Act, 1930 (c. 25), s. 1 (1)	95
Road Traffic Act, 1930 (c. 43), s. 7 (5)	154
—, s. 11 (1)	183
—, s. 35 (1)	385
—, s. 112 (2)	140
Carriage by Air Act, 1932 (c. 36), s. 1 (2)	761
Children and Young Persons Act, 1933 (c. 12), s. 1 (4)	753
Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13)	1
Arbitration Act, 1934 (c. 14), s. 3 (4)	95
Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1), (3), 4 (2)	13
Betting and Lotteries Act, 1934 (c. 58), s. 22	611
National Health Insurance Act, 1936 (c. 32)	745
Finance Act, 1936 (c. 34), s. 20	45
Housing Act, 1936 (c. 51), s. 25	419
—, s. 25, Sched. III, para. 2	590
—, s. 75	508
Shops (Sunday Trading Restriction) Act, 1936 (c. 53), s. 1, Scheds. I, II	191
Finance Act, 1937 (c. 54), s. 14 (3)	148
Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (d)	471
—, 10 (2)	161
Evidence Act, 1938 (c. 28), s. 1	121, 505
Leasehold Property (Repairs) Act, 1938 (c. 34), ss. 1, 5	712
Coal Act, 1938 (c. 52), ss. 18, 22 (5)	88

	PAGE
United Towns Electrical Company Act (Newfoundland), 1902 (c. 8), s. 30	423
Code of Criminal Procedure Amendment Act (India), 1923, s. 34	396
Newfoundland Carriage of Goods by Sea Act, 1932 (c. 18), ss. 1, 3	513
Patent Act (Canada), 1935 (c. 32), s. 50	410
Union of Benefices Measure, 1923 (No. 2), s. 2 (6)	282
Union of Benefices (Amendment) Measure, 1936 (No. 2), s. 2 (1)	282
B.S.C., Ord. 29, r. 1	701
—, Ord. 39, r. 6	390
C.C.R., Ord. 13, r. 1	8
—, Ord. 18, rr. 1, 2	630
—, Ord. 47, r. 21	630
Bankruptcy Rules, 1915, rr. 132, 385, 386	135
Workmen's Compensation Rules, 1926, r. 57 (2)	8
Matrimonial Causes Rules, 1937, r. 28 (5)	109
—, r. 67 (6)	374
Crown Office Rules, 1906, r. 115	782
King's Regulations and Admiralty Instructions, arts. 540, 552	786
Code of Criminal Procedure, s. 162 (1)	396
Police Regulations, 1920 (S.R. & O., 1920, No. 1484), regs. 15, 16, 18, 94	420
Woodworking Machinery, Use, of, Regulations, 1922 (S.R. & O., 1922, No. 1196), regs. 11, 23 (ii)	310
Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29 D	143
Palestinian Citizenship Order, 1925 (S.R. & O., 1925, No. 777)	720
Borstal (Extension of Age) Order, 1936 (S.R. & O., 1936, No. 839)	352
Treaty of Peace with Turkey signed at Lausanne on July 24, 1923, art. 30	720

WORDS AND PHRASES

All risk whatsoever of the passage	174	
An estate by itself	672	
British passport, Palestine	729	
Dangerous to the public	183	
Debenture	82	
Deduction of income tax	567	
Forthwith	135	
From any cause whatsoever	174	
Full and complete cargo	322	
Hearing	630	
High contracting parties	761	
Highly insubordinate conduct	786	
Hoarding	335	
House	335	
Meal or refreshment	191	419,
Member	148	590
Mills, factories, or other similar premises	23	
Not more than 23 years of age	352	
Not negotiable	166	
Park, garden or pleasure ground	508	
Pooling agreement	481	
Public office	635	
Required for the amenity or convenience of any house	508	
Share	82	
To be loaded on deck one-third	92	
War	819	
Wilful disobedience	786	

THE ALL ENGLAND LAW REPORTS ANNOTATED

Re A JUDGMENT DEBTOR (No. 2176 OF 1938), JUDGMENT CREDITOR v. JUDGMENT DEBTOR.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **December 20, 1938.**]

Judgments—Registration—Foreign judgment—Judgment of French court—Power to issue bankruptcy notice—Bankruptcy Act, 1914 (c. 59), s. 1—Foreign Judgments (Reciprocal Enforcement) Act, 1933 (c. 13).

A creditor obtained a judgment against the debtor in the Court of Appeal in France. The judgment was duly registered in this country in accordance with the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The creditor then caused a bankruptcy notice to be served upon the debtor. It was contended that the words of sect. 4 of the Act were not wide enough to provide for the enforcement of the judgment by bankruptcy proceedings :—

HELD : (i) the Act of 1933 places a foreign judgment, when registered for the purposes of a bankruptcy notice, in the same position as a final judgment of an English court.

(ii) the fact that the words of the Bankruptcy Act, 1914, s. 1 (g), taken by themselves, would exclude such a judgment does not have the result of preventing a foreign judgment, when registered, from becoming the basis of a bankruptcy notice.

[EDITORIAL NOTE.] Under the Judgments Extension Act, 1868, judgments obtained in Scotland and Ireland might be registered in England, and, upon that being done, execution upon those judgments might be levied in England. It had been held, however, that proceedings in bankruptcy commenced by a bankruptcy notice could not be based upon such a registered judgment. It is assumed that the position is the same in respect of Dominion judgments under the Administration of Justice Act, 1920, by which such judgments were, in certain circumstances, made enforceable in the United Kingdom. Judgments of countries outside the British Dominions were made enforceable in the United Kingdom by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, but the language used as to the enforcement of such judgments after registration in the United Kingdom is wider, and it is here held that a bankruptcy notice may be founded upon such a judgment when registered.

AS TO REGISTRATION OF FOREIGN JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 273-275, para. 576; and FOR CASES, see DIGEST, Vol. 30, pp. 170, 171. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 723-727.]

Cases referred to :

- (1) *Re Watson, Ex p. Johnston, Johnston v. Watson*, [1893] 1 Q.B. 21 ; 5 Digest 1035, 8466 ; 62 L.J.Q.B. 85 ; 67 L.T. 519.
- (2) *Re A Bankruptcy Notice*, [1898] 1 Q.B. 383 ; 4 Digest 89, 810 ; 67 L.J.Q.B. 308 ; 77 L.T. 710.
- (3) *Thompson v. Gill*, [1903] 1 K.B. 760 ; 21 Digest 670, 2498 ; 72 L.J.K.B. 411 ; 88 L.T. 714.
- (4) *Yukon Consolidated Gold Corpn., Ltd. v. Clark*, [1938] 2 K.B. 241 ; [1938] 1 All E.R. 366 ; Digest Supp. ; 107 L.J.K.B. 240 ; 158 L.T. 330.
- (5) *Galbraith v. Grimshaw*, [1910] A.C. 508 ; 21 Digest 618, 2058 ; 79 L.J.K.B. 1011 ; 103 L.T. 294 ; *affg.*, [1910] 1 K.B. 339.

APPEAL by the creditor from the decision of Mr. Deputy Registrar MELLOR, dated Nov. 21, 1938, setting aside a bankruptcy notice. In June, 1937, the appellant obtained a judgment against the debtor in the Court of Appeal in France. That judgment confirmed the judgment of the court of first instance. The judgment was duly registered, and a bankruptcy notice was served upon the debtor. The deputy registrar decided that a bankruptcy notice could not be issued on a judgment registered under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

Cyril Salmon for the appellant.

D. G. A. Lowe for the respondent.

Salmon : Under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, a foreign judgment which is registered according to the Act has the same force and effect as a judgment given in the courts of this country. The words of sect. 2 (2) are as wide as they can be, and they include bankruptcy proceedings, which is one of the most valuable remedies available to a creditor. Sect. 6 of the Act prevents a creditor from suing on a foreign judgment if it can be registered. Before the Act of 1933 was passed, a creditor who had a foreign judgment in his favour had to sue upon it in the courts of this country. The case against the appellant is based upon the decisions in *Re Watson, Ex p. Johnston, Johnston v. Watson* (1) and *Re A Bankruptcy Notice* (2), but the language of the 1933 Act is very different from the language of the Acts which were applicable to those cases. The only other case in which this question has been considered is *Thompson v. Gill* (3), where it was held that a receiver by way of equitable execution would be appointed in favour of a creditor who had obtained a judgment in Scotland. In the Act of 1933, there are no limitations of the kind which are found in the Judgments Extension Act, 1868, and, therefore, it cannot be said that the court is bound by those cases when construing the Act of 1933. There is no ground for construing sect. 4 of the Act of 1933 in the limited way suggested by the deputy registrar.

Lowe : The best guide in construing the 1933 Act is the consideration of the similar Acts of 1868 and 1920, and the cases decided on their application. When one considers the language of the Judgments Extension Act, 1868, the Administration of Justice Act, 1920, and the

Foreign Judgments (Reciprocal Enforcement) Act, 1933, it will be found that there is no fundamental distinction between those Acts. If the legislature had intended that bankruptcy proceedings should be included, they would have said so, and would not have left the matter in the air. The Act of 1933 contains no statement that it shall apply
A to bankruptcy proceedings. In view of the decision in *Re A. Bankruptcy Notice* (2), the Act cannot be so extended without express words. [Counsel referred to *Yukon Consolidated Gold Corpn., Ltd. v. Clark* (4) and *Galbraith v. Grimshaw* (5).]

B SIR WILFRID GREENE, M.R.: This is an appeal by the creditor against an order of Mr. Deputy Registrar MELLOR setting aside a bankruptcy notice. The bankruptcy notice was founded upon a judgment of a competent court in France for a sum amounting to the equivalent of something over £19,000, which judgment had been
C registered pursuant to the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in July, 1938. The French judgment having been delivered in June, 1937, on Oct. 6, 1938, the bankruptcy notice now in question was issued, and the application to set it aside was based on two arguments, the second of which was that, upon the merits, the debtor had a good
D set-off or counterclaim. That was negatived, and it has not been referred to before us.

The first of the arguments, which is the one with which we have to deal, raises a question of importance, but, in my opinion, a question presenting no real difficulty, under the Foreign Judgments (Reciprocal
E Enforcement) Act, 1933. Putting it quite shortly, the argument is that, under that Act, the only relief which the holder of a foreign judgment registered under the Act can obtain is relief by way of execution, whether execution strictly so called or execution in a looser sense, such as equitable execution by way of receivership or by way of garnishee
F proceedings (neither of which, of course, is in strictness execution at all). The Act of 1933 is the last of a series of Acts dealing with judgments which, for the purposes of the courts of this country, are foreign judgments. Whereas the earlier Acts dealt with judgments in courts of other parts of the United Kingdom and the British Dominions, the
G present Act is the first Act to introduce the system of registration in respect of judgments of the courts of countries which are not part of His Majesty's Dominions.

Before I come to look at the Act of 1933, I will say a word about the earlier legislation. The first Act to which attention is called is the
H Judgments Extension Act, 1868. That was an Act the object of which was to make judgments obtained in certain courts in England, Scotland and Ireland effectual in other parts of the United Kingdom. It did so by means of a scheme of registration of judgments. Sect. 1 deals with the question of registration of English and Irish judgments in Dublin and Westminster, and sect. 3 deals with the question of registra-

tion of decreets of the Court of Session at Westminster and Dublin. I need only refer to sect. 3, because sect. 1 is to the same effect, *mutatis mutandis*. Sect. 3 provides that the certificate of judgment

. . . shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered . . .

Then sect. 4, with regard to all judgments registered under the Act, A provides that the courts in the three countries

. . . shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered under this Act in such courts respectively, as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act.

It has been held, in cases binding upon this court, that, notwithstanding the generality of the words in sect. 3 "all proceedings shall and may be had and taken," the concluding words of sect. 4—namely, "in so far only as relates to execution under this Act"—impose a limitation upon the effect of registration by limiting that effect to execution, C although not to execution strictly so-called, because it has been held to extend also to the case of receivership by way of equitable execution. It was held, however, that those limiting words were sufficient to exclude from the operation of the Act and from the effect of registration a bankruptcy notice, and also a judgment summons under the Debtors D Act. That was the earlier of the two decisions cited to us. The reason why that view was taken in those cases was that the limiting words at the end of sect. 4 were sufficient to exclude the bankruptcy notice and the summons under the Debtors Act. Those cases are *Re Watson, Ex p. Johnston, Johnston v. Watson* (1) and *Re A Bankruptcy Notice* (2). E Before I leave that Act, there is another matter with regard to it which I must mention. Of course, apart from statute, the only way of enforcing the judgment of a foreign court (and in the word "foreign" I include courts other than the courts of England, and therefore I include Scottish and Irish and Dominion courts) was by action, and various defences F could be set up to an action of that kind. The Act of 1868 did not take away from the holder of a foreign judgment his right to start proceedings in the courts of this country to enforce the judgment, proceedings initiated by writ in the usual way, and, if he had taken such proceedings in the case, let me say, of a Scottish decreet, and had obtained judgment G in them, there was nothing to prevent him from commencing his bankruptcy proceedings on the basis of the judgment so obtained. The only effect of the authorities to which I have referred is that mere registration does not give the right to start bankruptcy proceedings, by way of bankruptcy notice or otherwise. In order to do that under that Act, H the creditor would have to sue upon the judgment, and obtain a judgment thereon. The Act did contain a provision in sect. 6 giving the court a discretion in the matter of the costs of an action brought to enforce any judgment or decreet which could be registered under the Act. As STIRLING, L.J., pointed out in one of the cases, the object was to dis-

courage the old method of enforcing foreign judgments by suit in this country, and to encourage the holders of such judgments or decreets to avail themselves of the machinery of registration. Nevertheless, as I have said, for the purpose of bankruptcy proceedings, it still remained possible under that Act for the bankruptcy machinery to be set in motion
 A in the way I have mentioned.

The next Act is the Administration of Justice Act, 1920, which in sect. 9 and the following sections contains provisions for the enforcement in the United Kingdom of judgments obtained in superior courts in British Dominions. The only matter which it is necessary to mention
 B with regard to sect. 9 is that, although the actual arrangement of the relevant provisions setting out the effect of registration is somewhat different from that of the Act of 1868, the language is clearly borrowed from that Act, and (what, for the present purpose, is most important) it contains the same limitation upon the effect of registration, limiting
 C it to execution, as was contained in the Judgments Extension Act, 1868, s. 4. The legislature in 1920 must be taken to have passed the Act of 1920 knowing how the Act of 1868 had been construed by the courts, and, accordingly, when it adopted the same words, "in so far only as relates to execution," it must be taken to have adopted them in
 D the light of those authorities. Similarly, under the Act of 1920, there is no prohibition against the enforcement of a judgment to which that Act applies by action in the old way, although there is a similar provision with regard to costs. Accordingly, just as under the Act of 1868, so under the Act of 1920, bankruptcy proceedings were still open to
 E the holder of a judgment covered by that Act, if he chose to start proceedings upon the judgment, recover judgment here, and then issue his bankruptcy notice.

We now come to the Act which is immediately in question in this case—namely, the Foreign Judgments (Reciprocal Enforcement) Act,
 F 1933. That is confined to judgments given in the superior courts of any foreign country where His Majesty is satisfied that reciprocity exists, and where, by order in council, he directs the Act to apply to a foreign country. Such an order has been made in the case of the republic of France, and the present judgment falls within the Act.
 G The Act differs from the Acts of 1868 and 1920 in two particularly striking matters. After providing for registration on application, sect. 2 (2) of the Act sets out the effect of registration. Many of the words and phrases used are an echo of, and no doubt borrowed from, the language of the Acts of 1868 and 1920, but the differences are particularly striking.
 H Sect. 2 (2) provides as follows :

Subject to the provisions of this Act with respect to the setting aside of registration (a) a registered judgment shall, for the purposes of execution, be of the same force and effect ; and (b) proceedings may be taken on a registered judgment ; and (c) the sum for which a judgment is registered shall carry interest ; and (d) the registering court shall have the same control over the execution of a registered judgment ; as if the judgment had been a judgment originally given in the registering court and entered on the date of registration . . .

Then there is a provision that execution is not to issue on the judgment so long as any party is in a position to make an application to set the registration aside. Comparing that language with that of the Judgments Extension Act, 1868, ss. 3, 4, for instance, it is to be noticed, first, that this section expressly gives to the registered judgment the same force and effect, for the purposes of execution, as if the judgment had originally A been given in the registering court. In the Act of 1868, no such express reference to execution is to be found. Then it is only para. (b) that uses the general word "proceedings," which was to be found in sect. 3 of the Act of 1868. It will be remembered that the Act of 1868 provided that "all proceedings shall and may be had and taken on such certificate." B Sect. 2 (2) (b) of the Act of 1933 makes that provision, but makes it after para. (a), which deals expressly with one subject, and one subject alone—namely, execution. It was suggested that the word "proceedings" in para. (b) must be limited to proceedings by way of execution, which are dealt with in para. (a), not executions in the restricted sense, but C executions in the broader sense which I have already mentioned. I am quite unable so to construe the language of those two paragraphs. They are dealing, under separate lettering, the one with execution alone, and the other with proceedings generally. The other matter on this section to which attention must be called is that para. (d), which says D that "the registering court shall have the same control over the execution of a registered judgment" (which is taken in substance from sect. 4 of the Act of 1868), omits the very words in that section which in the cases to which I have referred were held to have a limiting effect—namely, "but in so far only as relates to execution under this Act." The deputy E registrar has construed the subsection as though words to that effect were present. With all respect to him, in my opinion, it is quite illegitimate to read anything of the kind into the language of this subsection. The language taken by itself, in my opinion, quite clearly includes proceedings by way of bankruptcy proceedings, initiated by a bankruptcy F notice or otherwise. That is strongly confirmed by the second great point of difference between this Act and the earlier Acts, to which I am now about to refer. That is this. Sect. 6 provides :

No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom. G

Whereas the earlier legislation still left it open to the judgment creditor—under a possible penalty, it is true, as to costs—to sue in the old way on his Scottish, Irish or Dominion judgment, under the present Act, H sect. 6 prohibits any such method of dealing with a foreign judgment, if it is a judgment registrable under the Act. In other words, where the judgment is registrable under the Act, the only thing that the holder of such a judgment is entitled to do is to register it, and, after registering it, of course, he obtains the rights which the Act expressly

says shall follow upon registration. However, if the argument for the respondent were correct, it would produce the startling result that it would not be open to the holder of a foreign judgment registrable under the Act ever to enforce that judgment in bankruptcy, for the reason that he cannot sue on it—sect. 6 prevents him from doing so—and the

- A only thing that he could do would be to register it. Then sect. 2 (2), according to the respondent's argument, prohibits him from taking, or does not enable him to take, bankruptcy proceedings on the basis of the registered judgment. The result, therefore, would be that this Act would have placed the holders of foreign judgments, for the purpose
- B of enforcing those judgments in bankruptcy, in a much worse position than that in which they were before. I should have said, of course, that sect. 6 applies only to judgments for the recovery of a sum of money. It seems to me that sect. 6 shows that Parliament was intending by this Act to provide that the only method of enforcing foreign judgments should be by registration. That being so, the holder of a registered
- C judgment can do whatever sect. 2 tells him that he can do. When I look at sect. 2, and find clear language used which, according to its ordinary meaning, would cover a bankruptcy notice, I must decline to read into that language by implication limiting words which would
- D cut down its effect, and cut down its effect with a result which, I venture to think, cannot possibly have been intended by the legislature—namely, the result of depriving the holder of a foreign judgment of valuable rights with regard to its enforcement which he had previously possessed.

- E That being so, and that being the construction which I place upon the relevant language of the Act, it is only necessary to refer to the Bankruptcy Act, 1914, s. 1, which provides for the service of bankruptcy notices. It would, perhaps, have been more logical if I had referred to this at the beginning of my judgment, rather than at the end. It
- F provides in sect. 1 (*g*) that a debtor commits an act of bankruptcy :

... (*g*) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act ...

- G It has not been suggested, and indeed could not be suggested, that those words “final judgment or final order,” taken by themselves, extend to anything save a judgment or order of a court within the jurisdiction. That is to say, in England it would be a final judgment of an English court. That that is the meaning of those words is, I think, beyond
- H doubt. However, the effect of the Act of 1933, as I have construed it, is to place the foreign judgment, when registered for the purposes of the bankruptcy notice, in the same position as if it was a final judgment of an English court. Therefore, the fact that those words in the Bankruptcy Act, taken by themselves, would exclude such a judgment does not have the result of preventing a foreign judgment, when registered,

from becoming the basis of a bankruptcy notice. In the result, the appeal must be allowed, with costs here and below.

FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal allowed, with costs in both courts.

Solicitors : *Blount, Petre & Co.* (for the appellant); *Weldon & Edwards* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

LLAY MAIN COLLIERIES, LTD. v. JONES.

[COURT OF APPEAL (Slessor, Finlay and Luxmoore, L.JJ.), **December 6, 1938.**]

Workmen's Compensation—Application for medical reference—Consideration by registrar of medical reports not submitted to other side—Whether registrar can consider such reports—Workmen's Compensation Act, 1925 (c. 84), ss. 12 (3), 19 (2)—Workmen's Compensation Rules, 1926, r. 57 (2)—C. C. R., Ord. 13, r. 1.

The employers of a workman, who had been injured in 1934, being of the opinion that he had recovered from his injuries, applied for a medical reference under sect. 19 (2) of the Act. At the hearing of the summons, the registrar considered medical reports submitted by the parties, notice of which had not in either case been given to the other side, nor were the contents of such reports disclosed to the other side at the hearing:—

HELD : such reports can only be considered by the registrar provided they are tendered in evidence so as to be the subject of comment, objection, or admission if so required.

[EDITORIAL NOTE.] The Workmen's Compensation Rules, 1926, r. 57 (2), requires the application to the registrar to be accompanied by a report of every medical practitioner who has examined the workman. The point here taken is that, if any further reports are to be considered by the registrar, they must be tendered in evidence in the usual way, so that the other side may comment upon them, and raise any material objection to them. They must not be considered privately by the registrar, the other side being ignorant of their nature and effect.

AS TO PROCEEDINGS ON REFERENCE TO MEDICAL REFEREE, see HALSBURY, 1st Edn., Master and Servant, Vol. 20, p. 183, para. 394; and FOR CASES, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3062. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 419-422.]

Cases referred to :

- (1) *Kilbane v. Whitehaven Colliery Co., Ltd.* (1933), 26 B.W.C.C. 76; Digest Supp.
- (2) *Cartwright v. Lilleshall Co., Ltd.*, [1937] 4 All E.R. 242; Digest Supp.
- (3) *Hill v. Ladyshore Coal Co. (1930), Ltd.*, [1936] 3 All E.R. 299; Digest Supp.; 155 L.T. 567; 29 B.W.C.C. 255.

APPEAL from a decision of His Honour Judge ARTEMUS JONES, dated July 1, 1938, and delivered at the Wrexham County Court. The facts of the case are fully set out in the judgment of SLESSER, L.J.

Hartley Shawcross for the appellants.

Alun Pugh for the respondent.

SLESSER, L.J.: In 1934, Richard Jones, the workman, whilst loading a load of dirt at the colliery, was crushed between two tubs, and his pelvis was fractured. Thereafter the employers paid him compensation under the Workmen's Compensation Act, and took advantage of sect. 18 of the Act to require the workman, who was receiving weekly
A payments under the Act, from time to time to submit himself for examination by a duly qualified medical practitioner. The employers, on medical advice, came to the conclusion that at a certain time this man had recovered, and therefore they served him, under sect. 12 (3), with a copy of a certificate setting out the grounds of the opinion of the medical
B practitioner, together with notice of the intention of the employers at the expiration of 10 clear days from the date of the service of the notice to end the weekly payment, as by that subsection required. The certificate which they served under sect. 12 (3) was dated Apr. 12, 1938, and was in these terms:

C This is to certify that I have examined Richard William Jones of 8 Third Avenue, Llay, near Wrexham who sustained an accident on June 14, 1934, involving injury to the pelvis. I examined him on Apr. 11, 1938, and in my opinion he is now capable of resuming work as a collier. The grounds of my opinion are:—That the fracture of the pelvis is firmly united in good position; the slight flattening of contour of the right hip is of no significance; he has excellent movement of the hips and spine, and has made an excellent recovery.

D It was open to the workman on receipt of that certificate and notice within the meaning of the first proviso to subsect. (3) within 10 clear days to send to the employers the report of a duly qualified medical practitioner disagreeing with the certificate so served by the employers.
E He did not avail himself of that power there given, and consequently the employers proceeded under sect. 19 to endeavour to get a medical reference. They took out a summons on May 27, 1938, for that purpose.

By sect. 19 (2), it is provided that, where the application is made by only one of the parties—that is, in this case, as I pointed out, the
F employers—the registrar or the appeal judge, if he is of opinion that, owing to the exceptional difficulty of the case, or for any other sufficient reason, the matter ought to be settled in default of agreement by arbitration, shall refuse to allow the reference. It has been held in this court that the combined effect of that provision and the earlier words which say
G that otherwise the matter may be referred to a medical referee by the registrar is that, unless a case comes within the proviso, the word “may” means “must.” That was decided in *Kilbane v. Whitehaven Colliery Co., Ltd.* (1), and therefore it was necessary, if the workman were successfully to resist the application of the employers that the matter
H should go to the medical referee, that the workman should satisfy the registrar that there were in the case exceptional difficulties or other sufficient reasons why the matter should not go to the medical referee. In my opinion, when the matter came before the registrar, the only evidential material which was before him was the certificate of Mr. Watson Jones of Apr. 12, 1938. There was no other evidence at all.

We have been referred to the Workmen's Compensation Rules, 1926, r. 57 (2), which provides that an application to refer any matter to a medical referee shall be made in writing, that it shall contain a statement of the facts which render the application necessary, and be accompanied by a copy of the report of every medical practitioner who has examined the workman either on behalf of the employer or on the selection of the workman. The only report which was sent to the medical referee under the provisions of the regulation was the report of Apr. 12, 1938. That was perfectly in order, because, as was decided in this court in *Cartwright v. Lilleshall Co., Ltd.* (2), the certificate mentioned in sect. 12 (3) is available as a report under r. 57 for utilisation under the provisions of sect. 19 (2). A B

That was the position, and, if one had to decide the matter on that alone, it would appear, I think, on the face of that material thus submitted, that it would be almost impossible for the registrar to say that there was any evidence that the case was one of exceptional difficulty, or that there was any other sufficient reason why the matter should not go to the referee, because that report was merely a plain statement that the workman was capable of resuming work as a collier, that the fracture was firmly united, that he had excellent movement of the spine and the like, and that he had made an excellent recovery. A more simple and unambiguous certificate, free on the face of it from raising any matter of exceptional difficulty, it is difficult to imagine. What happened before the registrar was this. The workman tendered to the registrar, not as evidence, but privately for the sole perusal of the registrar, certain certificates by doctors on his behalf which we have not seen, but which I gather from the judgment of the judge involved certain conclusions derived from the taking of X-rays by a Dr. McAusland and a Dr. Gemmell. In reply to that, or possibly simultaneously, the employers also put in a report—and by the same doctor, Mr. Watson Jones, who had given the certificate of Apr. 12—which in certain respects was different from the report which he had given on Apr. 12. It was dated Apr. 11. It is not clear whether the opinion there stated is based on that examination alone or whether it is the result of a series of examinations which he had undertaken from time to time. The result of it is, however, that he is of opinion that the movements of the hip-joints were normal and that the X-rays showed no arthritic change in either hip. He also says that it would be kind if the workman could be given light work at first, but that within a few weeks he should be doing his full work. On that, the registrar, treating those private reports of the doctors for the workman and for the employer as matters proper for his consideration, came to the conclusion, as I understand it from the judgment of the judge, that the case came within the proviso, being one of exceptional difficulty, on the ground that, as both parties relied upon the somewhat uncertain conclusions provided by X-rays, there should be radiologists at the arbitration who could be cross-examined in court. C D E F G H

The judge has in substance accepted that view, and has upheld the decision of the registrar, to which he has added the second objection to the application—namely, that no true copy of the report was supplied within the meaning of sect. 19 (2).

As regards the latter matter, I am of opinion that the judge was
A wrong. As I regard it, the certificate of Apr. 12, 1938, is in the true sense of the word a sufficient report. It exactly follows the requirements of sect. 12 (3). It is a copy of the certificate, and it sets out the grounds of the opinion of the medical practitioner. The case which was cited to us by Mr. Pugh of *Hill v. Ladyshore Coal Co. (1930), Ltd.* (3), with
B every respect to Mr. Pugh, seems to be entirely beside the point in this matter, in that it is a decision based upon the fact that the report in that case was not a true report of the opinion there given, whereas here it is not contested that the workman was given an accurate copy of what Mr. Watson Jones had certified on Apr. 12. I am therefore
C unable to agree with the judge in his second view that these proceedings were vitiated *ab initio* by reason of the fact, as I understand him, that there was not served upon the workman a proper report under sect. 19 (2).

However, another matter, and a more serious one, arises in this case. Both the registrar and the judge have based their conclusion that this
D matter was one of exceptional difficulty upon documents which, to my mind, ought never to have been judicially considered by the registrar at all. It is true that r. 57 does speak of an application to refer the matter to the medical referee being sent to the registrar with a copy of the report, and does not in terms say that the copy shall be sent to the
E other side in the litigation, but it also brings expressly into operation the provisions of C.C.R., Ord. 13, r. 1, which provides :

Where . . . any application . . . before or after judgment . . . is authorised to be made [where the matter is not one *ex parte* and this clearly could not be *ex parte*, since it was an application, and had to be an application on notice], the notice shall be in writing and served upon the opposite party.
F

On the hearing, I see no reason why further reports should not be tendered in evidence before the registrar, tendered in evidence like any other piece of evidence—that is to say, not given privately to the registrar, so that the other side should not be able to deal with the matter, but
G tendered so as to be the proper subject, if so required, of comment or objection or admission. For I think it would be contrary to natural justice, where any person has to exercise judicial functions, that those functions should be exercised, and a decision arrived at, on material which was not in the possession of both parties to the litigation, so that
H either party could be heard to admit, to explain, or to object to, any matter which was before the registrar. I think, therefore, that the registrar was not entitled in this case to give judicial consideration either to the report of the workman of Dr. Gemmell and Dr. McAusland, or to the private report of Mr. Watson Jones of Apr. 11. It follows, therefore, that that material on which he thought that this matter

needed radiological examination in open court was material which was not available to him if he had been acting judicially. It equally follows that, if that was so, the matter could not be cured by the matter being tendered for the first time to the judge, or to the judge dealing with it, except by way of appeal from the registrar. In my opinion, therefore, one comes to the final result that both parties in this case have done A that which they were not in law entitled to do. The employer has sought to rely upon a document which was never of any evidential value. The workman, through his doctor's reports, has done the same thing.

Therefore, the only thing to be done in view of this rather unfortunate conclusion is for the case to be sent back for a new hearing on the basis B that all documents which are relied upon by either side in asking the registrar to decide whether or not he shall refer the matter to the medical referee must properly be tendered in evidence, as they would be in any other judicial proceeding. Then, if he looks privately at any matter C sent to him before the hearing, or tendered to him at the hearing, not in such a manner as will enable the ordinary process of examination and comment to be made upon it, and the other side to know what that matter contains, he will be erring in law, and will be acting contrary to natural justice.

At the new hearing before the registrar, it will be open to either party D to tender any evidence—I think I have sufficiently explained what is meant by that phrase—any material in the form of doctors' reports or otherwise, which they may think fit, and which may be relevant. We will discharge the order of the registrar, as approved by the judge, refusing a reference, so that the whole matter may be reconsidered. The E appeal will be allowed, and the matter must be reconsidered as from the time when it was first sent to the registrar for his decision.

FINLAY, L.J. : I agree, and have nothing to add.

LUXMOORE, L.J. : I also agree.

Appeal allowed. Order that the costs of the first hearing before the registrar and the judge shall be in the discretion of the registrar or the judge, as the case may be, at the second hearing, and that there be no costs in this appeal on either side.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Peace & Ellis*, Wigan (for the appellants); *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the respondent).

Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.

ATTORNEY-GENERAL v. CANTER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **November 28, 29, 30, December 19, 1938.**]

Executors—Liability of representative—Survival of action—Action for penalties—Whether action in tort—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1), (3), 4 (2).

Income Tax—Penalties for inaccurate return—Liability of estate—Income Tax Act, 1918 (c. 40), s. 30 (1).

The deceased had incurred liabilities to the Inland Revenue in respect of incorrect statements made in his returns for income tax for the years ending Apr. 5, 1932, and Apr. 5, 1933. No proceedings were taken against him during his lifetime, but proceedings were commenced against his executrix on July 26, 1937. The question was whether the cause of action in such a case by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), was made to survive against the estate of the deceased, and whether such proceedings were in respect of a cause of action in tort within the meaning of sect. 1 (3) of that Act:—

HELD: (i) the cause of action, although belonging to the special class created by the Income Tax Act, 1918, s. 30, was within the expression “all causes of action” in sect. 1 (1) of the Act of 1934, and survived against the estate of the deceased.

(ii) it was not a cause of action in tort within the meaning of sect. 1 (3) of that Act.

Decision of LAWRENCE, J. ([1938] 3 All E.R. 329) affirmed.

[EDITORIAL NOTE. The Court of Appeal have based their decision on the very wide words used in sect. 1 (1) of the Act of 1934. The expression “all causes of action” is stated to be “too recalcitrant to admit of a construction which would exclude from the admitted literal meaning of the words the special class of causes of action in respect of penalties under the Income Tax Act, 1918, s. 30.” The contention that the cause of action was one in tort within sect. 1 (3) of the Act was not seriously pressed.

AS TO SURVIVAL OF ACTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 415-417, paras. 779-783; and FOR CASES, see DIGEST, Supp., Executors, No. 6711 *et seq.*]

Cases referred to:

(1) *Rose v. Ford*, [1937] A.C. 826; [1937] 3 All E.R. 359; Digest Supp.; 106 L.J.K.B. 576; 157 L.T. 174.

(2) *Huntington v. Attrill*, [1893] A.C. 150; 11 Digest 455, 1118; 62 L.J.P.C. 44; 68 L.T. 326.

(3) *Seward v. Vera Cruz, The Vera Cruz* (1884), 10 App. Cas. 59; 42 Digest 769, 1959; 54 L.J.P. 9; 52 L.T. 474.

(4) *R. v. Minister of Health, Ex p. Villiers*, [1936] 2 K.B. 29; [1936] 1 All E.R. 817; Digest Supp.; 105 L.J.K.B. 792; 154 L.T. 630.

(5) *Lord Advocate v. McLaren* (1905), 5 Tax Cas. 110; 28 Digest 104, case *l*.

(6) *A.-G. v. Till*, [1910] A.C. 50; 28 Digest 103, 641; 79 L.J.K.B. 141; 101 L.T. 819; 5 Tax Cas. 440.

(7) *Inland Revenue Comrs. v. Sneath*, [1932] 2 K.B. 362; Digest Supp.; 101 L.J.K.B. 330; 146 L.T. 434; 17 Tax Cas. 149.

(8) *R. v. Income Tax Special Comrs., Ex p. Elmhirst*, [1936] 1 K.B. 487; Digest Supp.; 105 L.J.K.B. 759; 154 L.T. 198; 20 Tax Cas. 381.

(9) *Tobacco Pipe Makers' Co. v. Loder* (1851), 16 Q.B. 765; 32 Digest 325, 106; 20 L.J.Q.B. 414; 18 L.T.O.S. 34.

(10) *A.-G. v. Exeter Corpn.*, [1911] 1 K.B. 1092; 39 Digest 220, 4; 80 L.J.K.B. 636; 104 L.T. 212; 5 Tax Cas. 629.

APPEAL by the defendant from an order made by LAWRENCE, J., dated June 15, 1938, and reported [1938] 3 All E.R. 329, where the facts are fully set out.

Raymond Needham, K.C., and *Terence Donovan* for the defendant. A

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the informant.

Needham, K.C.: The meaning of the words "all causes of action" in sect. 1 (1) of the Act of 1934 must be gathered from the Act as a whole. All causes of action fit naturally into the field of the Act if the field excludes income tax. An income tax offence is not a cause of action, not a claim in respect of a tort, but something in a category by itself. Having regard to the nature of income tax, and its special characteristics and to the way penalties for defaults are provided, one can gather the true nature of a penalty by reading the Income Tax Acts with regard to their context. It is really a punishment. It is not in the nature of compensation or damages which arise from breach of contract or tort. The punishment in some cases bears a relation to the amount involved and in other cases does not. One has only to consider the maxim *actio personalis moritur cum persona* to see how far it is from the present case. The matter is quite clear in principle. The Income Tax Acts impose their own penalties in their own way. The Law Reform (Miscellaneous Provisions) Act, 1934, deals with matters that are dealt with in statutes or which have some relation to the maxim. The Income Tax Acts relate to the United Kingdom. The Act of 1934 by sect. 4 (2) excludes Scotland and Northern Ireland from its scope. This is really a case where the maxim *generalia specialibus non derogant* is applicable. There is no reference in the 1934 Act to income tax, and, therefore, the case falls within the general doctrine. A later general statute does not affect an earlier special Act without an indication of an intention that it should: *Seward v. Vera Cruz, The Vera Cruz* (3) and *R. v. Minister of Health, Ex p. Villiers* (4). The Income Tax Acts and the Act of 1934 are worlds apart, and there is nothing to bring those two worlds together. In *Lord Advocate v. McLaren* (5), where a man had made a false claim for relief, the section applicable was in the same terms as those of the section in the present case. The point arose as to whether or not the court could modify the penalty, and LORD ADAM said that he thought it must be made very clear that the court had that power. The wrong done in the present case was not discovered until after the executrix of the taxpayer had put in her affidavit. No offence was proved against the deceased. Although the deceased committed an offence when he made an untrue declaration, the offence did not assume any tangible form until after his death. There is liability in law and there is an accrued liability. The guilt of a person has to be attached before a penalty can be recovered. What-

ever is found due is treated as tax and added to the tax, and the taxpayer has to pay a higher rate on account of his default : see *A.-G. v. Till* (6), in which case the wrong return was due, not to fraud, but to negligence. In the present case, there is no cause of action against the executrix. If that be wrong, there is no cause of action within the

- A Act of 1934. That Act has to be read in relation to the mischief to be avoided. That is borne out by the *dictum* of LORD WRIGHT in *Rose v. Ford* (1), where his Lordship stated the purpose of the Act of 1934 as being to abolish in a special and particular way the rule which prevented the prosecution of a claim in tort for personal injuries where
B the person who would otherwise be plaintiff (or defendant) in the action had died.

Donovan : At the date of the death, no actual debt had arisen. Suppose that a man liable to pay income tax had died without having made the required return. That would not give a right of action against

- C his executors. There is no difference in principle between such a case and the present. The extraction of penalties is as much a matter of administration as is the assessment. In *Inland Revenue Comrs. v. Sneath* (7) and *R. v. Income Tax Comrs., Ex p. Elmhirst* (8), it was held that proceedings were purely administrative when brought for the purpose of discovering how much tax a man should pay. In no case has it
D been held that something in the nature of a punishment can give rise to a cause of action. On the true construction of the Law Reform (Miscellaneous Provisions) Act, 1934, income-tax payers are outside the scope of sect. 1. The present case falls within the doctrine of *generalia*
E *specialibus non derogant* : *Seward v. Vera Cruz, The Vera Cruz* (3). The Act of 1934 does not mention the Income Tax Acts, although it does mention other Acts. The Act of 1934 is capable of a reasonable application without introducing income tax matters into it. To do so would only lead to confusion.

- F *The Attorney-General* : It has been stated that the Act of 1934 should be construed as though it were dealing with the maxim *actio personalis moritur cum persona*, and that the survival of penalties is not included in the Act. In the present case, it was not stated in the court below that the failure to do what the Income Tax Act, 1918, s. 30, requires
G to be done creates a cause of action in the ordinary sense of the word. That cause of action, and also the liability to pay, both arise at the time of the wrongful act. The liability was subsisting at the date of the death. When, as in such a case as the present one, sums are sued for by information for debt, there are no grounds on which it can be
H maintained that there is not a cause of action : *Tobacco Pipe Makers' Co. v. Loder* (9). A passage in the opinion of LORD WRIGHT in *Rose v. Ford* (1) has been referred to, but it would seem that LORD WRIGHT was giving a warning. In that case, the court was dealing with a case where the injured person had died, but the same thing is true where the circumstances are the opposite. There are specific exceptions in

the proviso to sect. 1 (1) of the Act of 1934. There is no reason to cut down the words, except so far as the Act itself does so. One cannot say that the legislature has excluded all forms of action in which punitive damages may be claimed. The Income Tax Acts provide for a large number of matters in connection with income tax, but they are not a complete code. The 1934 Act says that causes of action shall survive against the estate. As regards sect. 4 (2) of the Act of 1934, the law of Scotland has always been different from that of England. The maxim *actio personalis moritur cum persona* is not part of the law of Scotland. One cannot cut down the words of an English Act because the result of not doing so would be to cause something different from the law of Scotland. If, in the Income Tax Acts, or in any other Act, there is a cause of action, and a statute is then passed dealing with all causes of action, one cannot rely upon such a case as *Seward v. Vera Cruz, The Vera Cruz* (3). When a man is still living, the Crown has an option as to whether it will take proceedings before the commissioners or in the court. If a man dies, the only way of enforcing a claim against the executors is through the courts. The Act of 1934 has not extended the alternative procedure before the commissioners. The Act applies quite generally to all causes of action. The words of the statute are perfectly plain, and should be given their full effect.

Hills : The Law Reform (Miscellaneous Provisions) Act, 1934, says what survives and what does not. Whatever may have been the case before the Act was passed, one ought not to forget the words of LORD WRIGHT in *Rose v. Ford* (1), where he said that the effect of the Act must not be cut down by considering the law as it was previously. If a penalty has been incurred, the Crown has a right of action, because the Act says that all causes of action are to survive. It is wrong to suggest that, because income tax is not mentioned in the Act, the provisions of the Income Tax Acts are not within its scope. This action is not against the executors, but against the estate. The Act keeps the penalties alive.

Needham, K.C., in reply : A penalty imposed by the Income Tax Acts does not alter its character according as to whether the procedure is before the court or before the commissioners. It is the procedure only which is altered, and the penalties do not differ in their quality. If one looks at the Income Tax Act, 1918, s. 132, or at sect. 146, it will be seen that there is a procedure laid down, and also provisions as regards penalties. It is sufficient for me to make good the proposition that the penalties which would be exigible before commissioners do not constitute a cause of action. This also applies to sect. 221 (5). The matters referred to there are not causes of action within the meaning of the Law Reform (Miscellaneous Provisions) Act, 1934. Sect. 4 (2) of that Act is of tremendous importance. One cannot attribute to the legislature an intention to discriminate between one country and another in the matter of income tax. In Northern Ireland, income tax is a

reserved matter. No effort has been made by the Crown to adapt the procedure laid down by the Income Tax Acts to the requirements of the Law Reform (Miscellaneous Provisions) Act, 1934. My argument is not based on the maxim *generalia specialibus non derogant* entirely, but that maxim ought to be applied in construing a statute of this kind.

- A The Act of 1934 does not include income tax penalties. The Exeter Corporation had by charter a right to fines which were imposed within their area. A person was fined under the provisions of the Income Tax Act, 1918, s. 225, and the corporation asked for the fine. It was held in *A.-G. v. Exeter Corpn.* (10) that the wide words of the charter must
- B be cut down so as to exclude a fine under that section. Similarly, the words of the Law Reform (Miscellaneous Provisions) Act, 1934, should be construed so as to leave the Income Tax Acts dominant in their own domain.

- C SIR WILFRID GREENE, M.R. [delivering the judgment of the court] : This appeal raises a question of considerable difficulty as to the operation of the Law Reform (Miscellaneous Provisions) Act, 1934, to which we will refer as the Act of 1934. The Crown, by information, seeks to recover from the appellant, as executrix of a testator who died after the com-
- D mencement of the Act of 1934, two sums amounting together to £2,843 13s. 9d., which the testator had become liable to pay by way of penalties under the Income Tax Act, 1918, s. 30 (1) (b), in connection with claims for allowances and deductions made by him for the years ending Apr. 5, 1932, and Apr. 5, 1933. Knowledge of the circumstances
- E giving rise to this liability first came to the Inland Revenue Commissioners after the death of the testator, and the proceedings out of which this appeal arises were begun by their order on July 26, 1937, by writ of subpœna. The facts were agreed, and are set out in a special case, which raised two questions for the opinion of the court. LAWRENCE, J.,
- F answered both questions in favour of the Crown. The questions raised by the special case were as follow : (i) whether the liability to pay the sums in question gives rise to such a cause or causes of action as are by sect. 1 (1) of the Act of 1934 made to survive as against the estate of the testator, and (ii) whether the proceedings are in respect of a cause
- G of action in tort within the meaning of sect. 1 (3) of the Act of 1934. The point of the second question lay in the fact that, if the answer to it were in the affirmative, the proceedings would be out of time. The point was not pressed before us, and, in our opinion, it is not possible to say that proceedings to recover a penalty under the Income Tax Acts
- H are proceedings in respect of a cause of action in tort.

The first question is a more difficult one. The answer to it depends upon the true construction of certain words in the Act of 1934 when read in the context of the Act as a whole and in relation to a particular subject-matter—namely, penalties recoverable by the Crown under the Income Tax Act, 1918, s. 30. The argument on behalf of the appellant

was a comprehensive one, since it was to the effect that the Act of 1934 has no operation with regard to any penalty imposed by the Income Tax Acts. It was not said that all penalties, or that all penalties recoverable by the Crown necessarily, as such, fall outside the scope of the Act of 1934, but that penalties under the Income Tax Acts, falling as they do within the code contained in those Acts, are not included. In order to answer the question raised, it is necessary to examine the language of the Act of 1934, and to ascertain the nature of the subject-matter in relation to which it is sought to be applied—namely, penalties under the Income Tax Acts, and, in particular, under the Income Tax Act, 1918, s. 30. The Act of 1934 is described in its long title as :

An Act to amend the law as to the effect of death in relation to causes of action and as to the awarding of interest in civil proceedings.

The latter part of this title and sect. 3 of the Act which carries it into effect have no bearing upon the present question, and can, accordingly, be ignored. Sect. 1 (1) of the Act provides as follows :

Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

Then follows an exception in the case of actions for defamation, seduction and inducement of spouses and claims for damages on the ground of adultery. Subsect. (2) limits the damages recoverable in cases where the cause of action survives for the benefit of the estate of the deceased person, and in particular excludes exemplary damages. It is worth noting that exemplary or punitive damages are not excluded in the case where the cause of action of a living person survives against the estate of the deceased person. Subsect. (6) provides that, where an estate is insolvent, any liability to which it is subject in respect of the surviving cause of action shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust. These latter words are taken from the Bankruptcy Act, 1914, s. 30 (1), under which such demands are not provable in the administration of an insolvent estate : see the Administration of Estates Act, 1925, s. 34. Sect. 2 contains some consequential provisions in relation to the Fatal Accidents Acts, 1846 to 1908. Sect. 4 provides that the Act is not to extend to Scotland or to Northern Ireland.

The object of the Act is commonly referred to as being to abolish the doctrine *actio personalis moritur cum persona*, the “existing mischief, in view of which the measure was enacted,” as was said by LORD WRIGHT, in *Rose v. Ford* (1), at p. 842 ([1937] 3 All E.R. at p. 367). That this was one of its objects is indisputable. However, it was not its only object, since its language extends to include causes of action such as those arising *ex contractu* to which the doctrine did not apply. In this sense, it may be said to form a code in relation to the survival of causes of action for the benefit, or to the prejudice, of estates of deceased persons.

It was not seriously contended that the phrase "all causes of action," taken by itself, is not wide enough to cover claims for penalties in general, and, in particular, claims for fixed penalties directly inflicted by the Income Tax Acts so as to be enforceable by suit at the instance of the Crown. Such claims are, in our opinion, properly described as causes
A of action, notwithstanding that penalties are *quasi*-criminal in their nature, as LORD WATSON pointed out in delivering the judgment of the Privy Council in *Huntington v. Attrill* (2), at p. 156 *et seq.* We may also refer to the fact that in the Civil Procedure Act, 1833, s. 3, the phrase "cause of such actions or suits" is used in reference to
B "actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force."

The penalties now in question are inflicted directly by the Income Tax Act, 1918, itself. They are fixed in amount, and can be sued for by the Crown as soon as the events happen which give rise to them, since
C the Income Tax Act, 1918, s. 30, provides that a person committing the offences there mentioned

... shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income and as if such claim had not been allowed.

The Income Tax Act, 1918, s. 221 (2), provides that they may be sued
D for in the High Court by information.

It is common ground that claims to penalties such as those imposed by the Income Tax Acts did not, previously to the Act of 1934, survive against the estate of a deceased person, the reason being that they were *quasi*-criminal in their nature. The same reason may well have been
E the historical origin of the rule *actio personalis moritur cum persona* in the case of torts, the remedy for which was regarded originally as punitive, and not, as it became later in most cases, purely compensatory : see the discussion of the rule in HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 3, p. 576 *et seq.* Whatever may be the true view on this matter,
F we can find nothing in the punitive character of penalties in general, or of the particular penalties in question in this appeal, which would justify the view that they are not covered by the Act, and, as we have said, the contrary was not seriously argued.

The substantial argument on behalf of the appellant was to the effect
G that, although the words "all causes of action" in sect. 1 (1) of the Act are, in their natural meaning, apt to cover penalties in general, and penalties of the character above-mentioned under the Income Tax Acts in particular, they must be construed in such a way as to exclude penalties under those Acts. This argument is based partly upon the
H general tenor of the Act of 1934, and more particularly on sect. 4 (2), and partly upon the nature of penalties under the Income Tax Acts and the fact that they form part of the income tax code. The argument based on sect. 4 (2) is one the force of which we recognise, and the presence of that subsection raises the strongest suspicion that the question of penalties under the Income Tax Acts was not in the mind of the legis-

lature when the Act of 1934 was passed. However, a suspicion of this kind, even if it be well-founded, does not justify a strained construction of the language used by the legislature, which must receive its proper construction, whether or not it was chosen inadvertently. The argument based on this subsection is as follows. It is said with truth that the Income Tax Acts have always been carefully framed by the legislature, and, so far as possible, construed by the courts in such a way as to produce uniformity throughout the territory in which they operate. Accordingly, it is said that, whatever the position may be with regard to Scotland (the law of which country was not examined before us), in Northern Ireland, at any rate, the operation of the Income Tax Acts in the matter of penalties will, if the Crown is right, differ from their operation in England and Wales, and that it is not to be supposed that the legislature can have intended by an Act like the Act of 1934 to take so novel a step. This argument is supported by a reference to the circumstance that, under the Government of Ireland Act, 1920, legislation with regard to the "imposing, charging, levying and collection of income tax" is (with an exception not relevant to the present question) declared to be a "reserved matter" (sect. 22 (1)), and, therefore, excluded from the legislative power of Northern Ireland (sect. 4 (1), (14)), and in this reservation are included "all powers and obligations incidental to the levying" of reserved taxes "or designed for preventing the evasion thereof" (sect. 22 (5)). The proceeds of reserved taxes are to be paid into the Consolidated Fund of the United Kingdom (sect. 22 (1)). It is unquestionably within the legislative competence of Northern Ireland to pass laws relating to the survival of causes of action in respect of matters not excluded, as income tax is, from the powers of the legislature of Northern Ireland. This may be said to be the reason for the exclusion of Northern Ireland from the operation of the Act, and we were told that an Act has since been passed in Northern Ireland in terms textually the same as those of the Act of 1934, *mutatis mutandis*. The result, it is said, will be that, if the Crown's contention is right, (a) the legislature of the United Kingdom has enacted a measure relating to income tax which is not applicable to Northern Ireland, and (b) the legislature of Northern Ireland is not competent to enact a corresponding measure relating to income tax for itself. We are content to assume, for the purposes of this judgment, that these propositions correctly state the position.

We now turn to a consideration of the Income Tax Acts. The law relating to income tax (including the machinery for its enforcement) has always been dealt with in financial measures. At least, no instance was cited of such a law enacted in any other way, although the Bankruptcy Act, 1914, s. 33 (1) (a), which gives priority in bankruptcy to claims for income tax, may perhaps be regarded as falling within this category. Since the law relating to income tax was codified by the Income Tax Act, 1918, amendments in that law effected by the Finance

Acts, passed in subsequent years, have been inserted into the income tax code, the method adopted being the definition of "the Income Tax Acts" as meaning the Income Tax Act, 1918, and any other enactments relating to income tax (Finance Act, 1919, s. 28), coupled with a provision in the Finance Act, 1919 (sect. 38 (1)), and in subsequent
A Finance Acts (for example, the Finance Act, 1920, s. 64 (1)), that the parts of such Acts which deal with income tax are to be construed together with the Income Tax Acts. It is, we think, at least arguable that, if the contention of the Crown is correct, the Act of 1934 is "an enactment relating to income tax," and so falls within the definition of
B the Income Tax Acts above-mentioned, particularly in view of the fact that a penalty measured by the rate of tax is described in the Income Tax Act, 1918, s. 223, as "an increased rate of tax imposed as a penalty." However, even if this argument be technically correct, it does not, in our view, materially assist the appellant.

C We now turn to the penalties imposed by the Income Tax Acts. They are many and various, but the only case with which we are concerned is that of penalties under the Income Tax Act, 1918, s. 30. As we have already pointed out, these penalties are fixed in amount, and are inflicted directly by the Act itself, and, in so far as they include treble tax, they
D fall within the description "increased rate of tax" in sect. 223 to which we have referred. This expression appears to mean that the taxpayer is, by reason of his own act or default, regarded as being taxed at a higher rate than his innocent fellows. Nevertheless, it is not true to say that, upon the Crown's contention, the Act of 1934 imposes a tax.
E It merely extends the duration of a pre-existing liability to tax, so as to make the estate of the taxpayer liable to discharge the obligation which he himself had incurred in his lifetime.

There are other penalties in the Income Tax Acts where the method of infliction is different. For example, those arising under the Income
F Tax Act, 1918, s. 146, can only be inflicted by commissioners, and, when so inflicted, are added to the assessment. Again, some penalties may vary in amount within a stated limit, notwithstanding that they are recoverable by suit without the necessity of assessment by commissioners. Examples are to be found in the Income Tax Act, 1918, ss. 98 (5), 102 (2).
G With penalties such as these, we are not concerned. However, there are two features of the scheme of penalties which must be mentioned. One is that in some cases (including the present) the Crown has an option to proceed either before the general commissioners or by action or information (see sect. 107 and sect. 221 (4)). Where such an option
H exists, the only limb of it which (if the Crown be right) survives under the Act of 1934 will be the latter. There is no machinery for getting legal personal representatives before the general commissioners for this purpose. The other feature is that in certain cases (which do not include the present) a delinquent is given the opportunity of escaping the penalty—for example, under sect. 107 (3) and sect. 140. Under sect. 107 (3),

if the commissioners are satisfied with regard to the matters mentioned, and give further time, the taxpayer may escape liability to the penalties imposed for the defaults with which the section deals.

Under sect. 140 (2), a person who has not delivered a statement or schedule within the time limited may deliver it at any time before proceedings for recovery of the penalty for non-delivery have been commenced, and this is a bar to any proceedings. Sect. 140 (4) contains a provision of the same character as that contained in sect. 107 (3). It is said that, in so far as the Crown's argument logically extends to such cases, the *locus penitentiae* given by these provisions is not available to anyone save the delinquent taxpayer himself, and, consequently, that, if the Crown's contention is correct, his executors will be in a worse position than that in which he was. A B

The various considerations—not all of them referred to in the course of the argument—which emerge upon the one side or the other of the present controversy sufficiently appear from the examination of the various aspects of the case which we have made, and there is no need for us to summarise them. After giving due weight to them, we find that the expression “all causes of action” in sect. 1 (1) of the Act of 1934 is too recalcitrant to admit of a construction which would exclude from the admitted literal meaning of the words the special class of causes of action in respect of penalties under the Income Tax Act, 1918, s. 30. As a matter of construction, it seems impossible to limit the words “causes of action” so as to exclude from their ambit income tax penalties of the class with which we have to deal. Moreover, if any such limited construction could be given to the words, it might well be found that the result of such a construction was to exclude, not only these income tax penalties, but also other “causes of action,” the exclusion of which can hardly have been intended. Indeed, if once the words “all causes of action” are cut down as the appellant would have us cut them down, there appears to be no ascertainable point at which the process is to stop. The cumulative effect of the various matters which we have discussed is, we agree, impressive. It strongly suggests that the legislature, in framing the Act of 1934, had not in mind the special case of penalties under the Income Tax Acts. However, as we have said, a suspicion of this kind is not a matter which can be permitted to affect the judgment of the court. D E F G

In conclusion, we must refer to a familiar principle of construction upon which the appellant strongly relies. It is stated by the EARL OF SELBORNE, L.C., in *Seward v. Vera Cruz, The Vera Cruz* (3), at p. 68 :

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. H

It is said that income tax penalties are subjects specially dealt with by

earlier legislation—to wit, the Income Tax Acts—and that the words “all causes of action” are mere general words within the meaning of the principle so enunciated. In our opinion, this principle does not assist the appellant. There is no question here of repealing, altering, or derogating from, the provisions of the Income Tax Acts with regard to penalties. If we rightly construe the Act of 1934, all that it does is to provide that, where a cause of action in respect of a penalty existed at the death, it is to survive against the estate. The provisions of the Income Tax Acts with regard to penalties are left entirely unaffected. In our opinion, the decision of LAWRENCE, J., was right, and the appeal must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the informant); *Burr, Sugden & Co.*, agents for *W. G. Burr, Sugden & Co.*, *Keighley* (for the defendant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

ELLERKER v. UNION COLD STORAGE CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), November 2, 14, 1938.]

Income Tax—Deductions against profits—Annual value of premises—“Mills, factories, or other similar premises”—Cold storage—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 5 (2).

A company carrying on a large cold storage business for that purpose owned and occupied a number of cold stores in various parts of Great Britain. In five of these cold stores part of the building was used for the manufacture of ice for sale. The others were only used for the purpose of cold storage. It was contended that these buildings were “mills, factories, or other similar premises” within the meaning of those words in Sched. D, Cases I and II, r. 5 (2):—

HELD: all the premises were within the meaning of the words “mills, factories, or other similar premises” in the above rule.

[EDITORIAL NOTE. The question here is purely one of the construction of the words of the rule, and it is held that these premises, which, although used for storage, are clearly something more than a warehouse, are within the meaning of the words of the rule.

AS TO MILLS AND FACTORIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 157, para. 322; and FOR CASES, see DIGEST, Vol. 28, p. 45, Nos. 227-229.]

Cases referred to:

- (1) *Whitbread & Co., Ltd. v. Edinburgh Assessor*, [1928] S.C. 425; Digest Supp.
- (2) *Milne (William), Ltd. v. Glasgow Assessor, Union Cold Storage Co., Ltd. v. Glasgow Assessor*, [1929] S.C. (Ct. of Sess.) 296; Digest Supp.

- (3) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 28 Digest 10, 51; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; *affg.* S.C. *sub nom.* *R. v. Income Tax Comrs.* (1888), 22 Q.B.D. 296.

- (4) *Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer)*, [1931] A.C. 459; Digest Supp.; 100 L.J.K.B. 271; 145 L.T. 73; *affg.*, [1931] 1 K.B. 385.

- (5) *Union Cold Storage Co. v. Inland Revenue*, [1930] S.C. 337; Digest Supp.

(6) *Cadbury Bros., Ltd. v. Sinclair*, [1933] 103 L.J.K.B. 29; Digest Supp.; 149 L.T. 412; 18 Tax Cas. 157.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The point at issue was whether the company's premises were "mills, factories, or other similar premises" within the meaning of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 5 (2). The premises of the company were fully described in previous cases, and those descriptions are respectively printed in [1931] A.C. 489 and [1929] S.C. 296. Those descriptions were adopted for the purposes of the present case. The facts are fully set out in the judgment.

It was contended on behalf of the company :

(a) That the company was entitled to deductions of the gross Sched. A assessments in respect of such of their cold storage premises as came under review in this case, such premises being mills, factories, or other similar premises within the meaning of the proviso to the Income Tax Act, 1918, Sched. D, Cases I and II, r. 5; (b) that in *Milne (William), Ltd. v. Glasgow Assessor* (2) and the other rating cases upon which reliance was placed on behalf of the inspector of taxes it was decided only that stores are not mills or factories for rating purposes whether or not ice is manufactured there unless the premises are used wholly or mainly for manufacturing ice, but there never has been a decision that cold storage premises are not "other similar premises" within the meaning of r. 5 of the Income Tax Acts; and (c) that 5 of the Union Cold Storage premises at which ice was in fact manufactured were either factories or "similar premises" and those at which ice was not manufactured were similar premises within the meaning of those words in the proviso to the Income Tax Act, 1918, Sched. D, Cases I and II, r. 5.

It was contended on behalf of the inspector of taxes :

(a) That as regards the 20 premises which are purely cold stores, none of these were mills, factories, or other similar premises; (b) that (i) as regards the 5 cold stores in which ice was also manufactured, regard should be had to the primary character and purpose of each of the premises as a whole, (ii) each of these premises was primarily and mainly a cold store, and was only used to a comparatively small extent for the purpose of manufacture of ice, (iii) regarded as a whole, none of these 5 cold stores were mills, factories or other similar premises; and (c) that the deduction to be allowed the company under Sched. D, Cases I and II, r. 5, in respect of each of the 25 cold stores should not exceed the amount of the assessments of the respective premises for the purpose of tax under Sched. A as reduced for the purpose of collection.

In support of these contentions, the following cases were relied on : *Whitbread & Co., Ltd. v. Edinburgh Assessor* (1), *Milne (William), Ltd. v. Glasgow Assessor*, *Union Cold Storage Co., Ltd. v. Glasgow Assessor* (2), *Union Cold Storage Co. v. Inland Revenue* (5), *Union Cold Storage Co., Ltd. v. Bancroft (Manchester Revenue Officer)* (4) and *Cadbury Bros., Ltd. v. Sinclair* (6).

The decision of the Special Commissioners was as follows :

The company claims under Sched. D, Cases I and II, r. 5, to be entitled to deductions of the gross Sched. A assessments in respect of their cold storage premises on the ground that the said premises are mills, factories or other similar premises.

This claim is resisted by the Crown on the ground that the premises in question are not "mills, factories or other similar premises" and their case is based mainly on a series of decisions under rating statutes. At 5 of the company's cold storage premises ice-making is carried on and from figures, which were given in evidence before us it appears that the ice-making business was considerable.

At the 5 premises the total turnover for storage for the years 1928-1933 was £367,848 and for ice over the same period £199,015; the average over the 6 years being storage £61,308, ice £33,169.

Evidence was given describing the premises, the machinery used, the lifts, the deleterious effect of condensation owing to low temperatures in the refrigerating chambers compared with the outside temperatures, and the vibration caused by lifts and machinery.

In our opinion the rating cases, which were cited to us, afford but little assistance as to the meaning of "mills, factories or other similar premises" under Cases I and II, r. 5. The decisions were dependent on special words of limitation appearing in the Rating Acts under discussion. Rule 5 is aimed at giving relief in cases where premises are subjected to excessive wear and tear. The words "mills, factories or other similar premises" are not limited or qualified in any way, and we have come to the conclusion that all the cold storage premises (except the store in Phillip Street, Liverpool, which was used merely as a storehouse for machinery and was admitted by the company not to fall within their claim), are premises similar to mills or factories within r. 5.

A *The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant.*

Sir Patrick Hastings, K.C., J. H. Stamp and D. Knight Dix for the respondents.

C MACNAGHTEN, J.: The Income Tax Act, 1918, Sched. D, Cases I and II, r. 5 (1), provides that the computation of income tax on the profits or gains of a trade under that schedule shall be made exclusive of the annual value of lands, tenements, hereditaments or heritages which are occupied for the purpose of the trade and are separately assessed and charged under Sched. A. Rule 5 (2) provides that the amount to be so excluded shall not exceed the amount of the assessment as reduced for the purpose of collection, except in the case of "mills, factories, or other similar premises." In the case of "mills, factories, or other similar premises," the gross amount of the assessments is to be deducted.

E The Union Cold Storage Co., Ltd., carry on, *inter alia*, a large cold-storage business, and, for the purpose of that business, the company own and occupy some 25 cold stores, situated in various parts of Great Britain. In 5 of these cold stores part of the building is used for making ice for sale. One of the cold stores, in which no ice is made for sale, is situated at 60, Miller Street, Manchester, and that building is typical of all the others. The description of the building in Manchester is as follows. The walls of all the refrigerating chambers are insulated by means of charcoal filled in between an outside and an inside layer of timber. Such insulation consists of a wall 13 ins. thick, comprising 9 ins. of charcoal impressed between thicknesses of tongued and grooved boards, which are in turn insulated with waterproof paper. The process of refrigeration is carried out by means of the compression of ammonia and the circulation of expanded ammonia in a complicated system of expansion pipes, which are distributed throughout the premises. The system is known as a system of direct "expansion." Ammonia is compressed in the engines to a pressure of 150 lbs. to the square inch, and forced into condensers, which are erected on the summit of the building. In these condensers, the ammonia liquefies, and thereafter expands in the pipes, causing a loss of heat in the process of expansion. The tempera-

ture in each chamber is subject to control. The building contains two hydraulic lifts. In the chambers used in connection with meat, the processes carried on consist of (a) freezing, (b) chilling—an entirely distinct process, not involving, as in the case of freezing, the destruction of any of the tissues of the meat under treatment—(c) defrosting, (d) trimming, (e) cutting and preparation of carcasses for sale, and (f) on occasion, special treatment of cargoes damaged in transit. Approximately 25 to 30 per cent. of the produce received on the premises is fresh, and requires to be refrigerated before export or sale. The remainder, approximately 75 per cent., arrives on the premises already refrigerated. The premises are in fact registered as a non-textile factory under the Factory and Workshops Acts.

In the 5 cold stores where ice is made, there is additional machinery for ice-making—an additional compressor and an ice-making tank. In those buildings, the total turnover for storage for the years 1928-1933 was £367,848, and for ice for the same period, £199,015.

Whether or not the premises are used for the manufacture of ice, the damage to them from the processes there carried on is very much greater than in the case of ordinary warehouses, and is, moreover, greater than in the case of ordinary factories. The reasons for this are (i) that the heavy type of machinery causes vibration throughout the buildings; (ii) that the temperature inside is kept at 14° F. to 15° F., with the result that condensation of moisture from the outside air is continually taking place, damaging by expansion the brickwork and joists; (iii) that the buildings are fitted with heavy lifts, which are also a cause of damaging vibration; and (iv) that iron trucks weighing up to 500 lbs. are used for carrying the frozen meat, and cannot be prevented from causing great damage to the floors.

Such is the description of the buildings belonging to and occupied by the company, which are claimed by them to come within the description "mills, factories, or other similar premises." The Special Commissioners, for the reasons which they gave, held that these buildings come within that description, and from their decision the Crown appeals to this court.

In support of the appeal, it was said that, though the question whether a particular building is a mill or a factory, or similar to a mill or a factory, is a question of fact, the determination of that question must depend on the true meaning of the words "mills, factories, or other similar premises," and that is a question of law, and that the Special Commissioners had misdirected themselves as to the true meaning of those words, and had, in consequence, given an erroneous decision.

Before the Special Commissioners, and in this court, the Crown relied upon two cases decided in Scotland under the Rating (Scotland) Act, 1926—namely, *Whitbread & Co., Ltd. v. Edinburgh Assessor* (1) and *William Milne, Ltd. v. Glasgow Assessor, Union Cold Storage Co., Ltd. v. Glasgow Assessor* (2).

Sched. I of that Act sets out the deductions to be allowed from the

gross annual value of certain classes of lands and heritages for the purpose of rates, and one of these classes is "mills, manufactories, works or premises of a similar character used wholly or mainly for industrial purposes." Such premises get a rating deduction of $6\frac{1}{4}$ per cent. It was held in *Whitbread & Co., Ltd. v. Edinburgh Assessor* (1) that bottling-stores belonging to that company, and, in the case of the Union Cold Storage Co., Ltd., that the cold stores of that company, did not come within the description :

. . . mills, manufactories, works or premises of a similar character used wholly or mainly for industrial purposes.

I do not think that those cases are of assistance in construing the somewhat similar words in the Income Tax Act, 1918. In the first place, the Rating (Scotland) Act, 1926, applies to Scotland only, and must be construed in accordance with Scottish law. The words in question must bear the meaning which is attached to them in Scotland, and it by no means follows that the same meaning is to be given to similar words in a taxing Act which applies to the whole of Great Britain : *Income Tax Special Purposes Comrs. v. Pemsel* (3). In that case, it was decided by the House of Lords that the word "charity" in the Income Tax Acts has a meaning very different from that which it bears north of the Tweed. Moreover, the words in the schedule to the Rating (Scotland) Act, 1926, are not in fact the same as the words in the Income Tax Act, 1918. "Mills, manufactories, works or premises of a similar character" are very nearly the same, but then those words are qualified in the Scottish Act by the words "used wholly or mainly for industrial purposes." Since no such words of qualification appear in the Income Tax Act, I do not think that the decisions on the Scottish Act are helpful in construing the words in the Income Tax Act. Indeed, those decisions, so far from being of assistance, are likely to mislead.

Then reference was made to *Union Cold Storage Co., Ltd. v. Bancroft* (*Manchester Revenue Officer*) (4). In that case, the question was whether a cold store of the Union Cold Storage Co., Ltd., was an "industrial hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928. Sect. 3 of that Act defines an "industrial hereditament" as :

. . . a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop : Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes. . . .

One of the following purposes is "(d) purposes of storage." Whatever else may be said about the buildings in question in this case, there can be little doubt but that they are primarily used for the purposes of storage. I therefore think that the decision in that case is not of any help in construing the words used in the Income Tax Act.

In my view, since the words "mills" and "factories" are ordinary English words, they must be construed in their ordinary and natural

sense, and it is only misleading to take words from other Acts passed for other purposes and to construe these words in the light of decisions under other Acts. All these cold stores are in fact factories within the meaning of the Factory Acts, but that does not make them factories within the meaning of r. 5 (2), since the definition of a "factory" in the Factory Acts obviously includes buildings which are not factories in the ordinary sense of that word. What, then, do the words "factory" and "mill" mean according to the common understanding of mankind? I take it that a factory is a building used for the manufacture of goods and equipped with machinery, and that the word is generally understood in that sense. It is a building where goods are made. The meaning of the word "mill" is also, I think, plain enough. A mill is a building where goods are subjected to treatment or processing of some sort, and where machinery is used for that purpose. The miller in his corn-mill grinds wheat into flour, or oats into oatmeal. So, too, at a scutching-mill, the miller scutches the flax, to prepare it for spinning. The saw-mill, the rolling-mill, the flatting-mill, the puffing-mill and the cotton-mill are all buildings where goods are treated or subjected to some process.

I was told in the course of the argument that in Lancashire no one in the trade would call a building where cotton cloth is woven a cotton-mill. The expression "cotton-mill" is confined to those buildings where spinning takes place. The buildings in which the yarn is woven into cloth are called, and properly called, factories. Mills and factories—though they differ in this respect, that in the former goods are treated or processed, and in the latter goods are manufactured or made—have this in common, that both are equipped with machinery, worked in former days by wind or water and nowadays by steam or electricity or some other power. Giving these meanings to the words "mills" and "factories," it seems to me that the cold stores belonging to the respondent company are beyond doubt very similar to "mills" in all the essential characteristics of such buildings, since they are equipped with machinery for the purpose of subjecting the meat and other commodities which are brought there to an artificial temperature. They are buildings where goods are treated or processed by means of machinery provided for that purpose. It is, therefore, unnecessary, in my view, to consider separately the 5 cold stores where part of the building is used for making ice for sale. However, I may observe that a building used for making ice out of water would seem to be properly described as an ice-factory, just as a building used for making cotton cloth out of yarn is properly described as a cotton-factory.

I therefore think that in this case the commissioners came to a correct decision, and I fully agree with their view that the rating cases cited to them afford but little assistance as to the meaning of "mills, factories, or other similar premises" under Sched. D, Cases I and II, r. 5. The Attorney-General criticised their further statement that "r. 5 is aimed at giving relief in cases where premises are subjected to excessive wear

and tear," and he urged that that statement indicated that they had misdirected themselves as to the meaning of the words in question. I am disposed to agree with the criticism of the Attorney-General. Rule 6 enables the commissioners to make such allowances for wear and tear as they consider just and reasonable, and I see no reason to suppose that r. 5 (2) was intended to supplement the provisions of r. 6. However, whether or not the commissioners misdirected themselves in that respect does not matter, since I take the view that, on the true construction of the words "mills, factories, or other similar premises," their decision was, having regard to their findings of fact as to the character and description of the cold stores, the only decision open to them. This appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Pinsent & Co.* (for the respondents).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

PILKINGTON v. PILKINGTON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **December 16, 1938.**]

Divorce—Collusion—Offer by husband of evidence by telephone—Wife's answers not amounting to acceptance—Absence of bargain.

After the husband had left the home for some time, he telephoned his wife saying that he wanted his freedom and would give her the necessary evidence. The wife answered that she was surprised and that she would see her solicitors on the matter. No further communication passed between the parties. During the following week, the husband wrote a letter suggesting that the wife should make inquiries at a certain hotel concerning his stay there on a date after the telephone conversation. Immediately after that telephone conversation, the wife telephoned her solicitors, stating that her husband was supplying the evidence, and stating further that she was not aware of the nature of the evidence it was proposed to supply to her:—

HELD : the facts did not amount to collusion. There was no evidence of any tacit understanding outside the conversation, and, therefore, nothing in the shape of an offer on the part of the husband which, being accepted by the wife, would form a collusive bargain.

[EDITORIAL NOTE.] In order to establish collusion, it is necessary to establish a bargain or agreement between the parties. A wife who quite unexpectedly finds herself engaged in a telephone conversation with her husband is in a somewhat perilous position in this respect, as she might easily be trapped into statements having the appearance of a collusive agreement. The present decision of the Court of Appeal will be welcomed as safeguarding the wife from a trap of this kind—it is not suggested that there was any such trap in this case. The wife is not to be regarded as seated at the telephone with her legal adviser by her side, but a liberal construction is to be put upon the conversation, and if what is said admits of an innocent construction, that construction is to be put upon it.

AS TO COLLUSION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 677, 678, paras. 1000-1003 ; and FOR CASES, see DIGEST, Vol. 27, pp. 332-336, Nos. 3123-3160.]

APPEAL from a decision of HODSON, J., dated May 23, 1938, dismissing a wife's petition for divorce on the ground of adultery, as HODSON, J., stated that he was not satisfied that there was an absence of collusion. The material facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

H. B. Durley Grazebrook for the appellant.

The respondent was not represented.

Grazebrook : There was nothing in the nature of an agreement between the husband and the wife. Unless there is a state of things which amounts to an agreement or bargain, it cannot be said that there is collusion. There is nothing in the evidence of the wife to show that she was applying her mind to the matter at all. She said that she was surprised at what her husband had said, and that she would see her solicitors. She did not apply her mind to the question as to whether her husband had committed adultery or was going to commit adultery. As an innocent interpretation can be put upon the matter, that interpretation should have been put upon it by the judge. With regard to the last part of the judge's finding—that he was not satisfied that adultery had been committed, but that he had not to consider that matter—there is sufficient evidence of adultery. It never occurred to me that the evidence as to the adultery was not accepted, and I did not address myself to that point. My impression was that the only matter upon which the judge felt a difficulty was the question of collusion.

SIR WILFRID GREENE, M.R. : This is an appeal from an order of HODSON, J., dismissing the wife's petition for divorce on the ground of adultery. The judge took that course because he was not satisfied that the petition was not presented in collusion with the respondent, and, as he was not so satisfied, he was bound, under the present Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (which was substituted for a previous section by the Matrimonial Causes Act, 1937, s. 4), to dismiss the petition.

The petition was presented on Dec. 8, 1937. The parties had been married since May, 1934, and there was no issue of the marriage. There had been differences between the parties, and there was a confession by the husband with regard to another lady, who is not the lady mentioned in the petition. As the result of that, according to the petitioner's evidence, the husband went out of the house, and was not seen or heard of again until an incident in Sept., 1937. It appears that on Sept. 18, 1937, which was a Saturday, the respondent telephoned the petitioner. The following is the judge's statement of what took place during that conversation :

In Sept., 1937, the respondent telephoned to his wife saying he wanted his freedom and that he would give his wife the necessary evidence. The petitioner's reply to that was that she was surprised, and she concluded by saying that she was seeing her solicitors, which she did, but no further communication, so far as the evidence before me shows, passed between the petitioner, or anybody acting on her behalf, and the husband.

It is to be noticed that the judge uses the word "concluded." It is not to be taken from that that the conversation contained anything more than what he has concisely summarised. There is no suggestion in his judgment that the petitioner was not giving perfectly truthful evidence, nor is there any suggestion that anything passed between them which
A amounted to any express agreement for collusion. The reason why the judge took the course that he did will appear presently. That conversation having taken place on the Saturday, on Monday, Sept. 20, the petitioner telephoned her solicitors and had a conversation with Mr. Hajee, the solicitor's managing clerk, who was called at the trial.
B He was called after the judge had raised the question as to the evidence of the absence of collusion, but the judge ruled that the conversation which took place between the petitioner and the clerk on that Monday was not admissible. The sequence of events was this. On Sept. 23, which was a Thursday, the respondent wrote a letter to the petitioner to
C the following effect :

As I informed you by telephone last Saturday, I want my freedom and if you care to make inquiries at the Hotel Congress, 5, Granville Place, W.1, where I stayed last night, Sept. 22, with a lady, you should be able to obtain the necessary evidence for divorce.

The judge called attention to the fact that the adultery relied upon in
D the petition (and this is the act of adultery relied upon) took place subsequently to the telephone conversation, and, of course, if that adultery had taken place pursuant to any express understanding, or any understanding properly to be inferred, the judge would have been perfectly right in holding, and, indeed, would have been bound to hold,
E that he was not satisfied that there was no collusion. The judge finds this in reference to that letter :

It seems to me that there was a tacit understanding, and nothing was done to remove that understanding, to the effect that evidence would be provided by the husband upon which the petitioner could, if she thought fit, sue for a divorce.

F It is quite clear from the judge's judgment that he is not basing that conclusion upon any view as to the credibility of the petitioner, or her demeanour in the witness-box, or anything of that kind. It amounts to an inference, from the facts that the conversation took place and the adultery took place subsequently, to the effect that the wife gave some
G sort of tacit consent, and did nothing to remove some sort of tacit understanding. With all respect to the judge, I should have found the greatest difficulty in approaching the matter from that point of view. The husband rings up on the telephone, says that he wants his freedom, and says that he will send evidence. The petitioner was not asked in what
H sense she understood that, and, indeed, the expression is ambiguous, because it might refer to evidence of past misconduct or it might indicate an intention of committing misconduct in the future. If that information had been conveyed by letter, and the petitioner had not answered the letter, it could not have been suggested that there was any tacit understanding, or anything of the kind. It was made by telephone, however,

and that implies a conversation, because the wife, on being rung up on the telephone, did not remain silent and put the telephone down ; nor would it be reasonable that she should be expected to do so. I cannot, myself, think that it is right that a person who, in circumstances like that, receives a telephone message should, so to speak, be put at peril if she says anything at all. After all, a woman confronted with such a situation is not to be expected to deal with it in the precise and strict way which she would do if she had her solicitor by her side. I myself, as I say, would have found the greatest difficulty in accepting that view of the evidence. Of course, I need scarcely say that, where a judge (and he is the first person who has to be satisfied on these matters) has seen the witnesses, and has formed a conclusion as to what their evidence should be treated as conveying, those are matters with which this court would interfere only in exceptional circumstances. In the present case, however, it is not a question of anything but the inference to be drawn from simple matters of evidence, given without any suggestion of untruthfulness or lack of candour. In those circumstances, this court is in as good a position as the trial judge to form a conclusion.

However, the matter in this court has gone further, because, on the question as to the state of mind of the petitioner, and as to the impression which the telephone conversation with her husband left upon her mind—a vital matter when one comes to infer from her conduct some tacit attitude of mind—regarding those matters as of relevance, we permitted the solicitor's clerk to be called. The evidence he gave confirms entirely what I myself think, or should have thought, was the proper inference to be drawn from the evidence. It appears that she rang up on the Monday and spoke to the clerk, and told him that she had some very surprising news. She said that her husband had telephoned to her, that she did not know where he was telephoning from, but that he said that he wanted his freedom, and that he would send her evidence. That agrees with what she said in the witness-box. The clerk asked her what sort of evidence. She did not know, and asked him : " Do you know what he means ? " Thereupon the witness said : " I do not." Then he said that she said : " You will have to stop him doing anything, because of my boy's career." The clerk told her that he could not do anything, and that they would have to await events, and he gave her the very proper advice to have no further communication with her husband. We saw the clerk in the witness-box. He gave his evidence with frankness, and there is no reason why that evidence should not be accepted. The importance of it is that it shows that at that date the wife had not construed anything that her husband told her as something in the shape of an offer to which her consent was expected, or anything of that kind, and, to my mind, it negatives any suggestion of a colluding mind on her part. That being so, in my opinion, we are justified in taking the view that the judge drew a wrong inference from the evidence before him as to the existence of an understanding between the parties which was brought into existence at

that telephone conversation, because that is the only occasion on which any such understanding could have come into existence, and there is no suggestion in the judge's judgment that he was thinking of any understanding outside that conversation. That tacit understanding, in my judgment, is one which we ought not to hold ever took place. That being so, the requirements of the section in that respect are satisfied, because this court is satisfied that the petition is not presented or prosecuted in collusion with the respondent.

However, that does not quite conclude the matter, because the judge said at the end of his judgment :

I should find some difficulty in being satisfied, in that state of affairs, that adultery had been committed. I am not driven to consider that matter, as I am deciding this case on the ground that I am not satisfied as to the absence of collusion.

The evidence of adultery in the present case was evidence which, in a case where there was no question or suggestion of collusion, would be sufficient evidence of adultery. Evidence was given that the respondent spent the night occupying the same room with a woman named in the petition and identified in the proper and usual way. If it had not been for the circumstance that the judge was not satisfied on the matter of collusion, I cannot think that he would not have been satisfied on the matter of adultery, because the evidence seems to me to be evidence upon which he ought to have been satisfied in that respect. The reason why he was not satisfied, I cannot help thinking, was that he had already decided that there was a tacit understanding to the effect that evidence would be provided by the respondent, and by that he means evidently that the husband would at a future date commit adultery. The judge having found that, it not unnaturally tended to colour his view as to the evidence of adultery having taken place. Once the element of collusion disappears, however, the evidence of adultery, being looked at by itself, as I have said, satisfies me that adultery did take place. In all the circumstances, I think that the appeal should be allowed, and a decree pronounced.

FINLAY, L.J. : I am of the same opinion. Of course, one always differs with hesitation from a judge having very special experience in these matters, but in this case I agree with SIR WILFRID GREENE, M.R., and agree so exactly and completely with what he has said that I do not desire to add anything myself.

LUXMOORE, L.J. : I also agree, and I have no desire to add anything to what has been said by SIR WILFRID GREENE, M.R., with which I am in complete agreement.

Appeal allowed, with costs.

Solicitors : *Bolton, Jobson & Yate-Lee* (for the appellant).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

HOWARD *v.* CHARLES P. KINNELL & CO., LTD.[COURT OF APPEAL (Slessor, Clauson and Goddard, L.J.J.), **November 30, 1938.**]

Workmen's Compensation—Compensation paid on footing of total incapacity—Employers offering to continue payments only at reduced rate on footing of partial incapacity—Claim by workman for arbitration—Answer by employers admitting liability at reduced rate—Form of award—Workmen's Compensation Act, 1925 (c. 84), s. 21—Workmen's Compensation Rules, 1926, r. 18 (3).

The applicant had been injured in an accident on Feb. 18, 1936, and thereafter received compensation on the footing of total incapacity at the rate of 30s. per week until Apr. 26, 1938, when the employers, having formed the opinion that the man was then only partially incapacitated, reduced the compensation to 21s. 6d. per week. The workman then commenced an arbitration under the Act, claiming that he was entitled to an award of compensation at the rate of 30s. per week. The respondents by their answer alleged that he was no longer entitled to compensation at a higher rate than 21s. 6d. per week. The judge, having found in favour of the respondents' contention, refused to make any order other than an award for the respondents without more :—

HELD : the proper form of award in such a case was an award for the workman for compensation at the rate of 21s. 6d. per week.

[EDITORIAL NOTE.] This case turns only upon the form of the award, and the importance of the form of the award is that it will determine the remedies of the workman by way of execution and otherwise.

AS TO FORM OF AWARD, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 222, 223, para. 512 ; and FOR CASES, see DIGEST, Vol. 34, p. 393, Nos. 3208-3214. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 448, 449.]

APPEAL by the applicant from an award of His Honour JUDGE BENSLEY WELLS at the Southwark County Court, dated July 25, 1938. The facts of the case are fully set out in the judgment.

S. Rees for the appellant.

F. W. Beney for the respondents.

SLESSOR, L.J. : On May 17, 1938, Victor Benjamin Howard issued proceedings under the Workmen's Compensation Act, 1925, asking for an arbitration. He claimed as compensation 30s. per week from Apr. 26, 1938, less amount received to date and continuing. He stated that he had received 30s. per week from the time of the accident, on Feb. 18, 1936, until Apr. 26, 1938, when the sum was reduced to 21s. 6d. per week. It appears that the employers, forming the opinion that the man was only partially incapacitated, attempted to use the machinery of sect. 21 (1) of the Act to reduce the compensation, but the workman did not accept their view that his incapacity had ceased to be total, and claimed under sect. 21 (2) to have an arbitration. Upon that, the employers, on June 11, 1938, filed their answer, and they stated, among other matters :

That since Apr. 26, 1938, and before that date the applicant has not been totally incapacitated for work but has been and is now able to earn in suitable employ-

ment or business wages which do not entitle him to compensation at a greater rate than 21s. 6d. per week.

A They then stated the ground upon which they denied their liability to pay compensation in excess of 21s. 6d. per week. From that, there was clearly, in my opinion, a question arising between the parties—namely, whether this workman was incapacitated to the extent of 30s. per week compensation or to the extent of 21s. 6d. per week compensation, or to some other intermediate sum. There were present, therefore, the requirements of sect. 21 of the Act, which provided in subsect. (1) :

B If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, or, except as otherwise expressly provided, to the right to or amount of any indemnity under this Act, the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled by the arbitration . . .

C This *lis* existing between the parties, as is required by the rules made under the Act, gave particulars and the answers I have read. By the Workmen's Compensation Rules, 1926, r. 18, if any respondent considers that the applicant's particulars are in any respect inaccurate or incomplete, or intends to rely on any facts of various kinds, he has to file an answer and fill in the matters upon which he relies. I am paraphrasing the effect of r. 18 (1). Then by r. 18 (3) :

D Subject to any answer so filed, and to the provisions of the next following paragraph, the applicant's particulars, and, in the case of a claim for compensation, the liability to pay compensation under the Act, shall be taken to be admitted.

E Here he has not used the negative method, but he has positively stated in his answer that the workman is not entitled to compensation at a greater rate than 21s. 6d. per week. That admission given in the arbitration may have most important consequences. Evidence may be called in the case, and, if the respondent shows to the satisfaction of the arbitrator that the man is not entitled to more than he has admitted, he is entitled to claim for further amounts being filed, and that results in costs. Nevertheless, the workman came to the court claiming 30s., or such lesser sum as the court might decide he was entitled to receive. At the end of the case, the judge having come to the conclusion that the employers were right in saying that he was only partially incapacitated to the extent of 21s. 6d. per week, Mr. Scott Duckers for the workman, correctly, in my opinion, asked the judge to make an order in favour of the applicant for 21s. 6d. per week. The judge declined to make any such order, but made an award for the respondents without more, and from that award the applicant appeals, saying that the award does not represent the effect in law of the decision of the judge, and that there ought to be an award for the workman for 21s. 6d. per week, which is the sum which the arbitrator decided that he was entitled to receive. In my view, the applicant is right, the issue being whether the workman should receive 30s. per week, or what lesser sum the arbitrator might award. That being the question in the case, the arbitrator came to the conclusion that he was partially

incapacitated to the extent of 21s. 6d. per week. The admission made by the employers by payment into court of any cash will have, of course, or may have, serious consequences upon the costs, but the workman is entitled to an award. He is a person who has been injured by an accident under the Workman's Compensation Act, and he is entitled in law to 21s. 6d. per week, and entitled to all the legal protection which the award, which has the effect of a judgment, gives him by way of execution or any other remedy. The fact that the employer concedes he is liable for that sum does not disentitle him, once there is an issue between the parties under sect. 21, from having that award pronounced. Since the employers were saying that he was entitled to only 21s. 6d. and the workman was saying that he was entitled to 30s., there was such an issue here. Therefore, in my view, this appeal must be allowed, and the award must be varied. There must be an award for the applicant for 21s. 6d. per week still continuing, less the amount which he has received.

CLAUSON, L.J. : I agree.

GODDARD, L.J. : I agree.

Appeal allowed. Award varied.

Solicitors : *Scott Duckers & Co.* (for the appellant) ; *A. E. Wyeth & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. BUCKINGHAM COUNTY VALUATION COMMITTEE.
METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. SURREY (NORTH WESTERN) AREA ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Macnaghten, J.), **November 21, 30, December 1, 2, 21, 1938.**]

Rates—Basis of assessment—Special classes of property—Electricity undertaking—Ring main—Apportionment of annual value between areas where tapped and not tapped.

An electric supply company transmitted electricity by means of a ring main passing through several rating areas. In one such area this main was not tapped for supply to any subsidiary distributor, but in a second area it was so tapped. The question for decision was the basis of apportionment of the rateable value of the main as between these two areas. The rateable value of the whole undertaking was sufficient to allow a reasonable rateable value in areas where the main was only indirectly productive if the rateable value in those areas was calculated on the contractors' basis and to allow a reasonable rateable value in areas where it was directly productive :—

Held : the rateable value of the whole undertaking being sufficient for the purposes above stated, it ought not to be apportioned evenly over its whole length, but, in areas where it is not tapped for distribution, it ought to be valued on the "contractors' basis," and the residue of the rateable value should then be apportioned between the areas in which it is tapped.

R. v. Mile End Old Town (Churchwardens & Overseers) (2) applied.

[EDITORIAL NOTE.] The apportionment of the rateable value of the necessary apparatus for the distribution of essential services has been settled in the case of water and gas, and the principle of the earlier cases is here extended to the bulk supply of electricity. The judge has reserved the question of the method of apportionment where the rateable value of the whole is not sufficient to permit the application of the method of apportionment here adopted.

A AS TO APPORTIONMENT OF ANNUAL VALUE OF WHOLE UNDERTAKING, see HALSBURY, Hailsham Edn., Vol. 27, pp. 420-422, paras. 851-854; and FOR CASES, see DIGEST, Vol. 38, pp. 547-554, Nos. 899-941.]

Cases referred to :

- B** (1) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 38 Digest 547, 901; 95 L.J.K.B. 605; 134 L.T. 483; *affg.* S.C. *sub nom.* *Metropolitan Water Board v. Kingston Union Assessment Committee*, [1925] 2 K.B. 509.
- (2) *R. v. Mile End Old Town (Churchwardens & Overseers)* (1847), 10 Q.B. 208; 38 Digest 552, 925; 16 L.J.M.C. 184; 9 L.T.O.S. 312.
- (3) *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716; 38 Digest 548, 908; 28 L.J.M.C. 135; 32 L.T.O.S. 388.
- C** (4) *R. v. New River Co.* (1813), 1 M. & S. 503; 38 Digest 548, 907.
- (5) *Sheffield United Gas Light Co. v. Sheffield Overseers* (1863), 4 B. & S. 135; 38 Digest 553, 932; 8 L.T. 692; *sub nom.* *R. v. Sheffield United Gaslight Co.*, 32 L.J.M.C. 169.
- (6) *R. v. Cambridge Gas Light Co.* (1838), 8 Ad. & El. 73; 38 Digest 554, 937; 7 L.J.M.C. 50.
- D** (7) *Manchester Corpn. v. Bolton Area Assessment Committee & Westhoughton Urban District Council* (1930), 144 L.T. 618; Digest Supp.

E SPECIAL CASE STATED for the opinion of the court by an arbitrator appointed by agreements made under the Rating and Valuation Act, 1925, s. 31 (6), Sched. V, Part II. The Metropolitan Electric Supply Co., Ltd., though named as parties, were in fact in a neutral position, as the total annual value of the main was not in dispute. The only matter here in question was the apportionment of the annual value between areas in which the main was tapped for supply to subsidiary distributors and areas in which it was not so tapped, but simply passed through on its way

F to the areas in which it was tapped. The facts are fully stated in the judgment.

A. S. Comyns Carr, K.C., Arthur Ward, and Malcolm Milne for the Buckingham County Valuation Committee, the appellants.

Sydney G. Turner, K.C., and Harold B. Williams for the Surrey (North Western) Area Assessment Committee, the respondents.

G *A. M. Trustram Eve, K.C., and G. D. Squibb* for the Metropolitan Electric Supply Co., Ltd.

H MACNAGHTEN, J. : In the exercise of authority conferred by Parliament, the Metropolitan Electric Supply Co., Ltd., supply electricity in bulk to a number of authorised distributors in the counties of Middlesex, Hertford, Buckingham, Berks and Surrey. For this purpose, the company obtain high-tension current from the power-station of the London Power Co. at Willesden and transmit it to the various authorised distributors in those counties by means of a ring trunk main. The

main is laid underground, and, starting from the power-station at Willesden, it passes the various points in those counties, where it is tapped by the authorised distributors, and then returns to the power-station from which it started. In its course, this ring main passes through the parish of Wyrardisbury, in the county of Buckingham, and then crosses the River Thames into the parish of Egham, in the county of Surrey. A It so happens that the main is not tapped by any authorised distributor in the parish of Wyrardisbury, but in the parish of Egham it is tapped by the Egham and Staines Electricity Co., Ltd., the authorised distributors for the surrounding district. The company accordingly obtain a considerable revenue from the bulk supply of electricity in the parish of B Egham, but obtain none at all in the parish of Wyrardisbury.

The question at issue in this case is : what are the respective rateable values of the two sections of the company's ring main in those two parishes ? That question depends on what is the proper method of apportionment of the rateable value of the whole of the ring main between C the various parishes through which it passes. By an agreement dated July 2, 1935, the company and the Surrey (North Western) Area Assessment Committee submitted to the arbitrament of Sir Walter Monckton, K.C., the question of the rateable value of the section of the ring main in the parish of Egham, which was then the subject of an appeal to the D Surrey Quarter Sessions. By an agreement dated Jan. 27, 1937, the company and the Buckingham County Valuation Committee submitted to the arbitrament of the same counsel the question of the rateable value of the section of the ring main in the parish of Wyrardisbury which was then the subject of an appeal to the Buckingham Quarter Sessions. These E agreements were made under the Rating and Valuation Act, 1925, s. 31 (6), Sched. V, Part II. The arbitrator took upon himself the burden of these references, and in each of them he has stated his award in the form of a special case for the opinion of the court. Thus there comes up for decision once again the well-worn question of the apportionment F of the rateable value of an undertaking which happens to be situate in more than one parish. The controversy as to the proper method of apportionment is not, as will appear in the course of this judgment, a controversy which concerns the Metropolitan Electric Supply Co., Ltd., who are the owners and occupiers of the ring main throughout its whole G length. At the very outset of the hearing before me, counsel for the company made a declaration of neutrality. The controversy is between the Buckinghamshire Committee for the parish of Wyrardisbury on the one side, and the Surrey Committee for the parish of Egham on the other. In these circumstances, the two cases were heard together, H and a single judgment must be given.

The company happen to be authorised distributors for part of the area which is served by their ring main. The parties are all agreed that, for rating purposes, the bulk supply of electricity by the company must be treated as a separate undertaking by itself. They are also agreed

that, first of all, the rateable value of this undertaking must be ascertained on what is called the "profits basis." When that has been done, the rateable value so ascertained must be apportioned between the several parishes through which the ring main passes, so that the sum total of all the parochial valuations does not exceed the rateable value of the whole undertaking. Thus far, all are in agreement. Even before the decision of the House of Lords in *Kingston Union v. Metropolitan Water Board* (1), it would have been plain enough that the valuation for the purposes of rating of an undertaking for the bulk supply of electricity over an area containing a number of parishes could not properly be made on any basis other than the "profits basis." That case, however, has put the matter beyond all dispute. The question at issue in the *Kingston* case (1) was whether the undertaking of the Metropolitan Water Board, which, like that of the Metropolitan Electric Supply Co., Ltd., extended over many parishes, ought, for rating purposes, to be valued on the "profits basis" or on what is known as the "contractors' basis." The Middlesex Quarter Sessions decided that, in the particular circumstances of that case, it ought to be valued on the "contractors' basis." The Metropolitan Water Board objected to that decision, and a case was stated by the quarter sessions for the opinion of the court. The House of Lords, affirming the decisions of the King's Bench Division and the Court of Appeal, decided that an undertaking such as that of the Metropolitan Water Board, though precluded by its constitution from making any profits, must be valued for rating purposes on the "profits basis," and ruled out once and for all any other method of valuation. *A fortiori* the undertaking of the Metropolitan Electric Supply Co., Ltd., a company limited by shares and making profits to be distributed by way of dividend to shareholders, must be valued for rating purposes on that basis. The rateable value of the undertaking in this case, the whole length of the ring main, having thus been ascertained, it then becomes necessary to apportion that sum between the parishes in which the main is laid. All are agreed that, whatever method of apportionment be adopted, the total of the amounts apportioned to the several parishes must not be more than the rateable value of the whole of the ring main. Therefore, except in so far as the rate levied in one parish may be higher than the rate levied in another, and that is a trifling matter, the method of apportionment does not affect the company at all. So the company stand neutral, and take no part in the conflict between the Buckingham Committee, on the one side, and the Surrey Committee, on the other.

It now becomes necessary to state the rival contentions as to the proper method of apportionment put forward by the Bucks Committee, for the parish of Wyrardisbury, on the one hand, and by the Surrey Committee, for the parish of Egham, on the other. The Bucks Committee contend that the rateable value of the ring main ought to be apportioned evenly over its whole length, and, since the section of the main in Wyrardisbury is very much longer than the section in Egham, the result of that method

of apportionment is that Wyrardisbury obtains a rateable value of £1,491 and Egham gets no more than the paltry sum of £151. Such an apportionment is naturally unacceptable to the Surrey Committee. Since the rateable value of the sections of the main in Wyrardisbury and Egham ought to depend on the rent which the hypothetical tenants of those sections would be willing to pay, and the company obtain A a considerable revenue from the supply of electricity in Egham, but no revenue at all in Wyrardisbury, the method of apportionment which produces the odd result that the rateable value of the revenue-producing section in Egham is barely one-tenth of the rateable value of the barren section in Wyrardisbury, would seem to be questionable. Accordingly, B the Surrey Committee contend that the proper method of apportionment is that which was laid down by the Court of Queen's Bench with regard to undertakings for the supply of water extending over a number of parishes in *R. v. Mile End Old Town (Churchwardens & Overseers)* (2) and *R. v. West Middlesex Water Works* (3). In the latter case, the judgment of the C court, consisting of LORD CAMPBELL, C.J., and WIGHTMAN, ERLE, and HILL, JJ., was delivered by WIGHTMAN, J., and the method of apportionment prescribed by that court was expounded by WIGHTMAN, J., as follows, at pp. 721-723 :

If an apparatus occupied by one occupier, consisting of several parts, lies in one parish, the rate is on the whole, and is received by that parish. If such an apparatus lies in several parishes, the occupier is liable for the same amount of rateable value, and no more ; but that amount is to be apportioned among the parishes in which it lies ; and the question then arises, as in the case, what is the principle which regulates such apportionment ? It is clear that each parish must rate the part that lies within it : such part becomes a separate rateable subject in that parish, and must be rated, according to the Parochial Assessment Act, upon an estimate of the rent which that part would yield after proper deductions. In practice, a tenant of the parochial portion of a canal, railway, gas works, water works, or the like, has rarely, if ever, been known. But an hypothetical tenant must be assumed ; and the terms of such a tenancy are not difficult to be conceived. If, in the hypothesis, some necessary incidents are also assumed to be involved, such as, first, that each part of the apparatus is to continue in joint co-operation, no one tenant of an essential part being able to stop his part ; secondly, that the title to the required land is permanent, so that there is no risk of being compelled to move fixed capital ; F thirdly, that there is land in the required quantity, and capital to be invested therein, and occupants ready to take and work parts yielding profit, as tenants at rack rent, and parts not yielding profit, as contractors for remuneration, provided any greater profit can be obtained than is ordinary in such relations. If a tenancy of each parochial part be assumed according to this hypothesis, then, although each parish rates separately upon its own estimate of the value of the part lying within it, and the law gives no power of making all the parishes co-operate in rating G the several parts lying in each, nevertheless this court is bound to protect the occupier of such an apparatus from being rated beyond the rateable value of the whole taken together : and it is in reference to this protection that the court must take into its consideration at once all the separate rates, as so many claims upon one given fund, and must apportion that fund, bearing in mind that every addition to the rateable value assigned to one parish must be a subtraction from the rateable value which might be given to some other parish. Supposing, then, the apparatus H to be apportioned to several tenants according to the parts in several parishes, the tenants of the parts directly earning net profits in a parish would be rated by that parish for all the profits earned therein ; this being the parochial principle of apportionment which has been unanimously upheld hitherto in respect of all canals, railways, water companies, gas companies and bridges. But the tenants of the parts directly earning no profit would not be liable to be rated in respect of any rent in the ordinary sense, which is, profit remaining after all deductions have been taken from the receipts. But, as these parts of the apparatus, directly earning

nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation; and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land and the profit on fixed capital therein.

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Applying the principle laid down in those cases to the undertaking of the Metropolitan Electric Supply Co., Ltd.—that is, to the ring main from which the authorised distributors draw their supplies of current—the Surrey Committee contend that those sections of the main which are laid in parishes where it is not tapped, and the company accordingly obtains no revenue, ought to be valued on the “contractors’ basis”—namely, by a percentage, be it 5 per cent. or something more or something less, upon the structural or capital value—and that the residue of the rateable value of the undertaking ought to be apportioned between the parishes in which the ring main is tapped in accordance with the gross receipts in that parish, as explained by the judgment of the court in the *Mile End Old Town* case (2). The arbitrator has found that this method of apportionment gives to Wyrardisbury a rateable value of £592, and to Egham a rateable value of £1,986.

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The question which of these two methods of apportionment should be adopted in this case was argued before me very fully. All the cases which have any bearing on the matter, cases relating to canals, railways, water, gas and electricity undertakings, beginning with the Amwell Spring case—that is, *R. v. New River Co.* (4)—were cited and discussed, and I am very much obliged to counsel for their assistance.

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In each of his awards the arbitrator states that, without the guidance of the reported cases, he would have treated the whole length of the ring main as equally productive, and would have apportioned a rateable value of £1,491 to Wyrardisbury and a rateable value of £151 to Egham. He considered, however, that he was bound by authority to decide in favour of the contention put forward by the Surrey Committee. The question for the opinion of the court is, therefore, whether the arbitrator was right in considering himself bound by authority to decide the matter submitted in a manner contrary to his own personal views.

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Counsel for the Buckinghamshire Committee conceded that the method of apportionment prescribed by the court in the *Mile End Old Town* case (2) and the *West Middlesex Waterworks* case (3) has ever since been adopted, not only in the valuation of undertakings for the supply of water, but also in the case of valuations of undertakings for the supply of gas and electricity. In *Sheffield United Gas Light Co. v. Sheffield Overseers* (5), the court, consisting of COCKBURN, C.J., CROMPTON, HILL and BLACKBURN, JJ., held that the principle laid down in the *West Middlesex* case (3) should be applied in the rating of an undertaking for the supply of gas. Counsel for the Buckinghamshire Committee, however, contended that this method of apportionment was not applicable

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to the ring main of the Metropolitan Electric Supply Co., Ltd., that the distinction between directly productive and indirectly productive hereditaments was inapplicable to this particular case, and that the ring main ought to be regarded as directly productive in all its parts. He submitted that the rival method of apportionment which was favoured by the arbitrator was, to say the least of it, permissible in this case. A That was the method adopted by the court in *R. v. Cambridge Gas Light Co.* (6), where it was held that the rateable value of the undertaking should be distributed amongst the several parishes in which it was situate in proportion to the quantity of apparatus situate in each parish, and not in proportion to the payments made by the consumers B of gas in each parish. LORD DENMAN, C.J., delivering the judgment of the court, consisting of himself and LITLEDALE, WILLIAMS and COLERIDGE, JJ., said, at p. 89 :

Since, therefore, in the present case, the land occupied by the apparatus in each parish through which it passes contributes to the whole value to let, it follows that C the company must be rated in respect of its occupation in each parish ; and, if so, we are aware of no rule which can be laid down as to the amount, except that it must be in proportion to the quantity of apparatus situate in each parish.

It is to be observed that LORD DENMAN, C.J. made that statement in 1838, and that he then said that the court was not aware of any rule which could be laid down as to the distribution of the amount, except that which D he stated.

Counsel for the Surrey Committee submitted that the *Cambridge Gas Light Co.* case (6) was in fact overruled by the decision of the court in the *Mile End Old Town* case (2) and the *West Middlesex Waterworks* case (3). The decision in the *Cambridge Gas Light Co.* case (6) is admittedly E not consistent with the later cases. LORD DENMAN, C.J., who delivered the judgment in the *Mile End Old Town* case (2), notwithstanding that the *Cambridge Gas Light Co.* case (6) was cited by counsel in argument, could not have been fully aware of the effect of that decision when he delivered his judgment in the *Mile End Old Town* case (2). The conclusion F seems to be that, although in 1838 LORD DENMAN, C.J. and his colleagues were aware of no rule other than that laid down in the *Cambridge Gas Light Co.* case (6), yet, when the *Mile End Old Town* case (2) came to be decided in 1847, some nine years later, the court, consisting of LORD DENMAN, C.J. and his colleagues, were then aware of another rule, and a G rule which they plainly considered to be a better one. Mr. Comyns Carr contended that the Court of Queen's Bench could not overrule its own decision. Perhaps it would be more correct to say that the method adopted in the *Cambridge Gas Light Co.* case (6) was in fact superseded by the method prescribed in the *Mile End Old Town* case (2). The Cam- H bridge Gas Light Co. case (6) is, I think, generally considered to have been overruled or superseded, and has not, as far as I am aware, ever been followed in the last 80 years. In my view, it would not have been permissible for the arbitrator to follow the method which was in fact used in that case. Then it was said that the ring main is in fact a single

cable carrying high-tension current from end to end, and it cannot be both directly productive and indirectly productive. Reliance was placed on *Manchester Corpn. v. Bolton Area Assessment Committee and Westhoughton Urban District Council* (7). The headnote runs thus :

- A In the rating of a water undertaking extending over several parishes, ascertained on the profits basis as approved by the House of Lords in *Kingston Union v. Metropolitan Water Board* (1), a hereditament (part of the undertaking) in a parish which has been assessed on the contractor's basis as "indirectly productive" in that parish, cannot be at the same time further assessed at an additional sum as "directly productive." To do so would be to produce that very injustice which the profits formula was designed to prevent.
- B The hereditament in question in that case was the section of the aqueduct carrying the water from Thirlmere to Manchester, a section which is situate in the parish of Westhoughton. In that parish, the aqueduct is tapped for the supply of water from the aqueduct to the Atherton Urban District Council. The Manchester Corporation were the owners and occupiers of the aqueduct throughout its whole length. The Atherton Urban District Council were in occupation of the pipe which tapped the aqueduct and conveyed the water to Atherton. The aqueduct was assessed as an indirectly productive hereditament. The respondents sought to assess it also as directly productive. The case, therefore, is
- D not parallel with the case now before the court, for the Surrey Committee do not suggest that the section of the ring main in Egham should be assessed as partly productive and partly unproductive. They claim that the section in the parish of Egham must be rated as a single supply, and that the whole of it from end to end in the parish should be treated
- E as a productive hereditament. If the Manchester Corporation had been in occupation of the pipe which tapped the aqueduct, they would, I presume, have been rateable in respect of that pipe as a directly productive hereditament. Alternatively, it may be that in such a case both the aqueduct and the pipe situated in the parish of Westhoughton could have
- F been rated as a single directly productive hereditament, but that the aqueduct itself could not be rated as both directly and indirectly productive. The law requires that the sections of the ring main in each parish shall be treated as a separate hereditament. In this case, the argument put forward strongly by Mr. Comyns Carr creates no difficulty
- G in treating one section of the ring main in one parish as directly productive and another section in another parish as indirectly productive. Indeed, the section of the ring main in Egham is directly productive, for in that parish the ring main does in fact produce revenue there, and in Wyrardisbury it is productive only indirectly, because it does not
- H produce any revenue there. Then it was said that the principle laid down in the *West Middlesex Waterworks* case (3) might produce an odd result if the section of the ring main in one parish were tapped to a very small extent, so that in fact the rateable value, on the *West Middlesex Waterworks* case (3) principle, would be less than if the section in that parish had been valued on the "contractors' basis." On the other side,

it is said that that was a contingency which was very unlikely to occur. If it did occur, the result would certainly not be so fantastic as the result which is produced by the method claimed by the Buckinghamshire Committee—namely, that the rateable value of the main in Wyrardisbury is ten times as large as the rateable value in the parish of Egham. Moreover, I apprehend that it might be open to a parish which was in an exposed position to say that, although one section was in fact directly productive of some revenue in that parish, the revenue was so small that it would be more advantageous to the parish to have the section valued on the contractors' basis. I think that it might be open to the parish to waive their right to have it considered as a directly productive hereditament, and to claim that it should be included in the indirectly productive section. I therefore consider that the arbitrator was right in coming to the conclusion that he was bound in law to adopt the method of apportionment which had been laid down in the cases and followed for so many years, and, therefore, that the rateable values for those two parishes should be, as found by him, £592 for the parish of Wyrardisbury and £1,986 for the parish of Egham.

I desire to add this only so as to make clear what is being decided in this case. In this case, the rateable value of the whole undertaking is sufficient, in the parishes in which the main is only indirectly productive of revenue, to allow to them a reasonable rateable value ascertained on the contractors' basis, and to allow to the parishes in which the directly productive sections are laid a rateable value in excess of that which they would get on the contractors' basis. This method of apportionment is applicable in such a state of facts. The question whether it would be applicable if the rateable value of the whole undertaking were not sufficient to allow a reasonable remuneration to the supposed contractor, and what would be the method of apportionment in such case, does not arise here. However, it may be that some day the point will arise in cases where this principle has been followed. Where the rateable value of the whole undertaking is not sufficient to provide a reasonable ratio of remuneration for the contractor in the indirectly productive hereditament and also the rateable value on the directly productive hereditament, what should be the method of apportionment in that case, as far as I am aware, has never been laid down by the courts. An attempt was made to raise this question in the *Kingston Union* case (1), but the House of Lords decided that it was not open to the Kingston Union to do so in that case. The question, and the only question, which was open to argument in that case was whether there were any special circumstances there which justified the Court of Quarter Sessions in departing from the usual rule that the whole undertaking should be valued on the profits basis. The decision of the court there was that, there being no such special circumstances, the profits basis, and not the contractors' basis, must be adopted.

Arbitrator's award upheld. The Buckingham County Valuation Com-

mittee to pay their full costs of the arbitration and of this hearing to the Metropolitan Electric Supply Co., Ltd., and the Metropolitan Electric Supply Co., Ltd., to pay their full costs of the arbitration and of this hearing to the Surrey (North Western) Area Assessment Committee.

A Solicitors: *Sharpe, Pritchard & Co.*, agents for *G. R. Crouch*, Clerk to the Buckingham County Council (for the Buckingham County Valuation Committee); *Dudley Aukland*, Clerk to the Surrey County Council (for the Surrey (North Western) Area Assessment Committee); *Sydney Morse & Co.* (for the Metropolitan Electric Supply Co., Ltd.).

B [Reported by *W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

C INLAND REVENUE COMMISSIONERS *v.* KERED, LTD.
KERED, LTD. *v.* INLAND REVENUE COMMISSIONERS.
INLAND REVENUE COMMISSIONERS *v.* SIGMA TRUST, LTD.
INLAND REVENUE COMMISSIONERS *v.* WILLANT
TRUST, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and
D Luxmoore, L.JJ.), **December 7, 8, 1938.**]

Income Tax—Undistributed income—Company of limited membership—Loan creditor—Apportionment of income—Loan repayable by stated instalments—Option to redeem larger sum upon notice—Finance Act, 1922 (c. 17), s. 21, Sched. I—Finance Act, 1936 (c. 34), s. 20.

E An investment company had issued debentures, and the holder of the debentures was a loan creditor within the meaning of the Finance Act, 1936, s. 20. For the year ending Nov. 30, 1935, the gross income of the company was £8,020 6s. 5d. The gross expenditure was £983 10s. 10d. The Crown contended that the difference in these amounts, £7,036 15s. 7d., was the company's actual income, and should be apportioned, as to £225, to the shareholders, and, as to £6,811 15s. 7d., to the loan creditor. The net income of the company was £6,215 15s., the payments made to it being subject to deduction of tax. The expenditure of the company was also subject to deduction of tax, and its net expenditure was £973 13s. 1d. The net cash available in the company's hands for the redemption of the debenture was £5,242 1s. 11d. The company in fact paid the loan creditor £5,200 in part redemption of the debenture which was the instalment of capital agreed to be repaid in that year:—

G **HELD:** (i) the special commissioners can only apportion to loan creditors the actual amount of the income expended in discharge of their loan capital, and not that amount grossed up by the addition of tax thereon.

H (ii) the special commissioners could apportion to loan creditors only the sum actually paid in redemption of debt, and not a sum larger than that. Although the company had income sufficient to redeem a larger amount of the debt, that larger sum was not a sum "available to be expended or applied in redemption" within the Finance Act, 1936, s. 20 (4) (b).

(iii) where a company has the option to redeem a larger sum upon giving a specified notice, its income is not available for the discharge of such larger sum unless such notice has been given.

Decision of LAWRENCE, J. ([1938] 2 All E.R. 564), affirmed.

[EDITORIAL NOTE.] The Finance Act, 1922, s. 21, was passed with the avowed object of preventing the evasion of super-tax (which tax has since been replaced by sur-tax) by the retention of income by a particular class of companies, and the section gives the special commissioners power to apportion the income among the members of the company as if a reasonable distribution had been made. The provisions of this section are extended by the Finance Act, 1936, s. 20, so that certain loan creditors of the company are included in the definition of "member" of the company. The effect is to give the special commissioners power to apportion the income of the company among its shareholders and a loan creditor. The section was enacted to prevent the issue of debentures to persons who should be shareholders, and thus entitled to receive part of the income of the company, instead of receiving, as they would do as debenture holders, a capital payment. The questions here debated are whether this apportionment should be based on the actual amount repaid to the loan creditor or on that amount "grossed up" by the addition of tax thereon, and whether, where there is a subsisting agreement to repay the loan creditor a proper proportion of the money advanced, any further part of the income of the company can be apportioned to the loan creditor. A

AS TO COMPUTATION OF INCOME FOR PURPOSES OF SUR-TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 292, 293, paras. 578, 579; and FOR CASES, see DIGEST, C Supp., Income Tax, Nos. 674g-674t.]

APPEAL from an order of LAWRENCE, J., dated Apr. 12, 1938, and reported [1938] 2 All E.R. 564, where the facts are fully set out.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the Inland Revenue Commissioners. D

Cyril King, K.C., and F. Grant for Kered, Ltd.

F. Grant for Sigma Trust, Ltd.

F. Heyworth Talbot for Willant Trust, Ltd.

The Attorney-General: The Finance Act, 1922, s. 21, is the section which deals with what one may call one-man companies formed with the view of avoiding sur-tax. The section was primarily passed to deal with cases where a man had carried on his business as an individual and then turned the business into a company because its gains were then not distributed but allowed to accumulate, thereby not paying sur-tax. When the company was put into liquidation, the accumulated profits were paid as capital. Power is given to the commissioners to say that the whole profits of the company are not being distributed. The Finance Act, 1936, s. 20, was passed to provide that money should be deemed to be available, in such cases, for distribution, in spite of the fact that it was applied in repayment of loan or redemption of shares. The section covers the case in which a man, instead of taking shares, and getting his profits and gains as dividends, took debentures, the repayment of which would of course be capital. The effect of it was that money expended in repaying the debentures would be regarded as money available for distribution. There is a definition of members in the Finance Act, 1922, s. 21 (7). The Finance Act, 1936, s. 20, made it possible to treat the loan creditor as a member, and thereby made him someone to whom the income could be apportioned in accordance with his interest. It is said, against the revenue, that the interest of the loan creditor is to be measured by the amount which he gets. The second point arises in this E
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- way. Let it be assumed that there are debentures repayable in 1, 2 3 and 4 years, and so on. The company can repay only one debenture in the first year and another in the second year, and so on. If there are profits larger than necessary to repay the one debenture which the company is entitled to repay in the year, it has to be decided whether
- A or not that larger figure is available to be expended or applied in redemption of the loan capital. Where the debenture has not to be repaid within the year to be considered, and no sum goes to the loan creditor, the commissioners have to apportion the gross sum to the extent to which it is available for distribution. In the case of Willant Trust, Ltd., there was
- B power to repay more than one debenture, on giving notice. There was money available to repay a second debenture, but no notice was given. The words of the section are wide enough to cover this case. The legislature has said "available to discharge any loan capital or debt" in respect of which a man is a loan creditor. These words cover loan capital or debt
- C which is repayable *in futuro*, and not in the year in question. Where, as in the case of Willant Trust, Ltd., there is a provision for the giving of notice, one cannot say that it is exactly the same as if the provision were not there. Really, however, it makes no difference. The relevant date on
- D the loan is normally the end of the company's financial year. A reasonable time is allowed to give the company an opportunity of deciding how it shall be distributed. The income to be apportioned is the actual income at the end of the year.

Hills followed on the same side.

- E *King, K.C.* : There is no question of any equity. The matter is purely a question of the meaning of the words of the statute. In 1936, the legislature was minded to bring the loan creditor into the region in which he could be dealt with by the Acts. The Act of 1936 is arbitrarily including in
- F a class of persons who had previously been described as members of a company persons who are not members of a company in the ordinary acceptance of the term. They are to be regarded as members for the purposes of the Finance Act, 1936, s. 20. The loan creditor is deemed to have something which he has not. He is deemed to have an interest in the income of the company, which income has to be apportioned to the
- G extent that that income has been expended. It is not possible to read it as meaning to the extent that the gross income has been expended, so far as it represents income tax paid to the revenue. That has gone away. It has gone to the revenue, and cannot be expended towards the discharge of the debt. A creditor can say that he has never had the gross part of the
- H income. The words "to the extent that" are really crucial. They have to be read as limiting the interest of the loan creditor to something less than the gross income. The creditor is deemed to have an interest in the net income corresponding to the net amount.

. *Talbot* : The point which is taken against my client, by way of distinction, is founded upon the fact that in the debenture deed there

is a condition entitling the company to pay off the debenture on giving notice. No notice had been given. On the relevant date, the company could not have paid off the debenture, because it had not given notice. The relevant day is the final day of the accounting period. The provisions of the Act will be unworkable unless that date is taken as the date for apportionment. Unless there is a fixed date, the whole scheme will be unworkable. The company has not given the notice, and so this case is unlike the others. A

The Attorney-General, in reply : The income available for distribution must mean the whole income. The section must mean that the whole of the income is to be treated as available for distribution. That is the gross amount. As regards the Finance Act, 1936, s. 20 (4) (b), I rely upon the concluding words as explained in sect. 20 (7). If it is found that the money in the coffers of the company is available for redemption of loan capital in the following year, one has gone far towards saying that the money is available for the redemption of any of the loan capital. The ordinary meaning of the word "available" and the actual words of the section, as reinforced by the definition clause, make it plain. B C

SIR WILFRID GREENE, M.R. : These are three appeals from judgments of LAWRENCE, J., affirming on one point and reversing on another point decisions of the Special Commissioners. The points involved in the appeals are all the same, but in one of them—that of *Inland Revenue Comrs. v. Willant Trust, Ltd.*—there is an additional point, with which I will deal separately. The nature of the questions and the solution of them are so clearly set out in the judgment of LAWRENCE, J., that I could be content merely to say that I agree with his judgment and with the reasons which he gives for it, but I will add a few words of my own, without going into the details of any of the cases, in reference to the principles involved. D E

The original mischief at which the company's sur-tax provisions in the Income Tax Acts were aimed was the holding up of profits by certain classes of companies, with the result that the members avoided liability to sur-tax. The original provisions of the Acts were directed to that class only. It appears that a certain number of taxpayers, subjects of His Majesty who found it consistent with the dignity of inhabitants of a free country to do so, then proceeded to adopt a method of getting round those provisions. In the present case, we have no knowledge, and, indeed, it is quite immaterial, whether or not that was the motive of the dispositions with which we have to deal. It may or may not have been. I know nothing about it, and I care nothing about it, because the only matter with which we are concerned is the administration of these Acts. F G H

The particular way in which the original provisions were avoided was, instead of vesting the shares in the company in the persons to be benefited, to give them debentures which were paid off periodically,

the amount of the debentures bearing a close relation to the income which would have been distributable among the shareholders if the matter had been done by means of an issue of share capital. The actual shares were left in the hands of persons who were not subject to sur-tax.

A The legislature was minded to bring such dispositions within the ambit of the charge, and accordingly, in 1936, the Finance Act, 1936, s. 20, was enacted. The method by which the legislature aimed at achieving this result was by providing that the holders of loan capital (that is to say, loan capital within the meaning of the section), creditors or debenture holders, should, in certain circumstances, be treated as in B the same position as that of members. In the circumstances stated—I need not go into the details of them—it is provided that the definition of the expression “member” shall, for the purposes of sect. 21 of the original Act of 1922, be extended so as to include any loan creditor of the company, and then any income of the company which is applied in C repaying a loan creditor is to be treated in the same way as though it were profits distributable among shareholders. That, in effect, was the object which the legislature apparently had in view. To anyone closely familiar with the difference between a shareholder of a company and a creditor of a company, it would have at once appeared that that particular D drafting technique was a matter of great difficulty and complication, because it involved bringing artificially into the class of members of a company persons—namely, loan creditors—whose relations with the company were as different from those of members as anything could possibly be.

E The question here is whether the language which has been used by the legislature is apt to put the loan creditor in exactly the same position as that of the member, for the purposes of company sur-tax. The scheme, so far as members were concerned, involved that the income of the company which fell to be apportioned was the actual income—namely, F the gross income before income tax was paid or deducted. It is said in the present case that the sum to be apportioned to the loan creditor is the gross income, and not the net income, or is such proportion of the gross income as equals the sum paid to the loan creditor by way of repayment of his loan, “grossed up” by adding back income tax. The G conception of grossing up the net dividend is, of course, familiar, and is inherent in the structure of the Income Tax Acts, but the conception of treating a creditor who has received, say, £3,000 in repayment of his loan as though he had received £4,000 (assuming that the tax would be £1,000), and saying that the £3,000 that he has received must be grossed H up, is, of course, totally alien to the true relationship of a creditor and a company.

The language with which that result is said to have been achieved is in sect. 20 (4) (b) :

For the purpose of the Finance Act, 1922, Sched. I, para. 8, a loan creditor shall be deemed to have an interest in any income of the company to be apportioned



under that paragraph to the extent that that income, or assets representing it, has or have been expended or applied . . . in redemption or repayment or discharge of the loan capital or debt (including any premium thereon) in respect of which he is a loan creditor.

That is contemplating that the loan will have been discharged either wholly or *pro tanto* by an expenditure of income. In other words, you must look and see whether or not, and, if so, to what extent, the loan has been discharged, and it is to that extent, and no further, that the creditor is to be deemed to have an interest in the income of the company to be apportioned. He is not to be deemed to have an interest in the income *simpliciter*, but only to the limited extent stated, and the limited extent stated is the extent to which it has been expended or applied in discharge of the loan. I am quite unable to read those words as contemplating some notional expenditure over and above the actual amount expended in discharge of the loan. To my mind, it is quite clear that those words can mean only actual discharge of the loan. Consequently, in the example that I took of £3,000 paid to a creditor, it is that £3,000 which is the relevant figure, and it is not legitimate to say that £4,000 has been expended in discharge of the loan, because it has not. That is the first point.

The second point I may put in the words of LAWRENCE, J., himself, who states it very succinctly, and it is, perhaps, unnecessary to repeat it. It raises the question :

whether they [the special commissioners] can apportion to such loan creditors more than the sum due on the loan if the income of the company is sufficient.

All of these companies have more income available than could be used in payment off of debentures, because the debentures were payable only by instalments, or at the rate of one a year, subject to one point in the case of Willant Trust, Ltd., which I shall mention. Apart from that one point, however, they are payable only by stated instalments, or at the rate of one debenture a year. The companies had more than enough to pay the instalment or the debenture, as the case might be. It is said that the balance of the companies' income must be treated as having been available to be expended or applied in discharge of the remainder of the loan capital. The answer to that, in my judgment, is that one must look at the position at the date which is mentioned in the Finance Act, 1922, Sched. I, para. 9—that is to say, the date to which the accounts of the company for the year or period are made up, if that be the one selected. One must at that date look at the income of the company and see what is available to be applied in discharge of the loan capital. If there is no loan capital due at that time, it is, to my mind, not possible to say that the money which the company has is available for the discharge of loan capital merely because at some future time loan capital will fall due for payment.

It is said that "available" must be construed in a much wider sense than that, but insuperable difficulties appear to me to be involved once it is attempted to look at liabilities which are to fall due in the future.

Some of these difficulties are mentioned in the judgment of LAWRENCE, J., and there is no need for me to repeat them. However, I may call attention to one matter which I think does confirm the view which he took (and which I take) upon it, and that is that in sect. 20 (4) (i) of the Act of 1936 provision is made for the case where, not the loan creditor himself, but some beneficiary under a settlement, is entitled to receive the proceeds of the loan. In such a case, it is that beneficiary, and not the loan creditor, who is to be deemed to be the recipient, and who is to be struck with sur-tax. In dealing with that particular situation, however, the language of the proviso is significant :

- B (i) where by virtue or in consequence of any settlement within the meaning of the next following section of this Act a loan creditor has been or could be required by some other person (hereafter referred to as a "beneficiary") to pay to the beneficiary the whole of any sums which have been or might be paid to that loan creditor by the company in redemption, repayment or discharge of the loan capital or debt (including any premium thereon) in respect of which he is a loan creditor . . .
- C The words to which I wish to call attention are the words "which have been or might be paid to that loan creditor." Those are clearly intended to have the same scope and meaning in their context as has the phrase "income which has been expended or applied or is available to be expended or applied." In the case of the proviso, it would be quite impossible to say, if there was a future liability under a debenture falling due, say, two years afterwards, that at the relevant moment those sums could have been required by the beneficiary to be paid to him. Accordingly, it seems to me that the proviso, according to its language, quite clearly would not cover such a case, and, if the proviso does not cover it,
- D it seems to me that that throws light upon the meaning of the language used in subsect. (4) (b).

The other point which arises in the case of Willant Trust, Ltd., is not specifically mentioned in the judgment of the judge, although his judgment and reasoning cover it. It is this. In that case, there is an option in the company to repay all or any of the outstanding debentures on 3 months' notice. At the relevant date—that is to say, the date to which the accounts of the company for the year or period were made up—no such notice had been given. Accordingly, there were no debentures falling due for payment except the one in question, and the result is that the surplus money which the company had could not be said to be available for the discharge of those other debentures, because they were not due. I think that the position in the Willant case is precisely the same as is the position in the other cases.

H In conclusion, I should like to call attention to one more matter which affects the second point in the case. The word "available" first appeared in this legislation in the provision introduced into the Finance Act, 1922, by the Finance Act, 1927, s. 31. That refers to "income available for distribution among the members of the company." That is where the word "available" appears there, and, when the legislation in 1936 introduced this highly artificial conception of loan creditors .

being treated as members, they could not, of course, use the phrase "income available for distribution among the members," but they altered the language, and used the phrase "available to be expended in redemption or repayment or discharge of the loan capital," thereby endeavouring to put the loan creditor in the same position as that of the member. It is to be observed, however, that the income available for distribution among the members is income which would have gone to the members, and could have gone to the members, if the company had decided to distribute it. In the case where the loan capital is not immediately payable, the income could not go to that loan creditor even if the company wished to pay it to the loan creditor, because the company could not compel the loan creditor to take it. Accordingly, if the Crown's contention be right, the position of the loan creditor would not be in step with that of the member. That is, I think, an additional reason for giving to the words in question the construction which I have given them. All three appeals fail, and must be dismissed with costs.

FINLAY, L.J. : I entirely agree with the way in which the case is dealt with by LAWRENCE, J., in the court below. I also agree with all that has been said by SIR WILFRID GREENE, M.R., and I myself do not desire to add anything.

LUXMOORE, L.J. : I also agree.

Appeals dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors : *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners); *Herbert Reeves & Co.* (for Kered, Ltd.); *Biddle, Thorne, Welsford & Gait* (for Sigma Trust, Ltd.); *Gilbert Samuel & Co.* (for Willant Trust, Ltd.).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

SPENCE v. SPENCE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **November 29, 30, December 1, 19, 1938.**]

Divorce—Desertion—Acts of husband not amounting to legal cruelty—Departure of wife from matrimonial home—Tacit consent of husband.

The parties were married for the first time in July, 1913, the wife being then under 21 years of age and 28 years younger than her husband. They were divorced in 1920, but remarried in 1927, and separated again in 1934. Throughout a large part of their married life, they quarrelled bitterly, and ultimately these quarrels degenerated into physical struggles. The injuries inflicted by the husband in these struggles did not amount to legal cruelty, and, although the health of the wife might have been affected by the worry of these conflicts, there was no question at all of her health being injured, either in the present or in the future. In 1934, the wife made repeated attempts to leave her husband, and ultimately left him on Sept. 18, 1934. For at least a fortnight before

that date, the wife had, to the knowledge of the husband, made open and active preparations for departure, and the division of their household property had been discussed :—

HELD : the separation did not amount to separation by either side, since the departure of the wife from the matrimonial home was with the complete consent and approval of the husband.

- A [EDITORIAL NOTE.** It was argued in this case that, where the faults of conduct were equal on each side, the act of one spouse in leaving the matrimonial home with the intention not to return would constitute desertion. This contention was not finally accepted or rejected, the judge merely stating that he was inclined to accept it subject to the addition of the further term that the leaving must be unaccompanied by any agreement or concurrence upon the part of the other spouse. The additional term is very material, since, if it were not essential, it would be within the power of the parties to obtain a consensual divorce.

AS TO NATURE OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, paras. 963, 964 ; and FOR CASES, see DIGEST, Vol. 27, pp. 310-312, Nos. 2881-2900.]

- C** Cases referred to :

- (1) *Sickert v. Sickert*, [1899] P. 278 ; 27 Digest 315, 2930 ; 68 L.J.P. 114 ; 81 L.T. 495.
- (2) *Harriman v. Harriman*, [1909] P. 123 ; 27 Digest 321, 2995 ; 78 L.J.P. 62 ; 100 L.T. 557.
- (3) *Ward v. Ward* (1858), 1 Sw. & Tr. 185 ; 27 Digest 310, 2881 ; 27 L.J.P. & M. 63 ; 31 L.T.O.S. 238.

- D**

PETITION by husband for dissolution of marriage on the ground that the wife had been guilty of desertion for a period of 3 years immediately preceding the presentation of the petition. On the pleadings in the shape which they finally assumed, the wife, in answer to the petition, **E** pleaded (i) that she was forced to leave the husband by reason of his cruelty, and (ii) that the husband had acquiesced in her conduct in leaving him as aforesaid, but the wife had filed a cross-petition which was withdrawn.

Noel Middleton, K.C., and R. Bush James for the husband.

- F** *D. Rowland Thomas, K.C., and Hon. Victor Russell* for the wife.

G LANGTON, J. : This is an unusual case, concerning two rather unusual people. I cannot say that it actually raises any new point of law, but it presents a somewhat unfamiliar aspect of the offence of desertion. Since the passing of the Matrimonial Causes Act, 1937, which made desertion a ground for dissolution of marriage, desertion has attained an added importance in law, and it is for this reason that I have thought it well to consider my judgment.

H Although, of necessity, a considerable amount of time had to be expended in eliciting and elucidating the facts, I do not feel any doubt concerning them. The parties were married for the first time on July 18, 1913. The husband is an Englishman, and is now over 70 years of age. The wife, who is as much as 28 years junior to her husband, is French by origin, and in 1913 was under 21 years of age. On Nov. 26, 1920, the wife divorced the husband in Scotland, on the ground of his

adultery with a lady whom Mr. Spence thereafter married. In 1926, Mr. Spence divorced the lady who had come between him and his first wife, the present Mrs. Spence, and on June 23, 1927, the petitioner and respondent were married a second time. During their first marriage, two children—a son and a daughter—were born, and both are living to-day. The matters before me consist, in the first place, of a petition A by the husband, Wilfred Lawson Spence, on the ground of his wife's desertion, and, in the second place, of a cross-petition on the part of the wife, Yvonne Marie Spence, based on the two grounds of cruelty and desertion. The husband's petition bears the date Feb. 7, 1938. To this the wife replied on Apr. 21, 1938, subsequently filing her cross- B petition on June 10, 1938. After various amendments and withdrawals, the position to-day is that the wife no longer asks for a divorce, but is content to answer her husband's petition on the two grounds that she was forced to leave him by his cruelty, and that her husband acquiesced in her action in leaving the matrimonial home. I have had very ample C opportunities of studying both Mr. Spence and his wife, for counsel on each side have respectively examined and cross-examined them at very considerable length concerning every incident of importance which has occurred during their second term of married life.

Mr. Spence is a man whose character it is not at all difficult to read. D In the course of the argument, I pointed out more than once that he had impressed me as a perfectly honest man. During the last few years, he has undergone no less than five major operations. Nevertheless, at the age of 70 he presents a hale and hearty appearance, his mind is alert and acute, and he has every appearance of vigour in body and mind. E He is, however, a man of such high temper and such intensity of conviction that it is almost impossible for him to state any case, whether his own or someone else's, dispassionately or fairly. To take a few instances which remain in my memory, he is obviously a man of the most violent political views. Only with difficulty did I succeed in preventing him F from launching upon a diatribe against a distinguished ex-Cabinet Minister who has political connections with Leamington. In passing allusions to his wife, he described her as having a genius for nagging, and the worst sense of humour in the world, and he is obviously ready to believe that in meanness, avarice, and ingratitude she is without G rival, and beyond compare. He described his son as a lout, who was too idle and spoilt ever to be capable of useful work. His daughter, with whom he could only recall one serious difference of opinion, when she had used an insulting expression for which he had promptly, and, as it seemed to me, with justification, boxed her ears, fared scarcely H better at his hands. When I asked him, *à propos* of an incident when she said that she had tried to see him, whether he on his side desired to see her, he replied that he did not really desire to see her again, because she had changed her religion against his will since she had left his house. By a great effort of self-control, Mr. Spence managed to restrain his

irascibility during a great portion of his sojourn in the witness-box, but towards the end his impatience so frequently got the better of him that I was obliged to intervene to save cross-examining counsel from the full consequences of his wrath.

A Mrs. Spence too, in spite of her French origin and a certain handicap in the English tongue, did not strike me as either a complex or a difficult character to assess. Her friend, Mrs. Lee, who came to give evidence on her behalf, agreed with my estimate of Mrs. Spence that she was a woman of spirit and courage, who was both able and determined to stand up for herself. For my part, I am not afraid to go further, and to express
B the view that she is a woman of exceptional obstinacy and determination. While listening to her evidence, I endeavoured never to lose sight of the fact that her husband, far older than herself, had wronged her seriously as a young woman, and, after I had made Mr. Spence's acquaintance, and had heard and seen him for 4 hours in the witness-
C box, I was well able to believe that he was a most difficult man with whom to live. Bearing all this in mind, and making the greatest allowances for Mrs. Spence, I am satisfied that she was hard and unsympathetic, and went to work in the worst possible way to deal with a spirited and choleric husband who was not without great qualities of mind and
D heart. It is undeniable that Mr. Spence has acted with great generosity towards his children, and it is impossible, even upon a 4-hours' acquaintance, not to recognise that he is a man with kindly instincts and of great candour. Unfortunately, whenever Mrs. Spence found herself at issue with her husband, she resorted in their latter years to every kind
E of irritating dodge and reprisal with the intention of bending his will to hers. Mr. Spence, no doubt, as usual, over-coloured his picture when he described his wife as possessing a genius for nagging. On the other hand, the evidence completely satisfies me that, so far from humouring her husband, or using any gentle arts towards him, Mrs. Spence took
F every small point against him to the full, and made a mountain out of every molehill of dispute. In the circumstances, it is not surprising that in the last years of their companionship—namely, 1933 and 1934—the contests between them at times degenerated into physical struggles. In the course of these undignified but not very serious combats, both received
G physical injuries which have, I am afraid, left unforgettable mental scars. Mr. Spence, who, it will be remembered, was a man nearing 70 years of age at the time, and in anything but continuously robust health at that period, tells me that he has had dressed by a doctor wounds inflicted by his wife through the medium of the fire-irons. Mrs.
H Spence, on the other hand, complains of a series of acts which she has sought to elevate to the height of legal cruelty, but which, when sifted, do not amount to anything more than her natural portion of the damage likely to accrue from a rough-and-tumble with a small, much older, but very determined husband. Given the fact, which I accept, from Mr. Spence, that his wife bruised exceptionally easily, I think that it is very

likely that she had occasional bruises to show, but I am clearly and perfectly convinced that neither Mrs. Spence nor her daughter ever felt the slightest physical fear of Mr. Spence, and, however the health of Mrs. Spence might have been affected by the nervous worry of perpetual conflicts with her husband, there was no question at all of her health being injured, either in the present or in the future, by any physical acts or mental cruelty for which he was responsible. A

To sum up the joint effect of the evidence of these two parties, the truth is that throughout a large portion of their term of marriage they quarrelled bitterly, and, latterly speaking, before the parting on Sept. 18, 1934, they quarrelled often, and all affection for one another had entirely left them. To-day, after 4 years of unhappy memories, each has forgotten all the grievances of the other party, and remembered with intensified clarity his own. This festering recollection has probably led in each case to considerable exaggeration of their real or fancied wrongs. Their married life came to ship-wreck the second time, neither on account of any cruelty on the part of Mr. Spence, nor, as was further suggested against him, on account of his attentions to other women, but solely because two people of inflexible will were daily pitting themselves against each other in every small rub of married life, without any particle of the softening influence of mutual affection and esteem. B C D

It was not alleged against Mr. Spence that during the second period of his married life he had committed adultery. In view, however, of his first offending in this regard, his relations with other women were naturally suspect to his wife, and on one occasion she carried these suspicions so far as to employ detectives to follow her husband. The results were so meagre that the detectives were not able to find him out in any transgression more serious than that of kissing a hospital nurse of mature years who had done him much kindly service during one of his many illnesses. I have no doubt at all that these suspicions, however natural in the circumstances, were in reality quite unfounded, though no doubt they served at times to feed the growing flames of resentment which flared up between the parties. E F

I find, upon the whole of the evidence before me, that Mr. Spence was not guilty of any cruelty to his wife, and did not by his conduct force her to leave him. Towards the middle of 1934, it became apparent to both parties that the position was rapidly becoming intolerable, and Mrs. Spence made repeated threats to leave her husband. I find that the fault or faults in conduct which led up to this position between the parties were faults equally attributable to both sides, and that it is not possible to say that it was due to the conduct of one alone that their cohabitation was terminated. G H

The circumstances in which Mrs. Spence came to leave her husband can be related very briefly. For at least a fortnight before she actually left her home, Mrs. Spence was engaged in quiet but open and active preparations for departure. Her husband was perfectly aware of her

- intentions, and indeed the division of their various household goods was discussed and debated between them, not without considerable tinges of what had then become habitual acrimony. Mr. Spence made not the smallest attempt to deter, or even to delay, his wife's departure. Indeed, when I put it to him that he had probably hailed her determination to
- A leave him with feelings of profound relief, he thought carefully before answering, and told me that he was a little sorry to see his children go, and even more sorry to be obliged to give up residence in a house upon which he had expended much care and money. He was far too honest to pretend that he had felt the slightest regret at parting from his wife.
- B In a period of 4 years, he has made no kind of effort to compass her return, and, indeed, save for one cautious inquiry through a solicitor as to whether she had any intention in that matter, does not seem to have concerned himself about it at all.

- To my thinking, it is quite impossible to describe a parting of this
- C kind between the spouses as desertion by either side. As GORELL BARNES, J., said in *Sickert v. Sickert* (1), at p. 282 :

- In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion,
- D the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.

- It has always seemed to me that this paragraph constitutes a most
- E comprehensive compendium of the law of desertion. Nor can I see that the passing of the 1937 Act (save, of course, as to the imposition of a term of years) has done anything to impair its value.

- Mr. Middleton, on behalf of Mr. Spence, pressed upon me the familiar passage so often quoted from the judgment of BUCKLEY, L.J., in
- F *Harriman v. Harriman* (2), at p. 148 :

Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her.

- I may point out in passing that I have considerable doubt as to whether it is right to treat this statement as anything but *obiter*. It will be
- G remembered that the point at issue in that case was as to the effect of a non-cohabitation clause in a magistrate's order. The very familiar *dictum* of BUCKLEY, L.J., which I have set out above occurs in the course of his consideration of the words of COCKBURN, C.J., in *Ward v. Ward* (3). After saying that the language of COCKBURN, C.J., is perfectly accurate
- H if confined to its context, he continues, as it were *arguendo*, to state the limitation of the context, and it is in so speaking that the passage quoted above occurs. If this passage were excised, the *ratio decidendi* of the judgment of BUCKLEY, L.J., would remain entirely untouched. Having made this comment, I desire to say that, taken in its context, I respectfully and entirely agree with the *dictum* of BUCKLEY, L.J. If one en-

visages the simple example of a wife who, after being treated with brutal cruelty sufficient to drive her from her home, sees with a certain sensation of relief that her husband is adding to his offences by deserting her, it is obvious that the existence of this sensation does nothing to qualify or mitigate the husband's offence of desertion. The limitations to be attached to this *dictum* of BUCKLEY, L.J., appear at once upon a consideration of the language of GORELL BARNES, J., in *Sickert v. Sickert* (1). Whilst it is true that the actual feelings of the deserted party may not be material in any given case, there must be, in order to constitute a matrimonial offence, an intention on the part of the accused party to desert the other. The intention is equally present in the two cases of simple and of constructive desertion. In the first instance, the intention is usually quite easy to collect from the act of leaving the matrimonial home. In the second case, there can be no constructive desertion unless the conduct of the accused party has been of such a character as to drive the other spouse from home, in which case the intention to desert must be implied. In the class of case envisaged by BUCKLEY, L.J., in *Harriman's case* (2), the wife would be feeling, and perhaps even expressing, relief in being called upon to suffer the lesser of two evils—desertion instead of cruelty—but the evil would none the less be there. In other words, the parting must be unfairly or unreasonably imposed by the offending spouse in order to constitute desertion. In the present case, it is unnecessary to go further than to recognise the position created by the tacit consent of Mr. Spence to the departure of his wife.

Mr. Middleton, in an able and instructive argument, contended that, where the faults of conduct are equal on each side, the act of a spouse leaving the matrimonial home with the intention not to return constitutes desertion. Without deciding the point, I am inclined to think that this contention is correct if the leaving be unaccompanied by any agreement or concurrence upon the other side. Mr. Middleton did not contend, however, that, if the parties separated by consent, whether tacit or expressed, there could be any case of desertion. Indeed, if this were possible, the greater part of the new Act of Parliament would have been superfluous, because it would have been put within the power of the parties to obtain a consensual divorce. Since, therefore, I am clearly of opinion that Mrs. Spence left her husband with his complete consent, and even with his approval, and that he was well aware that, when she left on this occasion, she had no intention of returning, he is unable to claim now that his wife deserted him. The position, must, therefore, be that the petitioner's claim fails, and, since Mrs. Spence no longer makes any cross-claim for a divorce, both petitions must be dismissed.

Petitions dismissed.

Solicitors: Preston, Lane—Claypon & O'Kelly (for the husband); Arthur Benjamin & Cohen (for the wife).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

DANN v. HAMILTON.

[KING'S BENCH DIVISION (Asquith, J.), November 14, December 19, 1938.]

Negligence—Defences—Volenti non fit injuria—Passenger in motor car with knowledge of intoxication of driver—Opportunity of leaving car.

The plaintiff was injured while travelling as a non-paying passenger in a car driven by one H. Prior to the accident H. had been drinking, and this had markedly affected his driving, which thereafter was fast and erratic. During a stop to let down a passenger, the plaintiff, who by then knew that H., while far from being dead drunk, was not sober, and that there was a certain danger in being a passenger in a car driven by him, had an opportunity of leaving the car, but elected to continue the journey. Shortly afterwards, the accident occurred, and it was contended for the defence that the maxim *volenti non fit injuria* applied :—

HELD : the plaintiff was entitled to succeed. By voluntarily travelling in the car with knowledge that through drink H. had materially reduced his capacity for driving safely, she did not impliedly consent to, or absolve H. from liability for, any subsequent negligence on his part which might cause injury to the plaintiff.

[EDITORIAL NOTE.] The defence of consent, or *volenti non fit injuria*, has usually been relied upon in cases arising out of the relationship of master and servant. Despite some statements to the contrary, it seems now settled that the defence is available in a case of pure tort, where the negligence complained of is unassociated with any contract. It is generally stated that there must be (i) perception, (ii) appreciation, and (iii) acceptance, of the risk. The present decision perhaps adds a qualification to the third essential—namely, that there must be such a consent to the negligence or acceptance of the risk as to absolve the defendant from liability for injury to the plaintiff.

AS TO DEFENCE OF VOLENTI NON FIT INJURIA, see HALSBURY, Hailsham Edn., Vol. 23, pp. 715-719, paras. 1006-1009; and FOR CASES, see DIGEST, Vol. 36, pp. 92-98, Nos. 608-653.]

Cases referred to :

- (1) *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; 36 Digest 8, 10; 56 L.J.Q.B. 340; 57 L.T. 537.
- (2) *Smith v. Baker & Sons*, [1891] A.C. 325; 36 Digest 95, 633; 60 L.J.Q.B. 683; 65 L.T. 467.
- (3) *Ilott v. Wilkes* (1820), 3 B. & Ald. 304; 36 Digest 94, 628.
- (4) *Cleghorn v. Oldham* (1927), 43 T.L.R. 465; 36 Digest 15, 60.
- (5) *Torrance v. Ilford Urban District Council* (1909), 73 J.P. 225; 36 Digest 96, 636.
- (6) *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K.B. 297; Digest Supp.; 102 L.J.K.B. 663; 149 L.T. 436.
- (7) *Woodley v. Metropolitan District Ry. Co.* (1877), 2 Ex. D. 384; 36 Digest 92, 610; 46 L.J.Q.B. 521; 36 L.T. 419.
- (8) *Membury v. Great Western Ry. Co.* (1889), 14 App. Cas. 179; 36 Digest 93, 613; 58 L.J.Q.B. 563; 61 L.T. 566; *affg.* (1888), 4 T.L.R. 504; *revsq.*, 4 T.L.R. 265.

ACTION for damages for personal injuries sustained in a motor car accident. The defence relied upon was that the plaintiff had voluntarily become a non-paying passenger in the car at a time when she knew the driver was under the influence of drink, and that therefore the maxim

volenti non fit injuria applied. The facts of the case are fully set out in the judgment.

H. I. P. Hallett, K.C., and *C. N. Shawcross* for the plaintiff.

P. E. Sandlands, K.C., and *T. F. Davis* for the defendant.

ASQUITH, J. : I reserved judgment in this case because it seemed A to me to be one of some difficulty. The situation involved is one which must often have occurred in the past, and which may be expected to recur, but I have been unable to find, nor have counsel cited to me, any authorities precisely in point.

In this action, the plaintiff claims damages for personal injuries which B she sustained, as she alleges, by reason of the negligent driving of a man named Hamilton, when she was a passenger in his car. Hamilton was killed in the accident, and the claim is therefore brought under the Law Reform (Miscellaneous Provisions) Act, 1934, against his widow, as representing C his estate. The defendant originally denied the negligence and the damage. She also relied, as an alternative defence, upon the maxim *volenti non fit injuria*, alleging that, if the deceased were negligent, the plaintiff well knew that he was under the influence of drink to such an extent as to be incapable of having control of the car, and that D the plaintiff nevertheless became, and/or elected to remain, a passenger in the motor car, and that she voluntarily took the risk involved therein. During the trial, the denial of negligence on the part of the deceased was withdrawn, and the special damage was agreed at £35 19s. 4d. This left outstanding (i) the issue as to general damages, and (ii) the issue as to whether or not the claim was defeated by the maxim *volenti E non fit injuria*.

As a matter of strict pleading, it seems that the plea *volenti* is a denial of any duty at all, and, therefore, of any breach of duty, and an admission of negligence cannot strictly be combined with the plea. The plea *volenti* differs in this respect from the plea of contributory negligence, F which is not raised in this case : see the observations of BOWEN, L.J., in *Thomas v. Quartermaine* (1). This technicality, however, is of no consequence in the present case.

The accident occurred on Apr. 27, 1937, at about two minutes before midnight, on a road between Hounslow and Staines. Earlier in the G evening, the deceased had driven the plaintiff and her mother, a Mrs. Rolfe, in his car to London to see the Coronation decorations. They had had a high tea (without alcohol) at Lyons' Corner House, Charing Cross, at 6 p.m., and between 9.30 p.m. and 10 p.m. they had had some beer at an unidentified public-house in London. It does not appear H how much beer Hamilton drank at this stage. Then, Hamilton driving and Mrs. Rolfe sitting beside him in front, while the plaintiff sat at the back, they motored to the Milford Arms, on the outskirts of Hounslow. The plaintiff denies that any further liquor was consumed here, saying that the public-house was just closing (it was 10.30 p.m.), but the party

here met a Mr. Taunton, whom all, or some, of them had known, in connection with insurance business, he being an agent for the Prudential Assurance Co. Taunton says that Hamilton and he each had a drink at the Milford Arms. Hamilton, he thinks, had beer. Hamilton's condition at this time is described by Taunton in the words: "He wasn't drunk, but I could see he had had one or two drinks." His condition is described by the plaintiff in the words: "It was obvious that Hamilton had had something to drink, but not a great deal." Hamilton seems to have been somewhere in the limbo which divides complete sobriety from mild intoxication. Someone then suggested, the Milford Arms having closed, that they should go on to the Osterley Park Club, which would still be open, and this they did, Hamilton still driving, and Taunton sitting behind with the plaintiff. Taunton says Hamilton drove rather too fast, and swerved slightly, but it does not appear that he was driving dangerously at this stage.

There is a conflict of evidence as to what happened at the Osterley Park Club. Taunton says that Hamilton ordered a round of drinks, including a pint of beer each for Taunton and himself, and that he drank his own pint rapidly, quarrelled with the waiter, ordered a second round (which was brought) and threatened to punch Taunton's nose for offering to pay for the second round. If he was in the state of noisy intoxication described by Taunton, it is curious that the waiter should have served him a second time, but I accept Taunton's account of the behaviour of Hamilton and of the events of the evening generally as in substance accurate, though somewhat over-coloured. The plaintiff remembers none of these events, but it is quite likely that the injury she sustained later impaired or obliterated her recollection, not merely of the accident itself, but also to some extent of preceding events. It is common ground that at no stage was she herself under the influence of drink at all. The party then agreed to drop Taunton at his house in Loring Street, about a mile off. Taunton says that he was asked by the two women to drive, but that Hamilton refused to let him. Anyhow, Hamilton drove down Wood Lane at an excessive speed, bumped over a level crossing, overshot the turning to the right into the London Road, which he should have taken, and passed straight over that road at high speed into Amherst Gardens, where Taunton induced him to pull up. The plaintiff agrees that there was some talk in the car about Hamilton driving too fast at this stage. Hamilton and Taunton then dismounted and went to the side of the road. According to Taunton, Hamilton was very drunk, but, on securing a promise from Hamilton, Taunton allowed him to remain at the wheel, and once more got into the back of the car. I do not think that he would have accepted Hamilton's promise if Hamilton had been as drunk as he suggests.

For a while, along the Twickenham Road, Hamilton went slowly, and then, after turning into Linkfield Road, he again accelerated and went up it to the corner of Loring Street at what seemed to Taunton to be

an excessive speed. Here Taunton was set down, his house being only 50 yds. off. He says that, before leaving, he said to the ladies, who were going on in the car, "You two have more pluck than I have," and the plaintiff answered: "You should be like me. If anything is going to happen, it will happen." The plaintiff does not remember this interchange, but I find that it, or something like it, in fact took place. A How seriously the words were spoken does not appear. Such words are often spoken semi-jokingly. The car then left, at 11.50 p.m. Eight minutes later, the accident occurred. It was a very bad accident. Hamilton was killed outright, Mrs. Rolfe was fatally injured, and the plaintiff sustained the damage which is the subject-matter of the present B claim.

As I have said, it is common ground that the deceased, Hamilton, negligently caused the collision, and the evidence further satisfies me that his driving at the time of the collision was that of a man, not only negligent, but negligent through excess of drink. The question is whether, on those facts, the rule or maxim *volenti non fit injuria* applies C so as to defeat the plaintiff's claim. It has often been pointed out that the maxim says *volenti*, not *scienti*. A complete knowledge of the danger is in any event necessary, but such knowledge does not necessarily import consent. It is evidence of consent, weak or strong according D to circumstances. The question whether the plaintiff was *volens* is one of fact, to be determined on this amongst other evidence: see *Smith v. Baker & Sons* (2), and other authorities.

As to knowledge, I find as a fact that the plaintiff knew at 11.50 p.m., when Taunton was set down, that Hamilton, while far from being dead E drunk, was under the influence of drink to such an extent as substantially to increase the chances of a collision arising from his negligence, that with this knowledge she re-entered the car, and that, in so doing, she was not acting under the pressure of any legal or social duty, or through F the absence of alternative and practicable forms of transport, since she could have gone home by bus for 2d. Is this enough to constitute her *volens* for the purposes of the maxim? Indeed, is it clear that the maxim applies at all to the present case?

The authorities as to the scope and limits of the maxim, and its application, afford less guidance than might have been desired in a case like the G present. In most of the decided cases, the plaintiff is servant and the defendant master, under a contract of employment. The question then is whether that contract includes a term, express or implied, whereby the servant exonerates the master from liability for any injury, otherwise H actionable, which the servant may sustain in the performance of his duties. These authorities, though undoubtedly instructive, have no direct application where, as in this case, no contract of any kind exists, and the liability alleged is one of pure tort.

The maxim, however, undoubtedly applies in many cases of pure tort, but case law in this field is very scanty. This is not, perhaps, because

its application is rare in this field, but because in a large class of cases its applicability is so obvious as not to be brought to the test of litigation. It is manifest, for instance, that the consent of the patient relieves the dentist who extracts a tooth, or the surgeon who extracts an appendix, of liability for assault, to which their action would otherwise amount.

- A In these cases, the certainty of physical injury is consented to. In another class of cases, perhaps more numerous, a man is not courting injury, but wishes to avoid it, but he nevertheless consents to the risk of its occurrence—for example, when he voluntarily engages in a game of cricket, or a boxing-match (with adequately padded gloves), or a fencing bout (with adequately buttoned foils). In such cases, he impliedly consents to the risks ordinarily incident to those sports, and here again, in the absence of consent, the party who sustains injury would be entitled to sue for assault, or otherwise for trespass to the person. Outside games and sports, the same principle was applied in *Hott v. Wilkes* (3) to a poacher who, having due notice that spring-guns were set on the defendant's land, proceeded deliberately to trespass thereon, and was injured. The case seems to have been good law before the Spring Guns Act, and I think it is in principle good law to-day.

- D Those are cases of trespass to the person. How stands the matter with regard to the tort of negligence, as we may now venture to call it? Does the maxim apply to negligence at all? *Cleghorn v. Oldham* (4) seems to decide that in relation to negligence the maxim does not apply at all. This case, however, was decided in relation to a particular game—namely, golf—and it would be improper to stretch general propositions laid down in it beyond the subject-matter immediately concerned.

- F Some text-book writers of authority, notably BEVEN ON NEGLIGENCE, 4th Edn., at p. 790, roundly deny that the maxim applies to cases of negligence at all. This is a hard saying, and must be read, I think, subject to some implied limitation. Where a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply, and to protect the defendant. Instances are *Torrance v. Ilford Urban District Council* (5) and the more recent *Cutler v. United Dairies (London), Ltd.* (6). Where, however, the act of the plaintiff relied on as a consent precedes, and is claimed to license in advance, a possible subsequent act of negligence by the defendant (and this, I think, must be the case BEVEN had in mind), the case may well be different. Here, *Smith v. Baker & Sons* (2) does not help as much as might be expected. In any case, it turned on contract, which is not in question here.

With some qualifications, POLLOCK ON TORTS, 13th Edn., supports BEVEN'S dictum, declaring, at p. 172 :

The whole law of negligence assumes the principle of *volenti non fit injuria* not to be applicable.

He points out, quoting the observations of LORD HALSBURY, L.C., in *Smith v. Baker & Sons* (2), that anyone crossing a London street knows that a substantial percentage of drivers are negligent. If a man crosses deliberately, with this knowledge, and is negligently run down, he is certainly not *volens*, and is not, therefore, precluded from a remedy. SIR FREDERICK POLLOCK adds, at p. 173 :

A man is not bound at his peril to fly from a risk from which it is another's duty to protect him, merely because the risk is known.

In *Woodley v. Metropolitan District Ry. Co.* (7), MELLISH, L.J., carries this illustration a step further. He says, at p. 394 :

Suppose this case : a man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defence : " You know my style of driving, you had seen me drive for a fortnight, I was only driving in my usual style."

The judgment of MELLISH, L.J., in this particular case was a minority judgment, but seems to have been preferred to that of the majority of the House of Lords in the later case of *Membery v. Great Western Ry. Co.* (8).

Cannot a yet further step be safely taken ? I find it difficult to believe, although I know of no authority directly in point, that a person who voluntarily travels as a passenger in a vehicle driven by a driver who is known by the passenger to have driven negligently in the past is *volens* as to future negligent acts of such driver, even though he could have chosen some other form of transport if he had wished. Then, to take the last step, suppose that such a driver is likely to drive negligently on the material occasion, not because he is known to the plaintiff to have driven negligently in the past, but because he is known to the plaintiff to be under the influence of drink. That is the present case. Ought the result to be any different ? After much debate, I have come to the conclusion that it should not, and that the plaintiff, by embarking in the car, or re-entering it, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for, any subsequent negligence on his part whereby the plaintiff might suffer harm.

There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, inter-meddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *volenti non fit injuria* would apply, for in the present case I find as a fact that the driver's degree of intoxication fell short of this degree. I therefore conclude that the defence fails, and the claim succeeds. I arrive at this conclusion with the less reluctance in that it

would be unjust that the deceased man's estate should be protected from suit by the mere fact that he got drunk before committing the final act of negligence, whereas, if he had committed the same act when sober, his estate would have been liable. The deceased was in fact, at the material time, at the time when the plaintiff re-entered his car, guilty
 A of the criminal offence of being drunk in charge of a car, and possibly, later, of the further criminal offence of manslaughter. According to some authorities, this in itself would be sufficient to exclude the operation of the maxim *volenti non fit injuria*. However, this seems to me to be open to question, and I prefer to base the present judgment on the
 B grounds indicated above.

If I am right, the defendant, as representing the deceased man's estate, is liable. The special damage has been agreed at £35 19s. 4d. I assess the general damage at £200, and there will be judgment for the plaintiff for £235 19s. 4d., with costs.

C Solicitors: *Gibson & Weldon* (for the plaintiff); *C. Howe Browne* (for the defendant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

D KEARRY v. PATTINSON.

[COURT OF APPEAL (Slessor, Clauson and Goddard, L.JJ.), December 20, 1938.]

E *Animals—Property in animals—Bees—Swarming and escaping on to a stranger's land—Right to pursue—When bees are feræ naturæ. Trover and Detinue—Conversion—Refusal to allow entry on land to recover property—Bees swarming and escaping on to defendant's land.*

F Some of the plaintiff's bees swarmed and settled on the defendant's land. The defendant refused to allow the plaintiff to enter upon his land and retake the bees, which were thereby lost. The plaintiff brought an action to recover the value of the bees, the case being argued principally as one of conversion:—

HELD: (i) the bees were the plaintiff's property so long as they were in his sight and he had power to pursue them.

(ii) power of pursuit ended when they had left his land and flown on to the land of another. They thereupon ceased to be chattels, and reverted to *feræ naturæ*, and were in no one's possession until
 G such time as they should be retaken and rehived.

(iii) they would thereupon become the property of the person who retook and rehived them.

(iv) the plaintiff had, therefore, no right to enter upon the defendant's land, and the action failed.

H [EDITORIAL NOTE. It has been said that a defendant may justify entry upon the plaintiff's land to remove his goods if (a) they have been placed there by the plaintiff, (b) they have been placed there by the felonious act of a third person, or (c) they have got there by accident. There is, however, no case to justify an entry upon the land of another to retake an animal, except, perhaps, where it has wandered from a right of way on to the servient tenement (*Anon.* (1631), *Het.* 166; 43 *Digest* 412, 353). The judgments herein discuss the right of the owner of bees to follow them on to the land of another, but it must be noted that the actual claim in the

action from which this appeal resulted was for damages in respect of the loss incurred by the refusal of the defendant to permit the plaintiff to go upon the defendant's land in pursuit of the bees.

AS TO ENTRY ON THE LAND OF ANOTHER TO RECOVER PROPERTY, see HALSBURY, 1st Edn., Vol. 27, Trespass, pp. 862, 863, para. 1516; and FOR CASES, see DIGEST, Vol. 43, pp. 411-413, Nos. 341-359.]

Cases referred to :

- (1) *Gedge v. Minne* (1613), 2 Bulst. 60; 43 Digest 411, 341.
- (2) *Hannam v. Mockett* (1824), 2 B. & C. 934; 2 Digest 209, 48; 2 L.J.O.S. K.B. 183.
- (3) *Tibbs v. Smith* (1661), T. Raym. 33.
- (4) *Anthony v. Haney* (1832), 8 Bing. 186; 43 Digest 412, 350; 1 L.J.C.P. 81.
- (5) *Smart Bros., Ltd. v. Holt*, [1929] 2 K.B. 303; Digest Supp.; 98 L.J.K.B. 532; 141 L.T. 268.
- (6) *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488; 9 L.J.O.S. Ex. 145.
- (7) *Wansborough v. Maton* (1835), 4 L.J.K.B. 154; 43 Digest 482, 194.
- (8) *Goff v. Kilts* (1836), 15 Wendell, N.Y., 550.
- (9) *Brown v. Eckes* (1916), 160 N.Y. Supp. 489.
- (10) *Harris v. Elder* (1893), 57 J.P. 553; 2 Digest 209, case 50i.
- (11) *Quantrill v. Spragge* (1907), 71 J.P. Jo. 425; 2 Digest 209, 50.
- (12) *Van Toll v. Wall* (1859), 1 F. & F. 504; 43 Digest 482, 195.
- (13) *Walker v. Clyde* (1861), 10 C.B.N.S. 381; 43 Digest 483, 198.

APPEAL by the plaintiff from a decision of His Honour JUDGE SIR REGINALD BANKS given at Kingston-upon-Hull County Court, and dated Oct. 12, 1938. The facts of the case are fully set out in the judgments.

Ralph S. Shove for the appellant.

Alastair Sharp for the respondent.

Shove : It is not necessary that the defendant should actively interfere with the bees in order to give the plaintiff a cause of action. The gist of the action is failure to deliver up the plaintiff's property, or to allow him to retake it. Merely preventing a person from retaking gives a cause of action. There can be property in bees, and power to pursue them : see BLACKSTONE'S COMMENTARIES, 1825 Edn., Bk. 2, p. 393. This passage was taken from BRACON, who in turn took it from the INSTITUTES OF JUSTINIAN. He said that your swarm of bees was yours so long as it remained in view and was easy of pursuit : *nec difficilis ejus persecutio est*. No matter how a chattel comes into a person's hands, he must give it up to the owner. The cases go so far as to say that it is conversion if he does not. It is immaterial how the goods have come into the defendant's possession. Merely preventing the owner from retaking is conversion, even if there is no intermeddling with the goods. [Counsel referred to SALMOND ON TORTS, 9th Edn., pp. 305, 307, 310.] Bees are property, and can be the subject of larceny : *Mackwell v. Cresset* (2). In *Tibbs v. Smith* (3), it was impliedly held that bees can be stolen, as it was held to be slanderous to say : " You have stolen our bees." [Counsel referred to HOULDSWORTH'S HISTORY OF ENGLISH

LAW, 3rd Edn., Vol. 3, p. 326, *Gedge v. Minne* (1), *Anthony v. Haney* (4), *Smart Bros., Ltd. v. Holt* (5), *Gledstane v. Hewitt* (6), *Wansborough v. Maton* (7) and THEOBALD'S LAW OF LAND, p. 200.] It has definitely been held in the United States that a man can follow his swarm of bees : *Goff v. Hiltz* (8) and *Brown v. Eckes* (9). If a swarm of bees is a chattel, A then there is no distinction between it and a horse, or a tamed deer that has escaped and gone on to a neighbour's land. [Counsel referred to *Harris v. Elder* (10), *Quantrill v. Spragge* (11), *Van Toll v. Wall* (12) and *Walker v. Clyde* (13).]

Sharp was not called on.

B

SLESSER, L.J. : This case is an interesting and an important one. It has been fully argued by Mr. Shove, but, since I have come to a certain conclusion, which I shall mention in a few moments, many arguments, and a consideration of the arguments which might have been discussed

C by the court, do not arise.

The facts of the case are these. The plaintiff, Thomas Kearry, was a bee-keeper. On June 16, about noon, some of his bees swarmed and settled in the garden of the defendant, who was his next-door neighbour. The judge tells us that the plaintiff went with his brother and another D bee-keeper to the defendant's house and asked the defendant's permission to go into his garden and recover these bees. The defendant refused. Later, on the next morning, the plaintiff having again seen the defendant, the defendant said :

The bees are on the hedge in my garden. You can get them by going across another man's field.

E

The plaintiff decided not to attempt to go across the other man's field, fearing that he would be a trespasser. Later on, upon his returning to the defendant, the defendant finally did give him permission to follow the defendant into the garden, but the bees had flown. Upon that, an F action was brought, and damages were claimed. The case was framed in this way. It was said that the plaintiff had suffered damage by the defendant, on or about June 16, preventing the plaintiff from going on to the defendant's land and refusing permission to the plaintiff to go thereon for the purpose of recovering the property of the plaintiff—

G

namely, a swarm of bees—and the plaintiff claimed damages, £4, and added an ordinary claim for further and other relief. When the case was argued before the county court judge it was really put, as I read the judgment, not so much upon the basis of a claim for invasion of a legal right, as upon the basis of conversion. However it may be put, H the first and basic question which arises is whether or not these bees at the material times were chattels, the property of the plaintiff. It is because I have formed the view that they were not chattels, but that at the material time they were in nobody's possession, that the other question will not arise.

It is quite clear, as is pointed out in BLACKSTONE'S COMMENTARIES,

20th Edn., Vol. 2, p. 424, that bees are *feræ naturæ*. That is the view taken both in civil law, which is to be found in the INSTITUTES OF JUSTINIAN, Book 2, Title 1, sect. 14, and in BRACTON, who, as we all know, so largely founded himself upon the civil law. However, there is an exception to that general rule. It is stated in this way by BLACKSTONE, and is in agreement, as I read it, with the earlier authorities : A

Bees also are *feræ naturæ* ; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words, with the civil law, speaks BRACTON : occupation, that is hiving or including them, gives the property in bees ; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon ; and therefore if another hives them, he shall be their proprietor : but a swarm, which fly from and out of my hive are mine so long as can I keep them in sight, and have power to pursue them ; and in these circumstances no one else is entitled to take them. B

There is no doubt in this case that these bees had been hived by the plaintiff. Therefore, before they swarmed, they were his property, and I think that the bees, when they swarmed, so long as they were in his sight, and so long as he had power to pursue them, would remain his property. What do these words "have power to pursue them" mean ? It appears, when the authorities are searched, that there really is no authority for the proposition that the plaintiff had any right to follow the bees on to another man's land without that other man's leave. The cases which have been cited to us where a man has been held in the past to have had some special rights to follow particular animals do not seem to me really to meet this point. We have looked at *Gedge v. Minne* (1), which is said to be an authority for the proposition that a man may enter upon land to recover his hound or hawk when they have escaped on to that land. I do not wish to discuss that case—it seems to be based in part upon a consideration of common interest and the like—beyond saying that I see no reason to extend it to the case of the right to pursue bees on to another man's land. There is no doubt whatever of that proposition. If there is no right to pursue a swarm of bees on to another man's land, and pursuit would amount to a trespass, I cannot help thinking that the power to pursue them which is referred to in the old books means, and can only mean, power to pursue while the swarm, although out of the hive, is in such a place that the owner when they were in the hive has still in law the right to take such steps by entering such land as he will have to enter in order to recapture them. To that extent he has the power to pursue, but I cannot think that he has a legal right to go on to the land of another in order to pursue them. Bees are *feræ naturæ* before being hived. When hived, they are taken into the disposition of the owner, and become his property. They remain his property while they are swarming only so long as they are in his sight, and he has lawful power to pursue them. That is how I read the authorities. Whether the point is right or not, I think that, as a matter of legal principle, it is clear that, once it is established C D E F G H

that he has no right to follow the bees, they cannot, the moment his right to follow ceases, be considered his or anybody's chattels until they are hived again. For that reason, I think that this action is misconceived, because the bees had ceased altogether to be in the disposition of the plaintiff. It follows, therefore, that no action can be

A maintained for conversion, because he has no property, and, secondly, in so far as he had the right to follow the bees on to the defendant's land, the defendant had not invaded any right the plaintiff had, and therefore no action could have been founded in the case suggested. Whether the action be founded in conversion or right, in both cases it fails, and should

B be dismissed.

CLAUSON, L.J. : I agree.

GODDARD, L.J. : I agree. We have had an interesting discussion

C in this case, and it is evidently regarded as one of some importance, but the point sought to be made—which was argued before the county court judge really is based on an entirely false premise. It is based on a misreading of a passage in BLACKSTONE'S COMMENTARIES, 1825 Edn., Bk. 2, chap. 25, p. 393, where Blackstone, speaking of the property

D in animals, says that they are *feræ naturæ*. He there refers to bees, and says that there may be a qualified property in bees—that is, a property once they have been reduced into possession so long as they are in the hive. Then he deals with what happens when bees swarm—that is, when they leave the hive, and go off and no longer return to the

E hive. He says :

Though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon ; and therefore if another hives them, he shall be their proprietor.

If bees settle on my tree and another person manages to get on to my

F land before I do, they become that person's property. How much more would one expect them to be that person's property if they go on to that person's land and he hives them there. It is said : But a swarm which flies out from my hive is mine so long as I have power to pursue it. The whole of this argument comes down to what Blackstone means when he

G speaks of " power to pursue them." In my view, he is saying no more than that the law with regard to bees is the same as it is with regard to any other wild creature which is reduced into possession, and in which a man has a qualified property so long as he keeps it in possession. If a wild deer which I have bought for my park gets out, I am at liberty to

H pursue it and get it back. I dare say that, while I am pursuing it, another person has not a right between me and the animal to prevent my retaking it. If that animal gets on to another person's land, I have no right to follow it on to that land, and, if I do, I can retake the animal. I shall be once more possessed of the animal, but I shall be liable in trespass, because I have gone on to that land without any authority so

to do. It follows, therefore, that one cannot demand entry upon another man's land for the purpose of retaking animals. BULLEN AND LEAKE, 3rd Edn., shows that there is no case to be found in the books for any plea justifying a trespass on the ground that you were pursuing an animal, or, indeed, any other property, for the purpose of retaking it,—a plea justifying a trespass on the ground that you were exercising the right to hunt the animal. There is no case to be found, as far as I can find in any book, suggesting that anybody has a right to go upon the land of another man to retake the animal. In my judgment, the defendant is under no obligation whatever to allow the plaintiff to come on to his land to get the bees. On the other hand, the defendant was entitled, if he chose, after he had got them on his land, to reduce them into possession and keep them for himself. They have never been in his possession, and never could be regarded as in his possession until he had put them into a skip or a hive himself. For these reasons, I think that the county court judge was right in the conclusion to which he came, although I do not agree with the view which he expressed. I say this in case the view he expressed should mislead other people. I do not agree that, if the defendant interferes with the bees when they were on his land, that would give any cause of action to the plaintiff.

Appeal dismissed with costs. Leave to appeal to the House of Lords on terms.

Solicitors: *Hamkins, Grammer & Hamlin* (for the appellant); *Smith & Hudson*, agents for *Richard Witty & Co.*, Hull (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

THE NORDBORG, NORDBORG (OWNERS) v. C. P. SHERWOOD & CO.

[COURT OF APPEAL (Scott, MacKinnon and du Parc, L.JJ.), **December 2, 12, 1938.**]

Shipping—Delivery—Over-delivery by shipowners to consignees—Whether consignees to be charged with goods over-delivered.

The defendants were the holders of 12 bills of lading under which they took delivery of a quantity of sawn timber borne in the plaintiff's vessel. The timber delivered included 362 pieces not covered by any of the bills of lading, and it was contended that the defendants ought to have given credit to the plaintiffs for the value of the timber over-delivered. The bills of lading incorporated all the terms, conditions, clauses and exceptions of the charterparty, and the charterparty provided that the shipowners were to be responsible for the number of pieces signed for by the master or his duly authorised agents:—

HELD: (i) the defendants were not liable in tort for a conversion of the timber over-delivered.

(ii) as between the shipowners and the consignees, the mere acceptance by the consignees of the overplus gave the shipowners no right to anything more than the payment of additional freight. The right to additional freight where the goods are not mentioned in the bill of

lading is not an implication of law, but an inference to be drawn from the facts.

(iii) the defendants were under no obligation to give credit to the plaintiffs for the value of the timber over-delivered.

[EDITORIAL NOTE.] In deciding this case in the way contrary to that in which it has here been decided by the Court of Appeal, the county court judge based his decision upon a *dictum* of ROMER, L.J., in *Mediterranean & New York S.S. Co. v. Mackay* (2). The facts in that case were rather different from those in the present case, and the Court of Appeal have not adopted that *dictum*, it being doubtful whether it was intended to be a statement of principle of general application. The *dictum* had previously been commented upon by GODDARD, J. (as he then was), in *Lauro v. Louis Dreyfus & Co.* (3), and must now be taken to be no longer a full statement of the law. It must be noted that the decision herein applies only as between shipowner and consignee.

AS TO DELIVERY OF WRONG QUANTITY BY SHIPOWNER, see HALSBURY, Hailsham Edn., Vol. 30, pp. 559, 560, paras. 712, 713; and FOR CASES, see DIGEST Vol. 41, p. 557, Nos. 3826-3828.]

C Cases referred to:

(1) *Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. and Graesser, Ltd. v. MacNicoll* (1918), 88 L.J.K.B. 601; 8 Digest 224, 1435; 118 L.T. 596.

(2) *Mediterranean & New York S.S. Co. v. Mackay*, [1903] 1 K.B. 297; 41 Digest 659, 4904; 72 L.J.K.B. 147.

D (3) *Lauro v. Dreyfus & Co.* (1937), 59 Lloyd L.R. 110.

(4) *Hart v. Mills* (1846), 15 M. & W. 85; 39 Digest 366, 58; 15 L.J.Ex. 200.

(5) *Cunliffe v. Harrison* (1851), 6 Exch. 903; 39 Digest 378, 169; 20 L.J.Ex. 325; 17 L.T.O.S. 189.

(6) *Sanders v. Vanzeller* (1843), 4 Q.B. 260; 41 Digest 626, 4531; 12 L.J.Ex. 497.

E (7) *White & Co. v. Furness, Withy & Co.*, [1895] A.C. 40; 41 Digest 553, 3801; 64 L.J.Q.B. 161; 72 L.T. 157; *revsq.* S.C. *sub nom.* *Furness, Withy & Co. v. White (W. N.) & Co.*, [1894] 1 Q.B. 483.

(8) *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.*, [1913] A.C. 680; 41 Digest 537, 3644; 83 L.J.C.P. 23; 109 L.T. 580.

(9) *Van Oppen & Co., Ltd. v. Tredegars, Ltd.* (1921), 37 T.L.R. 504; 43 Digest 472, 110.

F

APPEAL by the defendants against a judgment given in the Kingston-upon-Hull County Court by His Honour JUDGE BANKS, and dated Oct. 25, 1937. The facts are fully set out in the judgment of the court delivered by DU PARCQ, L.J.

G *F. A. Sellers, K.C.*, and *A. A. Mocatta* for the appellants.

O. L. Bateson for the respondents.

Sellers, K.C.: There is no basis upon which a credit allowance can be made to the respondents. It is to be inferred that there is some contract with the shippers which may have some bearing on the over-deliveries.

H [Counsel referred to the Sale of Goods Act, 1893, s. 30.] There is no suggestion that the shipowners are under any liability to the shippers of the timber. If the respondents are right in their contention, there must be some such liability. The only person who could be entitled would be the true owner. There has been no detention from him. What the respondents are trying to do is what the shipowners were held not

to be able to do in *Mediterranean & New York S.S. Co. v. Mackay* (2). [Counsel referred to *Lauro v. Dreyfus & Co.* (3).]

Bateson : A carrier who delivers the wrong goods is entitled to recover them, or their value. In the *Mediterranean* case (2), that point was argued. [Counsel referred to *Mediterranean & New York S.S. Co. v. Mackay* (2), at p. 150, and *Van Oppen & Co., Ltd. v. Tredegars, Ltd.* (9).] A I rely on the analogy of the Sale of Goods Act. It is admitted that we made no claim for the return of the goods.

Sellers, K.C., in reply : There is no evidence that the goods were delivered by mistake.

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DU PARCQ, L.J. [delivering the judgment of the court] : The defendants in this case were the holders of 12 bills of lading bearing various dates in Aug., 1933, under which they took delivery of a part-cargo of sawn timber borne in the plaintiffs' vessel from Leningrad to Hull. To a claim for freight amounting to £19 12s. 9d., the defendants, C while admitting the claim, counterclaimed damages on the ground of short delivery on 4 of the bills of lading. It was provided in each of the bills of lading that

... all the terms conditions clauses and exceptions contained in the charterparty were deemed to be incorporated therein. D

By cl. 10 of the charterparty, the owner was to be responsible for the number of pieces signed for by the master or his duly authorised agents. Possibly because of the operation of this clause, the plaintiffs were constrained to admit in their reply that

... they failed to deliver certain pieces of wood to the defendants as claimed in the counterclaim. E

By way of defence to the counterclaim, however, they sought to rely on the fact that there had been received from them by the defendants a quantity of timber, amounting to 362 pieces, which was not covered by any of the 12 bills of lading. By their pleading, they made alternative F and inconsistent allegations, as, of course, they were entitled to do. First, they said that the defendants had accepted the quantity over-delivered

... in satisfaction or on account of [the plaintiffs'] obligation to deliver the number of pieces set out in the respective bills of lading. G

Alternatively, they said that this timber had been delivered to the defendants "by mistake," and that the defendants had refused to deliver it up to the plaintiffs and had wrongfully detained it. They claimed to be entitled to be credited with the value of the 362 pieces, H or to have the 362 pieces returned or their value paid to them.

At the trial, the bills of lading were put in evidence. There was no other evidence, written or oral. Each party relied on the admissions in the other party's pleadings. The plaintiffs, for their part, further relied on certain admissions obtained from the defendants in response

to a notice to admit facts. These admissions, so far as it is necessary to set them out, were as follow : (i) that 362 pieces of wood over and above the number shown in 7 specified bills of lading were discharged to and received by the defendants from the vessel on those bills of lading, and that they were of the quality described in such bills of lading ; and
A (ii) that the value of those 362 pieces, calculated on the average of the respective bills of lading, exceeded the value of the admitted shortage of 286 pieces of wood calculated on the same basis.

The question which we have to decide is whether, on the admitted facts, the judge was justified in holding that the defendants must give
B credit to the plaintiffs for the value of the 362 pieces described as " over-delivered." It was conceded by counsel for the plaintiffs that, upon these facts, he could not ask the court to find that the defendants had accepted the 362 pieces " in satisfaction or on account of " the plaintiffs' obligation to deliver the number of pieces set out in the bills of lading.

C He contended, however, that the proper inference from the facts was that the plaintiffs had established their alternative allegation, and that the defendants were liable to them as tortfeasors in detinue or conversion. In support of this contention, counsel referred us to the decision of a Divisional Court in *Lancashire & Yorkshire Ry. Co., London & North*
D *Western Ry. Co. and Graeser, Ltd. v. MacNicol* (1). In that case, it was not in dispute that the consignees had received from the carriers goods which were the property of another, and to the possession of which they had no right. In the present case, as was pointed out by counsel for the defendants, it is consistent with the facts admitted that, as

E between themselves and their vendors, the defendants were contractually bound (or at least entitled) to accept, and to pay the vendors for, the 362 pieces, and that they were in truth themselves the owners of the timber described as " over-delivered." The figures in the bills of lading, though conclusive evidence against the shipowners, may be erroneous,

F and it may be that in fact the 362 pieces were shipped by the consignor under those bills of lading. Not only is there no admission of the allegations that the 362 pieces were delivered " by mistake," and that the defendants have " refused to deliver " them to the plaintiffs, but it was admitted at the bar that these allegations were first made by the plaintiffs

G in a pleading delivered on Jan. 4, 1937, and they were then pleaded as an alternative to the allegation that the defendants had accepted this quantity of timber in satisfaction of the plaintiffs' obligation to deliver other timber. It was, indeed, common ground that from 1933 to 1937 no request had been made by the plaintiffs that the 362 pieces

H should be re-delivered to them. It may well be thought that the true inference from the known facts is that the plaintiffs were well aware that the defendants were entitled to retain the 362 pieces. On the materials before the county court judge, it would have been impossible for him to hold, and indeed he has not held, that the defendants were liable to the plaintiffs in tort.

The remaining question is whether the mere fact that a consignee has received from the shipowner a quantity of goods in excess of that specified in the bill of lading renders him liable to pay to the shipowner, or to credit him with, the value of the overplus. The county court judge has answered this question in the affirmative. In so doing, he followed a previous decision of his own in which he had founded his judgment upon a *dictum* of ROMER, L.J., in *Mediterranean & New York S.S. Co. v. Mackay* (2), at p. 305. In that case, there was a short delivery of goods of one sort, but an over-delivery, which was accepted by the consignees, of goods of another sort. The decision of the court was that the consignees had a claim for shortage and for an allowance in respect of (i) the freight attributable to the portion not delivered, and (ii) the value of the quantity which was not delivered. It appears that the consignees had in fact given credit to the shipowners for the value of the goods over-delivered : see the report in 72 L.J.K.B. 147. In the course of his judgment, ROMER, L.J., said, at p. 305 :

I can find nothing in the circumstances of the case to show that because they [the consignees] took the over-delivery of scantlings and boards they must be taken to have elected to treat the over-delivery as making up, so far as it covered it, the shortage of deals. That being so, the result would be that they would be entitled to compensation for the deficiency of the deals, and ought to give credit for the over-delivery in scantlings and boards. The amount awarded in the court below is the difference between the loss by shortage of deals and the value of the over-delivery of scantlings and boards, and appears to be right in every respect.

The report in the LAW JOURNAL REPORTS, at p. 150, attributes to ROMER, L.J., the further statement that the consignees had in fact given credit for the over-delivery. It may be doubted whether ROMER, L.J., in the passage quoted, intended to enunciate a principle of general application. Assuming that he did so intend, it is, we think plain that his *dictum* was not necessary to the decision of the case, and nothing to the same effect is to be found in the judgments of the other members of the court. We were referred to a recent decision of GODDARD, J. (as he then was), in which doubt was expressed as to the correctness of the *dictum* and the accuracy of the reports : *Lauro v. Dreyfus & Co.* (3), at, pp. 116, 117.

In the absence of any binding authority, it is necessary for this court to decide the question according to general principles. It was argued that, just as the buyer who accepts a larger quantity of goods than that which he contracted to buy must pay for them at the contract rate (see the Sale of Goods Act, 1893, s. 30 (2)), so, by analogy, the consignee who takes delivery from the shipowner of a quantity of goods larger than that which the bill of lading specifies must pay their value to the shipowner. In our view, the two cases are in no way analogous. As between seller and buyer, the delivery of a quantity larger than that specified in the contract was regarded at common law as a proposal for a new contract of sale which the buyer might accept by retaining the goods : *Hart v. Mills* (4) and *Cunliffe v. Harrison* (5), per PARKE, B., at p. 906. As between shipowner and consignee, we can find no reason

for holding that, whether (as was suggested) by implication of law or by way of inference from the facts, the acceptance by the latter of the overplus of itself gives the shipowner a right to anything more than the payment of additional freight. *Prima facie*, the shipowner is entitled to be paid for carrying the surplus goods, but not to be paid their value or their price. Even the right to additional freight, where goods are not mentioned in the bill of lading, and are thus, it would seem, not covered by the Bills of Lading Act, 1855, s. 1, would appear to depend, not on an implication of law, but on an inference which may properly be drawn from the facts: *Sanders v. Vanzeller* (6), at p. 295, and *White & Co. v. Furness, Withy & Co.* (7), per LORD HERSCHELL, at p. 43. In the present case, there were no facts before the county court judge to support a finding that the defendants were bound by contract to pay to the shipowners the value of goods the price of which, for all that appears from the admitted facts, either may have been paid long ago by the defendants to their vendors or may be a debt due from the defendants to their vendors which would not be satisfied by payment to the shipowners.

Counsel for the plaintiffs sought to rely upon a passage in the opinion of LORD MOULTON in *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.* (8), at pp. 696, 697, which deals with the position of a consignee whose goods have become "inextricably and indistinguishably mixed" with those of another consignee, "without loss and without deterioration." LORD MOULTON there says that, if the consignee chooses to exercise his right to claim as tenant in common the mixture of his goods with those of another:

... the shipowners are entitled to the benefit of what he receives in reduction of damages for their breach of contract. . . .

In the case supposed, the consignee elects to exercise a right which he has acquired solely by reason of the shipowners' breach of contract. He thus becomes co-owner of a mixture in which the goods which should have been delivered to him as a separate entity have been merged. It seems almost self-evident that any profit which this co-ownership brings him should be set off against the loss occasioned by the breach of contract. In the present case, the consignee is not shown to have received any countervailing advantage whatever which may be set against his loss, nor is there anything to show any *commixtio* of his goods with those which are the property of another person. Here again the answer to the respondents' contention is that the appellants may well have had a right to receive, not only the goods which the respondents failed to deliver, but also the 362 pieces which, according to the bill of lading, were over-delivered.

In the result, the appeal succeeds. The judgment in the county court must be varied (i) by omitting that part of it which adjudges that the plaintiffs are to be given credit for a sum to be assessed as the value of overage of delivery, and (ii) by giving the costs of the issue raised

by the reply to the defendants, instead of to the plaintiffs. The defendants are to have the costs of this appeal.

Appeal allowed, with costs. Leave to appeal to the House of Lords.

Solicitors: *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for the appellants); *Botterell & Roche*, agents for *Sanderson & Co.*, Hull (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

MAYER & SHERRATT v. CO-OPERATIVE INSURANCE SOCIETY, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), December 6, 21, 1938.]

Workmen's Compensation—Industrial disease—Injury by accident—Date of accident—Death of workman without obtaining certificate and not in receipt of compensation—Whether date of accident date of death—Workmen's Compensation Act, 1925 (c. 84), s. 43 (1) (iii) (a), (2) (b).

The workman, an employee of the claimants, had, though the fact was not established until after his death, contracted lead-poisoning in their employ, had become totally incapacitated in Nov., 1936, and had died from that disease in Mar., 1937. His dependants were awarded compensation and costs under the Workmen's Compensation Act, 1925. The claimants were insured with the respondents against all claims in respect of personal injury by accident or disease sustained while in the service of the claimants, under a policy which expired on July 11, 1936, and claimed to be indemnified in respect of the compensation and costs paid to the dependants of the workman and of their own costs. It was found as a fact that the workman was suffering from lead-poisoning when he entered the claimants' employment in 1929. From May 5, 1932, to Apr. 11, 1936, but not after that date, he was engaged in work involving the use of lead or its compounds, and it was further found as a fact that during this period by gradual process he suffered an aggravation of the disease, and that the aggravation was the direct cause of his death. The workman died without having obtained a certificate of disablement and was not at the time of his death in receipt of a weekly payment on account of disablement, and it was therefore contended that, since by the Workmen's Compensation Act, 1925, s. 43 (1) (iii) (a) the disablement or suspension shall be treated as the happening of the accident, and by sect. 43 (2) (b), the date of disablement, in the circumstances of this case, is the date of the death, the date of the accident in this case was the date of his death, and, therefore, after the expiry of the policy:—

Held: upon the proper construction of the Workmen's Compensation Act, 1925, s. 43, modification (a) (sect. 43 (1) (iii) (a)) has no application to the case where the workman has died as a result of the disease. The respondents' contention, therefore, failed, and the claimants were entitled to the indemnity claimed.

[EDITORIAL NOTE.] It was here contended that the Workmen's Compensation Act, 1925, s. 43 (1) (iii) (a)—known as modification (a)—ought to be read and construed with sect. 43 (2) (b), with the result that the date of the death of the workman becomes the notional date of the accident. The decision in this case, which negatives that contention, is based upon the decision of the House of Lords in *Richards v. Goskar* (5), from which it is deduced that the disease itself is to be treated as the counterpart of injury by accident in an ordinary case, and that the

modifications are to facilitate the fixing of subsidiary matters, such as the time for giving notice and the calculation of compensation.

AS TO INDUSTRIAL DISEASE AND INJURY BY ACCIDENT, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 534-536; and FOR CASES, see DIGEST, Vol. 34, pp. 470, 471, Nos. 3844-3846.]

Cases referred to :

- A (1) *Blatchford v. Staddon & Founds*, [1927] A.C. 461; 34 Digest 465, 3810; 96 L.J.K.B. 608; 137 L.T. 257; 20 B.W.C.C. 391.
- (2) *Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co., Ltd.*, [1932] 1 K.B. 401; Digest Supp.; 101 L.J.K.B. 117; 146 L.T. 153; 24 B.W.C.C. 376.
- (3) *Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine*, [1925] A.C. 354; 34 Digest 463, case r.
- B (4) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1938] 4 All E.R. 831; Digest Supp.
- (5) *Richards v. Goskar*, [1937] A.C. 304; [1936] 3 All E.R. 839; Digest Supp.; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357.
- (6) *M'Douqall v. Summerlee Iron Co., Ltd.* (1927), 20 B.W.C.C. 419; Digest Supp.
- C

SPECIAL CASE STATED by an arbitrator for the decision of the court pursuant to the Arbitration Act, 1934. The facts are fully set out in the judgment.

Eric V. E. White for the claimants.

A. S. Trapnell for the respondents.

MACNAGHTEN, J. : The question raised by this case is whether the respondents, the Co-operative Insurance Society, Ltd., are bound by a policy of insurance, dated June 23, 1926, to indemnify the claimants, Messrs. Mayer & Sherratt, against their liability to the dependants of one of their workmen, Alfred Sutton, under the Workmen's Compensation Act, 1925, ss. 8, 43.

The claimants carry on business as manufacturers of china. Alfred Sutton first entered their employment in the autumn of 1929. Thereafter, he was in their employment from time to time until Nov. 7, 1936, when he became so ill that he was unfit for work. Throughout part of the time when he was employed by the claimants—namely, from May 5, 1932, to Apr. 11, 1936—he was employed by them as a lead-worker, and his work then was glostplacing, work which involved the use and handling of lead or its preparations or compounds. He was employed in glostplacing throughout part of the fortnight ending Apr. 11, 1936. He died from lead-poisoning on Mar. 10, 1937, and between Nov. 7, 1936, the date of the termination of his employment by the claimants, and Mar. 10, 1937, the date of his death, he was, as the arbitrator finds, suffering from lead-poisoning, and was in consequence confined to bed, and totally incapacitated for work.

The Workmen's Compensation Act, 1925, s. 43, provides as follows :

(1) Where : (i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this Act and is thereby

disabled from earning full wages at the work at which he was employed ; or (ii) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease ; or (iii) the death of a workman is caused by any such disease ; and the disease is due to the nature of any employment in which the workman was employed at any time within the 12 months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications : A
(a) the disablement or suspension shall be treated as the happening of the accident.

Sect. 43 (2) (b) provides that, for the purposes of that section, the date of disablement in a case where the workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, shall be the date of his death. No certificate of disablement was ever obtained by Alfred Sutton, nor was he at the time of his death in receipt of a weekly payment on account of disablement. I was informed by counsel that the fact that lead-poisoning was the cause of his illness and death was not discovered until a post-mortem examination of his dead body was made. B C

Since the death of Alfred Sutton was in fact caused by lead-poisoning—one of the diseases mentioned in the Workmen's Compensation Act, 1925, Sched. III—and the disease was due to the nature of his employment by the claimants within 12 months previous to his death, his dependants were plainly entitled to compensation under sects. 8 and 43 of the Act, and on July 7, 1937, the deputy judge of the Hanley and Stoke-upon-Trent County Court made an award in their favour of £265 by way of compensation, together with £26 for costs. Thereupon the question arose as to the right of the claimants as against the respondents to an indemnity under the policy, dated June 23, 1926, in respect of those sums of £265 and £26, and also their own costs of defending the claim made by the dependants. By that policy, which was from time to time renewed, and, by virtue of the renewals, remained in force until midnight on July 11, 1936, the respondents agreed to indemnify the claimants against all sums for which they should be liable D E F

... in respect of any personal injury by accident or disease as described in the Workmen's Compensation Act, 1925, sustained whilst engaged in the service of the insured in work forming part of or process in the business mentioned in the schedule.

They also agreed to be G

... responsible for all costs and expenses incurred with their consent in defending any claim made upon the insured in respect of any such accident or disease.

By an indorsement on the policy, also dated June 23, 1926, it was provided as follows :

It is hereby understood and agreed that this policy shall indemnify the insured only in respect of their liability to lead-workers ; all other employees being strictly excluded. H

Alfred Sutton was in fact suffering from lead-poisoning when he entered the employment of the claimants in 1929, and continued to suffer from it up to May 5, 1932, when he was first employed in glostplacing by

the claimant. However, by paras. 8, 9 and 10 of his award, the arbitrator finds as follows :

8. Between the said May 5, 1932, and the said Apr. 11, 1936, the said Sutton, as a direct result of his employment under the claimants in glostplacing between the said May 5, 1932, and the said Apr. 11, 1936, by gradual process contracted further lead-poisoning and by gradual process suffered an aggravation of the condition from which he was already suffering on May 5, 1932.

9. The said contraction of further lead-poisoning by the said Sutton, and the said aggravation of his former condition, were the direct cause of his incapacity between Nov. 7, 1936, and Mar. 10, 1937, and the direct cause of his death on Mar. 10, 1937.

10. Being satisfied as aforesaid, I find that the said incapacity and death of the said Sutton were due to the nature of an employment—namely, glostplacing—in which he was employed under the claimants throughout, *inter alia*, portions of the fortnight ending Apr. 11, 1936.

In these circumstances, the claimants maintain that since, during the currency of the policy, Alfred Sutton in the course of his employment by the claimants as a lead-worker “by gradual process contracted further lead-poisoning, and by gradual process suffered an aggravation of the condition from which he was already suffering on May 5, 1932,” and this disease was the direct cause of his illness and incapacity from Nov. 7, 1936, onwards, and was also the direct cause of his death on Mar. 10, 1937, and since also Alfred Sutton ceased to be a lead-worker on Apr. 11—three months before the date of the termination of the policy—and was never engaged after that date in any lead work at all, the respondents are, by the express terms of their policy, bound to indemnify them against their liability to the dependants of Alfred Sutton under the Workmen’s Compensation Act, 1925, in respect of that disease.

To this claim the respondents make answer that, although it is true that the employment of Alfred Sutton by the claimants as a lead-worker during the currency of the policy caused his death, nevertheless they are under no liability to the claimants, because by the Workmen’s Compensation Act, 1925, s. 43, Alfred Sutton must be deemed to have contracted the disease which caused his death on the day when he died—namely, Mar. 10, 1937, eight months after the policy had expired.

Their argument runs thus. The Workmen’s Compensation Act, 1925, s. 43 (1), provides that, where the death of a workman is caused by a scheduled disease, and the disease is due to the nature of his employment within 12 months previous to the date of his disablement or suspension, he or his dependants are entitled to compensation under the Act as if the disease or such suspension were “a personal injury by accident arising out of and in the course of his employment,” subject to, amongst others, the following modification, modification (a) [sect. 43 (1) (iii) (a)], that “the disablement or suspension shall be treated as the happening of the accident.”

Sect. 43 (2) (b) provides that, in a case such as that of Alfred Sutton, where the workman dies without having obtained a certificate of disablement, or is not, at the time of his death, in receipt of a weekly payment on account of disablement, then, for the purposes of that

section, the date of disablement shall be the date of death. Therefore, since, for the purposes of the section, the date of his death, Mar. 10, 1937, was the date of the disablement of Alfred Sutton—though he had in fact, in consequence of the disease, been in bed and totally disabled from doing any work ever since Nov. 7, 1936—and since, by subsect.

(1) (iii) (a), his notional disablement is to be treated as “the happening of the accident,” it necessarily follows—so the respondents say—that the case must be decided on the assumption that Alfred Sutton contracted the disease of lead-poisoning on the day when he died from the disease, long after the date of the expiry of the policy, and, therefore, they are under no liability to the claimants.

The respondents pray in aid of their argument the observation of LORD SUMNER in *Blatchford v. Staddon & Founds* (1), where his Lordship, expounding the provisions in the Workmen’s Compensation Act, 1906, which correspond with those in the 1925 Act, said, at p. 470 :

The difficulty of proving the date when the disease was contracted is met by treating the date of the disablement as the date of the happening of the accident.

They also rely on the decision of the Court of Appeal in *Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co., Ltd.* (2). It is, however, to be observed that in neither of those cases was the court dealing with the case which is presented here—namely, that of a claim by the dependants of a deceased workman who has, in fact, died of disease, which was not discovered to be one of the scheduled diseases until after his death. In both *Blatchford v. Staddon & Founds* (1) and *Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co., Ltd.* (2), the workmen were alive, and had obtained certificates of disablement. The same observation applies to the decision of the Judicial Committee in *Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine* (3), on which the claimants relied, notwithstanding the criticism passed upon it by SCRUTTON, L.J., in the *Ellerbeck Collieries* case (2).

Since there is no authority, so far as I am aware, directly in point on the question at issue in this case, it is advisable to turn to the Act itself. I am more ready to do so in view of the observations of LORD WRIGHT in the House of Lords in *Harris v. Associated Portland Cement Manufacturers, Ltd.* (4). In that case, LORD WRIGHT observed, at p. 842 :

I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered, rather than litigated upon.

The whole foundation of the respondents’ argument depends on the view that modification (a), “the disablement or suspension shall be treated as the happening of the accident,” is applicable to a case where the workman has died from a scheduled disease without having obtained a certificate of disablement or without having been “suspended from his usual employment on account of having contracted a scheduled disease.”

Sect. 43 (1) deals with three cases, (i) where the workman has obtained

a certificate of disablement, (ii) where a workman has been suspended, and (iii) where a workman has died. In each of those cases, provided the disease contracted by the workman is due to the nature of his employment at any time within 12 months previous to the date of his disablement, he or his dependants can recover compensation, subject
A to, amongst other modifications, modification (a)—namely, that the disablement or suspension is to be treated as the happening of the accident.

In my view, modification (a) does not apply to the third case in the Workmen's Compensation Act, 1925, s. 43 (1)—namely, where the work-
B man has died from a scheduled disease without having obtained a certificate of disablement and without having been suspended from his usual employment. I am, of course, greatly fortified in that view by the observations of LORD ATKIN in *Richards v. Goskar* (5), at p. 320. In that case, LORD ATKIN, who delivered the leading opinion, explained
C that the scheduled disease itself, and not the certificate of disablement in consequence of the disease, is the equivalent within the meaning of sect. 43 of "a personal injury by accident," and exposed the fallacy of the contrary view which had found favour in the court below, and was thought to have been approved in some of the opinions in the House of
D Lords in *M'Dougall v. Summerlee Iron Co., Ltd.* (6).

In *Richards v. Goskar* (5), LORD ATKIN said, at p. 312 ([1936] 3 All E.R. at p. 842) :

On this construction, [that is, that "disablement" is the "accident" within the meaning of sect. 43.] disease which in terms is the injury, and by the statute is an injury caused by accident, has yet caused the accident. The only comparable
E sequence that occurs to me arose when Alice learned from the White Queen's accident the art of living backwards: first the bandage, then the bleeding, then the pin prick. It must be noticed that in the case of death there may be no certificate of disablement and no suspension and that modification (a) has no application.

That is the case here. As his Lordship said, at p. 313 ([1936] 3 All E.R.
F at p. 842) :

It must be noticed that in the case of death there may be no certificate of disablement and no suspension, and that modification (a) has no application.

Further, even if I were wrong in holding that modification (a) has no application to the case before me, the observation of LORD ATKIN that
G one must not translate the word "disability" into "accident," and that, if one does so, the whole scheme under the Act falls to pieces, is sufficient for the purpose of deciding this case.

This view—namely, that modification (a) has no application to the case where the workman has died from a scheduled disease without
H having obtained a certificate of disablement and without having been suspended from his usual employment—deprives the respondents of the whole foundation of their argument, and is sufficient for the decision of the case. It is, therefore, unnecessary to consider whether the criticisms of the decision of the Privy Council in *Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine* (3) were well-founded, or whether the

decision of the House of Lords in *Richards v. Goskar* (5) has affected the force of those criticisms. I therefore hold that the claimants are in law entitled to the indemnity which they claim from the respondents, and the provisions set out in para. 17 of the arbitrator's award must take effect. The respondents will pay to the claimants their costs of the argument before me.

Solicitors : *Berryman*s, agents for *T. Haynes Duffell & Son*, Birmingham (for the claimants); *Freeland & Passey* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

R. v. FINDLATER.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), November 28, December 19, 1938.]

Criminal Law—Offer for sale of shares—"Share"—"Debenture"—Founder's unit guarantee certificate—Companies Act, 1929 (c. 23), ss. 356 (1) (7), 380 (1).

The appellant was indicted upon a charge of conspiring with 6 other named persons and certain other persons unknown to contravene the Companies Act, 1929, s. 356 (1), and also of causing and procuring 3 of the 6 named persons to go from house to house offering shares for subscription or purchase to the public, in contravention of that section. Three canvassers called upon persons who had already subscribed for "units" and offered "founder's units" for sale. Purchasers of "founder's units" received a "founder's unit guarantee certificate," by which the company undertook for 21 years to cultivate certain mushroom farms, and market the produce at the best prevailing prices, during the same period to pay to the holder a proportionate part of 50 per cent. of net profits from the sales, being not less than 10 per cent. of the total amount subscribed by the certificate holder, and to arrange for the delivery to the certificate holder of a capital sinking fund bond to be issued by a reputable insurance company guaranteeing the return of the subscribed capital at the end of the 21 years. The certificate was transferable by giving 30 days' notice to the company. The Companies Act, 1929, s. 356 (7), defines "shares" as including debentures, and sect. 380 (1) defines "debenture" as including debenture stock, bonds, or any other securities of a company, whether constituting a charge on the assets or not. It was contended that the founder's unit guarantee certificate was neither a share nor a debenture within these definitions, and that, as the appellant had never met the canvassers, he had not caused or procured them to contravene the section. The appellant had in fact acquiesced in the system of financing the company by the sale of the certificates, and had corrected "literature" for the use of the canvassers :—

HELD : (i) the certificate was a debenture within the definition in sect. 380 (1).

(ii) the appellant had caused or procured the canvassers to contravene the section.

[EDITORIAL NOTE.] It is not difficult to draft documents which have little of the usual appearance of a debenture or bond, and are yet capable of being issued to investors in consideration of loan capital subscribed. The consideration of the scope of the definitions in the Companies, Act, 1929, is, therefore, of importance,

as it is not to be supposed that persons pursuing the practices there made criminal offences will issue documents which are clearly within those definitions.

AS TO OFFERS FOR SALE OF SHARES OR DEBENTURES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 218, 219, paras. 374-378; and FOR CASES, see DIGEST, Vol. 10, p. 743, Nos. 4637, 4638.]

Cases referred to :

- A (1) *R. v. Naiman, Soskin and Wilson* (1938), Unreported, Apr. 29.
 (2) *British India Steam Navigation Co. v. Inland Revenue Comrs.* (1881), 7 Q.B.D. 165; 6 Digest 500, 3172; 50 L.J.Q.B. 517; 44 L.T. 378.
 (3) *Lemon v. Austin Friars Investment Trust, Ltd.*, [1926] Ch. 1; Digest Supp.; 95 L.J.Ch. 97; 133 L.T. 790.

B APPEAL against conviction at the Central Criminal Court of conspiring between Jan., 1936, and Mar., 1938, with six other named men and with other persons unknown to contravene the Companies Act, 1929, s. 356 (1), and also of causing and procuring three of the six named men in Jan., 1938, and Feb., 1938, to go from house to house offering shares for subscription or purchase to the public, in contravention of
 C the Companies Act, 1929, s. 356 (1). He was bound over in his own recognisances. The facts are fully set out in the judgment of the court delivered by CHARLES, J.

R. F. Levy, K.C., and *J. Grimond* for the appellant.

G. B. McClure for the Crown.

D CHARLES, J. [delivering the judgment of the court]: The history of the company in this case, and of the appellant's connection with it, may be shortly stated. In June, 1935, Cucklington Mushrooms, Ltd., was registered to take over the mushroom-growing business of a man
 E named South. In Sept., 1936, its capital was increased from £3,000 to £7,000. In October, the appellant met an acquaintance, Murchie, who told him about Cucklington Mushrooms, Ltd., explained its system of finance, and told the appellant that its financial agents were Mendoza and Naar, who were directors of a concern called Oliver Berkeley, Ltd.
 F It is to be observed that Oliver Berkeley, Ltd., had no other business than that of the raising of finance for Cucklington Mushrooms, Ltd., and took at first 50 per cent., and then, owing to the appellant's intervention, 40 per cent. of the capital raised, for its services.

In November, on Murchie's suggestion, the appellant became a whole-
 G time director, at £750 a year, and £200 allowance for expenses. When he so became director, he found that the company was being financed by the sale of "units" by canvassers who were sent out by Mendoza and Naar, and who went from house to house endeavouring to sell "units" in the company. The appellant undoubtedly took an active part in the
 H business. He arranged for a form of insurance of the capital subscribed by the unit holders, and signed letters forwarding certificates sold by the canvassers to the purchasers of units.

In Jan., 1938, and Feb., 1938, the three canvassers called upon persons who had already subscribed for "units" and offered other "units" for sale, and these were made the subject of the present charges. They

were called founder's units, and the certificate was called a founder's unit guarantee certificate. By these certificates, the company undertake :

(1) That for a period of 21 years it will plant mushroom-beds and cultivate the same at the company's farms, and that it will duly market the same at the best prevailing prices.

(2) That for a period of 21 years it will pay to the certificate holder profits proportionate to 50 per cent. of the net profits arising from the total sales of mushrooms marketed by the company, the said proportion to be based on the number of units issued by the company. A

(3) That the proportion of the annual profits payable to the holder of this certificate shall not be less than 10 per cent. per annum of the total amount of money subscribed by the holder of this certificate.

(4) The company will arrange for delivery to this certificate holder of a capital sinking fund bond, to be issued by the Crown Life Insurance Co., Ltd., or any other reputable insurance company which bond shall guarantee to the holder the return of the subscribed capital under this certificate, intact, at the expiration of 21 years. B

(5) The holder of this certificate shall have the right to transfer this unit by giving 30 days' notice to the company.

Such being the nature of the founder's unit guarantee certificates, which were admitted to have been offered for sale from house to house, it is necessary to look at the Companies Act, 1929, ss. 356 (1) (7), 380 (1), in order to see whether it can be properly described as a "share" the selling of which from house to house constitutes an offence against sect. 356 (1). Sect. 356 (7) states that the expression "shares" includes debentures, and in sect. 380 (1) "debenture" is defined as including debenture stock, bonds, or any other securities of a company, whether constituting a charge on the assets of the company or not. C

The appellant appeals against his conviction on three grounds. The first ground of the appeal is that the founder's unit guarantee certificate is not a "share," and this contention was generally accepted. There then arose the question as to whether or not such a document was a "debenture" so as to bring it within sect. 356 (1). This very question was considered by GODDARD, J., on Apr. 29, 1938, in *R. v. Naiman, Soskin and Wilson* (1), and he came to the conclusion that the document which we are now considering was a debenture. We agree with the opinion D that he expressed in that case. This court has had the advantage of perusing three documents which we believe were not before GODDARD, J. First, a document called the Great Three-point Programme for 1938. The third point is expressed as follows : E

Unit holders to receive larger profits and assured security of capital. G

In the same document, this further statement is to be found :

It should be clearly realised that the capital refunding bonds issued in respect of founder's units involve unit holders in no liability of any kind. All premiums are paid by the company. The bonds may be assigned to any nominee of unit holders and are transferable at any time during the 21 years. H

Secondly, a document entitled "Application for Sinking Fund Bond," which is expressed as maturing in 21 years, has printed upon it in red lettering, distinctive from the rest of the document, the following words :

It is understood and agreed that the sinking fund bond shall be purchased on

my behalf and in my name by Cucklington Mushrooms, Ltd., who shall defray the entire cost thereof, the bond to be delivered to me and to be my sole property.

Thirdly, the policy itself undertakes to pay the sum assured at maturity date—that is, at the twenty-first anniversary of the date thereof.

A It is quite clear that there never has been any precise definition of a debenture. In *British India Steam Navigation Co. v. Inland Revenue Comrs.* (2), LINDLEY, J., says, at pp. 172, 173 :

B Now, what the correct meaning of “debenture” is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds ; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness.

C The founder’s unit guarantee certificate does appear to contain that which is implicit in the widest definition of a debenture—namely, an acknowledgment of an existing debt. The company undertakes to pay the premiums to a reputable insurance company, which undertakes to return the amount of the subscribed capital intact at the end of 21 years. Such premiums are to be paid annually out of its own funds, and, failing the payment of such premiums, the terms of the policy of guarantee would become inoperative, unless the company revived the policy—which, by their failure to pay, would cease to be in force—by a payment of unpaid premiums within 2 years. By undertaking to pay these premiums, the company take upon themselves a liability which is only consistent with an acknowledgment of an existing debt. It was urged on behalf of the appellant that there was no acknowledgment of an existing debt, because, even if there was a debt or obligation to pay, it was not an immediate debt, but referred to something payable in the future. However, reference to the judgment of SARGANT, L.J., in *Lemon v. Austin Friars Investment Trust, Ltd.* (3) makes it clear that such an argument cannot be sustained. As SARGANT, L.J., says, at F p. 19 :

But surely that is altogether to give the go-by to the common doctrine that you may have a debt which is *debitum in praesenti solvendum in futuro*, and which may not only be payable in the future but may be payable on a contingency.

G Regarding, therefore, the founder’s unit guarantee certificate as a debenture, we hold that the offence alleged under sect. 356 (1) is complete if any person goes from house to house offering such debenture for subscription or purchase to the public or to any member of the public.

H The appellant has clearly conspired with the canvassers to contravene the Companies Act, 1929, s. 356 (1). We say clearly conspired because, by his own admission, he was well aware that such a course was being adopted by the canvassers. It was contended on his behalf that, although he was aware of the existing system which had been adopted, and acquiesced therein, he would not have done so had he known that such a system was unlawful. This submission appears to us to cut athwart the first principles of law. Ignorance of the law will not excuse from

the consequence of guilt any person who has the capacity to understand the law: *HALE'S PLEAS OF THE CROWN*, p. 42. When he conspired to do the unlawful act, the offence was complete, whether or not he had knowledge of its illegality.

It was finally argued that, inasmuch as he had never met the canvassers, it could not be justly said that he had caused or procured them to commit the act which was in fact illegal. The system was in operation before he joined the company, it is true, but he acquiesced in that system, corrected the "literature" for the canvassers, and was also well aware that the company, for a directorship in which he was being paid £750 per year, was being financed by the sale of those units. For these reasons, the court considers the appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. Baron & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

R. v. TENNET.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **December 16, 1938.**]

Criminal Law—Receiving stolen property—Misdirection as to time when knowledge of theft necessary.

Upon a charge of receiving goods well knowing them to have been stolen, the judge in his summing up to the jury by inadvertence used the words: "They [the prosecution] have got to prove the important thing that, at the time he received them, or had them in his possession, he knew they were stolen." The prisoner was convicted:—

HELD: as this phrase might convey to the jury that it was sufficient for the prosecution to prove that he became aware that the goods had been stolen at any time during which he was in possession of them, and as there was no passage in the summing up that contradicted that erroneous view, the conviction must be quashed.

[EDITORIAL NOTE.] It is, of course, necessary to prove that a person charged with the offence here in question must be shown to have known that the property was stolen property, or, at any rate, property obtained by dishonest means, at the time when he received it.

AS TO RECEIVING STOLEN PROPERTY, see *HALSBURY*, Hailsham Edn., Vol. 9, pp. 550-558, paras. 935-947; and FOR CASES, see *DIGEST*, Vol. 15, pp. 960-977, Nos. 10,733-10,927.]

APPEAL on a point of law by leave of the court against the appellant's conviction at the Liverpool Assizes upon an indictment charging him in 9 counts with receiving 9 bicycles well knowing them to have been stolen. He was sentenced to 15 month's imprisonment. The facts are fully set out in the judgment of the court delivered by LORD HEWART, L.C.J.

R. H. Forrest for the appellant.

A. Hamilton for the Crown.

LORD HEWART, L.C.J. [delivering the judgment of the court]: The appellant in this case submits that there was here a misdirection on a point of law which is of such a nature as to go to the root of the conviction. The argument turns on a particular passage, if I may say so, in this admirable and complete summing up, where the judge said :

A The offence of receiving means that the prosecution have got to prove that the goods in question were in fact stolen. Then they have got to prove that the goods in question were received by the defendant. It is quite obvious what that means. Then they have got to prove the more important thing—that, at the time he received them, or had them in his possession, he knew they were stolen.

Those words, precise as they are, may well have had the effect, and
B indeed it is difficult to contemplate any other possibility, of conveying to the jury that the important thing they had to be satisfied about was that (a) at the time of receipt, or (b) at some time when the appellant had these bicycles in his possession, he knew they were stolen, and that in one case or the other, the requirements of the law would be fulfilled.
C Unfortunately there is no passage in this careful and elaborate summing up which contradicts that view.

The case was undoubtedly a grave case. The indictment charged a man named Major with stealing bicycles, Major and a man named Stevens with conspiracy to pervert the course of justice, a man named Lambrenos with stealing 6 bicycles, and the appellant with receiving within a period of 3½ months 9 of the bicycles well-knowing them to have been stolen. The appellant had kept a shop for something like 9 years as a radio dealer, and the evidence shows that in Jan., 1938, he began to deal in secondhand cycles. In order to carry on that business, it was necessary
E for him to obtain a broker's licence in order to deal in secondhand goods, and it was the practice of the police to deliver at the shop at intervals notices containing particulars of bicycles and other property which had been stolen. The appellant said that he had received notices of that kind for some years, and hardly ever read them, for the reason that he
F was fully occupied with the main part of his business, that business being the sale and service of radio batteries.

According to the evidence, in the 6 months following Jan., 1938, he bought 220 secondhand bicycles. He recorded his purchases in a book, but did not keep all the particulars of his operations required by the
G bye-laws, and the evidence made it clear that he had received bicycles which had been stolen. In these circumstances, it was of fundamental importance that the jury should appreciate that the critical moment was the time of receipt. To suggest, as a practical alternative, that it was enough if, at some time when the appellant had these bicycles in his
H possession, he knew they were stolen, was unfortunate, as it conveyed a view which might be destructive to the whole scheme of this class of the law. We have carefully considered this matter, and we have come to the conclusion that the probable effect of this summing up may have been to direct the mind of the jury to an incorrect view of the law. It may well be that, after this summing up, the jury came to the conclusion

that they were entitled to convict, and ought to convict, if at any time the appellant had in his possession goods which he knew had been stolen.

It is suggested, on the part of the Crown, that, in certain circumstances, the proviso to sect. 4 of the Act ought to be applied; on the ground that, if the whole facts had been before the jury, and had been explained to them, as they ought to have been explained, the jury most certainly or inevitably would have arrived at the same conclusion. We reluctantly take the view that we cannot accept that proposition. This precise and pointed statement of the law may go to the whole root of the matter, and may lead the jury to take a view contrary to the law. The real question was the effect of this statement of the law on the mind of the jury, and we cannot assume what that effect may have been. In these circumstances, though it is perfectly obvious to us, of course, that this sentence, or half-sentence, was nothing more than an accidental slip, we take the view that this conviction cannot stand, and the appeal must be allowed.

Appeal allowed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;
Director of Public Prosecutions (for the Crown).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Re SHERWOOD COLLIERY CO., LTD.

[RAILWAY AND CANAL COMMISSION (Wrottesley, J., Sir Francis Taylor, K.C., and Sir Francis Dunnell), **December 12, 13, 14, 15, 20, 1938.**]

Mines—Working facilities—Land vested in large number of owners having varied interests—Practicability of obtaining sufficient and enforceable rights from owners—Effect of Coal Act, 1938—Position of Coal Commission—Coal Act, 1938 (c. 52), ss. 18, 22 (5).

The applicants applied for the right to work four seams of coal and for the right to let down the surface in the course of working and certain ancillary rights. The coal, which amounted to about 6,250,000 tons in freehold ownership and 9,000,000 tons in what was formerly copyhold ownership, was vested in such a number and variety of interests that it was impracticable to obtain the right to work it. It was contended on behalf of the Coal Commission that the right to work this coal should be granted on two conditions : (i) the reservation of a minimum rent, and (ii) an obligation within 10 years to sink further shafts to enable the lower seams to be properly developed :—

HELD : (i) a minimum rent ought not to be reserved. If the court assessed the amount of the minimum rent now, it would be a reservation of the minimum rent in favour of the large number of present owners, who could not in their individual capacity guarantee the applicants the period of industrial life, which alone could justify a minimum rent. The only alternative was to reserve a minimum rent to commence from the date when the coal would vest in the Coal Commission. Such a rent could only be assessed at the vesting date, and no postponement of assessment had here been asked for.

(ii) having regard to the fact that the applicants were a well-administered company and to the powers of inspection of the Coal

Commission, an obligation within 10 years to sink shafts to work the lower seams ought not to be imposed.

(iii) the Coal Act, 1938, s. 22 (5), gives the Coal Commission a right to appear and be heard upon an application of this nature.

[EDITORIAL NOTE. Under the provisions of the Coal Act, 1938, all coal and mines of coal, as therein defined, in Great Britain are to vest in the Coal Commission.

- A** Two dates are fixed for this purpose. The first is the valuation date, which is Jan. 1, 1939. The other is the vesting date, which is July 1, 1942. Between these dates all coal and mines of coal are to be held by the existing owners as if, in respect of all their interests therein other than retained interests, they had entered into a contract on the valuation date for the sale thereof to the Coal Commission at a price to be ascertained by valuation. As from the date of the passing of the Act, the coal is
- B** not to be dealt with to the prejudice of the Coal Commission. These provisions naturally react upon the consideration of a grant of working facilities under the Acts of 1923-1926, and the judgment herein is concerned with certain aspects of that question.

AS TO CONDITIONS OF GRANT OF WORKING FACILITIES, see HALSBURY, Hailsham Edn., Vol. 22, pp. 686-688, para. 1463; and FOR CASES, see DIGEST, Supp., Mines, Nos. 327d-327z.]

- D** APPLICATION by the Sherwood Colliery Co., Ltd., under the Mines (Working Facilities and Support) Acts, 1923, 1925, and the Mining Industry Act, 1926, for the right to work coal in four different seams, and for the right to let down the surface in the course of working, and, in addition, for certain ancillary rights necessary to enable the coal to be properly and conveniently worked.

The Coal Act, 1938, ss. 18, 22 (5), provides as follows :

- E** 18. As from the date of the passing of this Act until the valuation date, all persons interested in coal or a mine of coal shall be treated as holding their respective interests in a fiduciary capacity for giving effect to the provisions of this part of this Act, and as being subject accordingly to an obligation to refrain from any dealing therewith (not being a disposition or other dealing which might reasonably have been effected in the ordinary course of business if this Act had not been passed) calculated to give a factitious or artificial value to a holding or to prejudice the interests or powers to be acquired by the commission under this part of this Act.

- F** 22. (5) In the Mines (Working Facilities and Support) Act, 1923, s. 10 (2), there shall be inserted, after the words "The Board of Trade and any other Government Department", the words "and the Coal Commission".

H. V. Rabagliati, K.C., and P. G. Roberts for the applicants.

J. W. Brunyate for the first objectors, the Duke of Portland and Welbeck Estates.

- G** *J. P. Ashworth* for the second objectors, the Butterley Co.

David Bowen, K.C., and Hon. Dougall Meston for the Coal Commission.

- H** WROTTESELEY, J. [delivering the judgment of the court]: The minerals in question in this case lie either alongside of, or below, minerals already in lease to the applicants. The ground for the application is that the number of ownerships and the variety of interests involved make it impracticable to obtain the right to work these minerals. In addition, some of the owners, it is said, cannot be found, in spite of diligent inquiry by the applicants, and there are some hundreds of acres of land involved, formerly copyhold land. On all these heads, the

court is satisfied, and, since there are not objections in principle to the application, it only remains to consider whether it is expedient in the national interest that the right applied for should be granted, and to decide two questions raised by the Coal Commission as to the proper conditions to be imposed, and as to the amount and nature of the compensation to be paid in the case of the coal which is in freehold ownership. A

Seeing that, unless an order is made by the court, about 6,250,000 tons of coal in freehold ownership, and 9,000,000 tons of coal in what were formerly copyhold lands, will not be able to be worked in accordance with proper mining practices, and will very probably have to be left unworked altogether, there is no doubt that it is in the national interest B that the court should make the order.

As all the other objections to the order have been either withdrawn or settled upon terms which the court has found itself able to approve, it only remains to deal with the two outstanding points raised by the Coal Commission. I will deal first with the contention of the Coal Commission C that, among the terms imposed by the court by way of compensation or consideration, there should be a minimum rent. The amount of this proposed rent has fluctuated somewhat in the course of the inquiry, but is now a rent starting at £50 for the first year after July 1, 1942, and rising by £50 yearly until it reaches £400 yearly, at D which figure it is to remain until the end of the period for which the rights are granted. This rent is to attach only to the 560 acres of freehold coal the subject of the order, and not to such coal as lies in former copyholds, and it is not to commence from the date of the order, but from July 1, 1942, being the date upon which, under the Coal Act, 1938, the E fee simple in all coal and mines of coal is to vest in the Coal Commission.

There is no doubt as to the right of the Coal Commission to appear and be heard by this court on this application, for the Coal Act, 1938, s. 22 (5), gives them the right in terms, and also enables the court to require their assistance in a case of this kind. Moreover, in fixing the F amount and nature of a consideration or compensation which is in the nature of a rent or royalty in respect of coal, the court cannot lose sight of the Coal Act, 1938, s. 18, which places all persons interested in coal, since July 29, 1938, in a fiduciary position for giving effect to the Act, and forbids them to do anything either to inflate artificially the value G of their interests or to prejudice the interests which are, under the Act, to pass to the Coal Commission. This is not the same thing as an obligation so to deal with such property as to increase its value in the hands of the Coal Commission.

In our view, the question whether or not a minimum rent should be H imposed by this court is a question which has to be decided on the merits of the particular case. We accept the proposition laid down by Mr. Hyslop, the vice-chairman of the Coal Commission, that the proper functions of a minimum rent are (i) to secure diligent working, and (ii) to ensure to the owner of the coal some measure of constancy of

income. At the same time, it has, we think, to be borne in mind that, if a minimum rent is to bring about these results, and also to bring about good mining practice, it must only be imposed in suitable cases, and with due regard to the likelihood or otherwise of the rent being in fact earned within a reasonable period of time.

- A** The duty of this court is clear as to the measure it is to apply in fixing compensation. Compensation is to be what is fair and reasonable as between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is granted. Here the grantors are many hundreds of persons, quite unable in their individual capacity to afford to the applicants the scope or period of industrial life which alone would justify a minimum rent, and it is doubtless for this reason that the Coal Commission content themselves with a proposal for a rent to commence from the date when the coal of the country will vest in them. It seems to us, however, that the court must either assess the
- C** compensation now—that is to say, to the present owners—or postpone the assessment. No postponement has been asked for, and it is difficult to see how it could be justified in this case. Matters being as they are, we think that a minimum rent is not a thing which a willing grantor could reasonably demand, nor a willing grantee submit to pay. As
- D** regards the other function of a minimum rent—namely, to ensure diligent working—this is sufficiently provided for, in the case of orders made by this court, by the liberty to apply, which will enable the Coal Commission to come to this court if necessary.

- The second matter to be determined by the court is whether or not
- E** the order of the court shall include a term imposing on the applicants the obligation within 10 years of sinking further shafts to enable the coal in the lower seams, the subject of the order, to be properly developed. If the function of the court were to grant leases giving the lessees within the range of the covenants in those leases freedom to act as they pleased,
- F** I think it quite likely that the court would incorporate such a covenant. Nevertheless, it would remain a leap in the dark, imposing on the lessee a very heavy liability which might turn out to be unnecessary, and, therefore, oppressive.

- It is common ground that the applicants are a well-administered
- G** company and have shown skill and a proper sense of responsibility in their operations here and elsewhere. Having regard, therefore, to the powers of the Coal Commission to inspect the applicants' mine, we think it both unnecessary and unwise to impose any such obligation. If the applicants, or any other person working coal under an order of this court,
- H** should be guilty of a lack of diligence in exploiting minerals the development of which has been confided to them on the faith of a promise to develop them properly, the court will, on the facts being established, take the necessary steps to enforce their orders, and in this and in all the other cases now before us the liberty to apply will extend to the Coal Commission.

Finally, it will be seen that it has not been necessary for the proper consideration and determination of this case to decide the matter which was argued before us at some length—namely, whether on July 1, 1942, there will pass to the Coal Commission the interests of the various freeholders (as opposed to copyholders) now interested in the coal the subject of the order we propose to make—and upon the construction of the numerous other sections of the Coal Act, 1938, to which our attention was called in the course of the argument, we express no opinion now. At the same time, we are obliged to counsel on either side for the pains they took to expound the provisions of the Coal Act, 1938, which are complicated and far-reaching.

We take this opportunity of saying that it is clear that the Coal Commission has not lost sight of the fact that we were entitled to their assistance in the course of our deliberations, and we are grateful for that assistance.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wells & Hind*, Nottingham (for the applicants); *Baileys, Shaw & Gillett* (for the first objectors, the Duke of Portland and Welbeck Estates); *Thicknesse & Hull* (for the second objectors, the Butterley Co.); *B. S. Jaquet* (for the Coal Commission).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

MESSERS, LTD. v. MORRISON'S EXPORT CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), **December 14, 1938.**]

Sale of Goods—Rejection—Stipulation in contract—Timber “to be loaded on deck one-third”—More than one-third loaded on deck—Whether buyers entitled to reject.

A contract for the sale of timber contained the words “to be loaded on deck one-third at British Columbia” and “shipmen' January and February one-third on deck.” More than one-third was in fact shipped on deck, and the buyers thereupon rejected the goods as not answering to the description of the goods in the contract:—

HELD: the contract upon its proper construction required that one-third only was to be placed on deck, and the buyers were, therefore, entitled to reject the goods.

[EDITORIAL NOTE.] The point here is the short one whether goods not loaded in accordance with the provisions of the contract are goods not answering the description in the contract, so as to entitle the buyers to reject them. This point is decided in favour of the buyers.

AS TO STIPULATIONS WHICH ARE CONDITIONS, see HALSBURY, *Hailsham Edn.*, Vol. 29. pp. 53, 54, para. 65; and FOR CASES, see DIGEST, Vol. 39, p. 438, Nos. 669-675.]

Cases referred to:

- (1) *Montague L. Meyer, Ltd. v. Travaru A/B H. Cornelius, of Gamleby* (1930), 46 T.L.R. 553; Digest Supp.
- (2) *White Sea Timber Trust, Ltd. v. W. W. North, Ltd.* (1932), 14S L.T. 263; Digest Supp.

SPECIAL CASE STATED by an umpire for the opinion of the court. The dispute arose upon the proper construction of a clause in a contract for the sale of timber which provided that one-third of the timber should be loaded on deck. The facts and the terms of the contract and the award fully appear from the judgment.

A *G. J. Paull* for the buyers.

Valentine Holmes for the sellers.

BRANSON, J.: This action turns upon quite a short point. It comes before me as an appeal by way of case stated from an award
B made in an arbitration between the buyers, Messers, Ltd., and Morrison's Export Co., Ltd., the sellers, under a contract dated Jan. 4, 1938, upon the Pacific Coast contract form. Under the contract, Morrison's Export Co., Ltd., agree to sell to Messers, Ltd., a quantity of timber, and in the contract there is the following provision about loading: "to be
C loaded on deck one-third at British Columbia." The words "under deck," printed below the words "on deck," are struck out. Later on, under the heading of specification and prices, one gets another clause: "shipment January and February one-third on deck." The shipment was made, not one-third on deck, but 69 standards out of the total of
D 80 of the particular goods which are referred to in the clause upon the January and February shipment were so loaded. More than one-third was, therefore, shipped on deck. Upon that ground, the buyers rejected the parcel, and the question is whether or not they were entitled so to reject. This question turns upon the true construction to be placed
E upon the provision as to one-third loaded upon deck.

Mr. Holmes most ingeniously argues that the contract is only concerned with one-third, and does not account for where the rest is going to be. I am afraid that I cannot assent to that, and it seems to me that the proper construction to be placed upon the contract, which says that
F one-third of the cargo is to be loaded on deck, is that it is to be one-third only on deck. One starts with the general proposition that the deck is not the place upon which to put cargo except by some special arrangement. The matter is set out in SCRUTTON ON CHARTERPARTIES, 13th Edn., at p. 163:

G The shipowner or master will only be authorised to stow goods on deck: (1) by a custom binding in the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper of the particular goods so to stow them.

H It is quite true that this is dealing with a matter in relation to a contract between a shipper and a shipowner.

I cannot help reading this contract as containing a direction that one-third, and one-third only, is to be shipped on deck. That being so, the goods in excess of one-third which were shipped upon deck are not goods which answer to the description of the goods in the contract. It is not a parcel of timber "loaded

one-third on deck," upon the proper construction of those words. Consequently, the two cases which Mr. Paull cited—*Montague L. Meyer, Ltd. v. Travaru A/B H. Cornelius, of Gamleby* (1) and *White Sea Timber Trust, Ltd. v. W. W. North, Ltd.* (2)—are authorities which bind me to hold that this parcel was properly rejected by the buyers. This conclusion is consistent with the two letters to which Mr. Holmes A referred me and which indicate quite plainly, to my mind, that the view I have been taking of the contract is that which was taken by the parties themselves. The letter in which the sellers offered an allowance of 5s. per standard suggests that they were tendering a peace offering in order to avoid an arbitration about it. It looks, as I think it is, a case in B which they knew that they had done wrong, and were offering the 5s. per standard in order to try to get the buyers to take the goods which they were not bound to take, and which the sellers knew they were not bound to take. The decision of the arbitrator that the buyers were not entitled to reject this parcel is wrong in law, and must C be set aside. Under cl. 13 of the contract, I have come to the conclusion that the arbitrator should have given effect to the buyers' contention. D

Solicitors: *William A. Crump & Son* (for the buyers); *Pritchard, Englefield & Co.* (for the sellers).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

SMITH v. PEARL ASSURANCE CO., LTD.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.J.J.), **January 11, 1939.**]

Arbitration—Staying proceedings—Action for damages for negligence—Insolvency of defendant—Action by successful plaintiff against defendant's insurers—Arbitration clause in insurance contract—Poverty of plaintiff—Whether such poverty a ground for refusing to stay action brought under the Poor Persons Rules—Third Parties (Rights against Insurers) Act, 1930 (c. 25), s. 1 (1)—Arbitration Act, 1934 (c. 14), s. 3 (4).

The plaintiff was injured in a motor car accident owing to the negligence of B., and recovered judgment against him. B. became insolvent, whereupon his rights under his contract of insurance became transferred to the plaintiff, by reason of the Third Parties (Rights against Insurers) Act, 1930, s. 1 (1). The plaintiff then started an action against B.'s insurance company, the present defendants, who applied to have the action stayed, on the ground that there was an arbitration clause in the contract between themselves and B. The plaintiff contended that, owing to his poverty, although he could proceed with an action in the High Court with the aid of such assistance as he could get from the Poor Persons Committee, he would not be able to proceed with an arbitration, to which form of proceedings the Poor Persons Rules do not apply :—

HELD : the plaintiff's poverty was not a sufficient ground for exercising any discretion that the court might have to refuse to order a stay.

[EDITORIAL NOTE. The court were not here under the necessity of deciding whether there is a discretion in the court to stay proceedings in the circumstances of this case, but have merely had to decide that, even assuming that there is such a discretion, this was not a case in which it ought to be exercised. It will be noted that the plaintiff here was not a party to the insurance contract in which the arbitration clause was included, and, therefore, was only bound by that clause by reason of his being a person to whom the rights of the insured were transferred by statute.

AS TO STAYING PROCEEDINGS PENDING AN ARBITRATION, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 640-643, paras. 1089, 1090 ; and FOR CASES, see DIGEST, Vol. 2, pp. 368-375, Nos. 353-394. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 2177-2188.]

APPEAL from an order of ASQUITH, J., dated Dec. 12, 1938. The facts of the case are fully set out in the judgment of SLESSOR, L.J.

The Third Parties (Rights against Insurers) Act, 1930, s. 1 (1), provides as follows :

Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors ; or (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge ; if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

The Arbitration Act, 1934, s. 3 (4), provides as follows :

Where it is provided (whether by means of a provision in the arbitration agreement or otherwise), that an award under an arbitration agreement shall be a

condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

L. B. Schapiro for the appellant, the plaintiff.

H. D. Samuels, K.C., and *Montague Berryman* for the respondents, A
the defendants.

SLESSER, L.J. : We are very much indebted to Mr. Schapiro for putting clearly before us all that can be said in this unfortunate case, but, having come to a clear conclusion that, even if this court has a discretion in this matter—a matter which we think raises a difficult question—we think that the discretion cannot here properly be exercised to interfere with the contractual conclusions which were arrived at between the two principal parties. Therefore, on that ground alone, this appeal must fail. B C

The facts of the case, shortly stated, are these. A Mr. Blackmore was insured with the defendants, the Pearl Assurance Co., Ltd., against what are generally called third-party risks. The plaintiff was a passenger in the motor car the subject of the insurance, and it is alleged that, owing to the negligence of Blackmore, the plaintiff suffered a serious injury, loss, and damage which, on judgment being entered on Dec. 24, 1937, was assessed at no less a sum than £2,160, and it was adjudged that the plaintiff recover against Blackmore £2,160 and costs to be taxed. Blackmore became insolvent, and, in accordance with the provisions of the Third Parties (Rights against Insurers) Act, 1930, s. 1 (1), the rights of the insured under the contract were transferred to, and vested in, the third party—namely, the person to whom the liability was so incurred, that is, the plaintiff. D E

The plaintiff then issued a writ and a statement of claim against the insurance company reciting the facts which I have stated,* and the insurance company took the point that, under the contract of insurance between them and Blackmore, they were entitled to have the action stayed, on the ground that the parties had agreed to refer their differences to arbitration. That was under cl. 6 of the policy, which so stated, and also went further, adding a provision that the making of an award should be a condition precedent to any right of action against the company. F G

It may well be that the effect of those words in the Arbitration Act, 1889, would be to exclude discretion to that end. It has been argued that, under the extended language of the Arbitration Act, 1934, s. 3 (4), the court may order that the provision that the making of an award shall be a condition precedent shall cease to have effect with regard to that dispute, dealing with other matters, even where there is, in circumstances such as these, no submission. As I have said, on that very difficult condition I express no opinion. However, I am clearly of opinion that, where a discretion on the grounds suggested in this case H

is not sufficient to justify the court in refusing to stay the action, if the matter had been looked at in the first place as it ought to have been, as between Blackmore and the insurance company, it is clear to my mind that the parties, being both contractors, have contracted, without any condition as to the poverty of Mr. Blackmore or anyone
A claiming through him, that the making of the award shall be a condition precedent to any rights of action, and that all differences shall be submitted to arbitration.

If Mr. Blackmore had been in the position of the present plaintiff and it had been argued on his behalf that he could only appear under
B the Poor Persons Rules, and had no money to provide the expense of bringing the matter before the court, it would be almost unarguable that the ground on which the court has proceeded on the matters involved, being questions of law—questions of the subject-matter—would be the sort of ground on which the discretion could be exercised to
C interfere with what, *prima facie*, has been agreed between the parties—namely, that they should proceed to arbitration.

The position of the present plaintiff, and that of Mr. Blackmore, is made clear under the Act of 1930. Whatever his rights were, they are transferred to, and vested in, the plaintiff, and the result may be that,
D by reason of his poverty, the plaintiff who could have proceeded under the Poor Persons Rules may have difficulty in finding the money to proceed under the Arbitration Act. These facts cannot, in the circumstances, be any ground for saying that effect should not be given to the contract between Mr. Blackmore and the insurance company when
E its rights and conditions are vested in the plaintiff. If the contention of the appellant's counsel is right, it seems to me that every person in a state of poverty—certainly such a state of poverty as to entitle him to have recourse to the Poor Persons Rules—can argue that he is not bound by the arbitration clause. I can find no authority for that, and,
F if it be a question which is open at all, I do not think that we should exercise our discretion to interfere with the rights of the insurance company merely because of the poverty of the other party to the arbitration clause, or a person deriving title from him.

G CLAUSON, L.J.: I agree. As I understand the matter, the judge and the master took the view that this was not a case in which the court had the discretion which is *prima facie* given by the Arbitration Act, 1889, s. 4, to stay the proceedings. That question I should desire to leave entirely open. It turns partly on the construction of the contract
H and partly on the true result of the Arbitration Act, 1889, as varied by the Arbitration Act, 1934. Accordingly, I would assume for the purpose of this judgment that this court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, will not make an order staying the proceedings. Then I address myself to the question whether or not in this case there

is a sufficient reason why the matter should not be referred to arbitration. The only sufficient reason suggested is that the plaintiff finds himself to be in such a financial position that, if his suit were continued in the High Court, he would, as he conceives, have the benefit of the Poor Persons Rules, and would, accordingly, be in a favourable position for bringing the matter before the court. It is pointed out that, if the matter is to go to arbitration, he will not get any corresponding benefit, and will be gravely hampered in establishing his case. This, it is to be observed, is a personal disability under which the plaintiff finds himself, a personal disability in no way connected with the contractual rights or obligations arising out of the contract in respect of which he has, or conceives himself to have, a cause of action. In my judgment, it can only be in some very exceptional case indeed that the court would be justified in holding that one party's mere personal disability of this character would be a sufficient reason for the court to exercise the power, given by the Arbitration Act, 1889, s. 4, of overriding the contractual right of arbitration. On that ground, in my view, the order made below must stand.

I only wish to add that, should it become necessary in the future to deal further legislatively with the matter which was dealt with in the Third Parties (Rights against Insurers) Act, 1930, I trust that those who have to deal with the matter will carefully consider whether there are not weighty reasons why persons who have the advantage of some such legislative provision should not be freed from the restriction, which might otherwise fall upon them, of being driven to arbitration. That, however, is a matter of policy, upon which I should not be justified in expressing any view. Nevertheless, I do think, having regard to such experience as I have had in these matters, that I am justified in drawing attention to the desirability of that question being very carefully considered, should the occasion arise.

DU PARCQ, L.J.: I agree, both in the result and for the reasons which have been given, with the judgments which have been delivered, and I do not think that I can usefully add anything.

Appeal dismissed.

Solicitors: *Pennington & Son* (for the appellant); *Berrymans* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re ANGLO-CONTINENTAL PRODUCE CO., LTD.

[CHANCERY DIVISION (Bennett, J.), December 16, 20, 21, 1938.]

Companies—Winding up—Just and equitable—Company's petition—Majority of shareholders desirous of being repaid their capital—Company earning little or no profit—Suggested friction or deadlock in management—Companies Act, 1929 (c. 23), s. 186 (6).

A

A company presented a petition for its compulsory winding up, under the Companies Act, 1929, s. 186 (6), on the ground that it was just and equitable that it should be wound up. The petition was presented as the outcome of a resolution to wind up carried by a majority, which was not a three-fourths majority, of the shareholders. The substantial reasons given for its being just and equitable to wind up were (i) that the majority of shareholders desired to have repaid to them the money which they had tied up in the company, as it was not earning any interest or dividend, and (ii) that there was a state of deadlock and friction which made it impossible for the business of the company to be carried on. The company was not being carried on at a loss :—

B

C

D

HELD : the court ought not to exercise its jurisdiction under the Companies Act, 1929, s. 186 (6), unless some wrong has been done to the company and the company is deprived of its remedies in respect of it by the improper use of voting power of the shareholders, or that the substratum of the company has gone, or that it is impossible, owing to the way in which the voting power is held and to the feelings of the directors towards one another, for the business of the company to be carried on. The petitioner had failed to establish that any of these conditions existed, and the petition ought to be dismissed.

[EDITORIAL NOTE. Generally speaking, where a petition is based upon the ground that it is just and equitable that a company should be wound up, it is not sufficient to show that the company is not earning a profit, or even making a heavy loss, if it is not insolvent. If friction or improper or *ultra vires* acts are relied upon, they must be acts done in the past, and not those contemplated as likely to be done in the future. The failure of the petition here is mainly upon these grounds.

E

AS TO "JUST AND EQUITABLE," see HALSBURY, Hailsham Edn., Vol. 5, pp. 545-548, para. 885 ; and FOR CASES, see DIGEST, Vol. 10, pp. 821-828, Nos. 5353-5398.]

F

Cases referred to :

- (1) *Re Langham Skating Rink Co.* (1877). 5 Ch.D. 669 ; 10 Digest, 845, 5562 ; 46 L.J.Ch. 345 ; 36 L.T. 605.
- (2) *Baird v. Lees*, [1924] S.C. 83 ; Digest Supp.
- (3) *Loch v. Blackwood (John), Ltd.*, [1924] A.C. 783 ; Digest Supp. : 93 L.J.P.C. 257 ; 131 L.T. 719.

G

PETITION by a company for an order for its compulsory winding up on the ground that it is just and equitable that it should be wound up. The facts are fully set out in the judgment.

C. R. R. Romer, K.C., and J. B. Lindon for the petition.

F. R. Evershed, K.C., and Hon. Denys B. Buckley against the petition.

H

BENNETT, J. : This is the petition of the Anglo-Continental Produce Co., Ltd., for its own compulsory winding up. The petition is presented by the company as the outcome of a resolution passed at an extraordinary general meeting of the company held on Oct. 18, 1938, the resolution being that the company be wound up and that the directors be directed

to present a petition therefor, the resolution being carried by the votes of 12 shareholders, who had 6,599 votes, against the votes of 3 shareholders, who had in respect of their shares 2,875 votes, the shareholders voting in favour of the resolution not having a majority sufficient to enable them to pass a special resolution. Since the petition was presented to the court, there has been a slight change in the voting, but I do not think that there is any substantial difference between the votes held by the shareholders who now desire the company to be wound up by the court and those stated above. A

The company is a private company, formed in 1898, and by its articles of association it is provided that there shall be two governing directors, a Mr. Hansen and a Mr. Robinson. Art. 67 provides as follows : B

The said H. P. Hansen and W. A. Robinson shall be the governing directors of the company until they vacate the office of directors under art. 63 and while they retain the said office they shall have authority to exercise all the powers, authorities, and discretion by these presents expressed to be vested in the directors generally, and all the other directors for the time being of the company shall be under their control and shall be bound to conform to their directions in regard to the company's business. C

Then art. 68 provides as follows :

The said H. P. Hansen and W. A. Robinson, whilst they hold the office of governing directors, may from time to time appoint any other person or persons to be a director of the company, and may define, limit, and restrict his or their powers, and may fix or determine his or their remuneration and duties, and may at any time remove any director howsoever appointed, and may at any time convene a general meeting of the company, but so that the total number of directors at any time shall not be less than three, or unless so determined by the company in general meeting, more than four. D

Art. 69 provides as follows : E

If the said H. P. Hansen shall resign his office pursuant to art. 63, or he shall die while he holds the office of governing director, he or the trustees for the time being of his will, as the case may be, shall have the right to appoint a governing director of the company in his place, and the person so appointed shall exercise the powers vested in governing directors by arts. 67 and 68. F

There is one other relevant article, and that is art. 109, which provides as follows :

Notwithstanding the provisions of the Companies Acts, the company shall not be wound up voluntarily for the term of 12 years from Dec. 1, 1906, for any reason other than that the company is insolvent without the written consent of the said William Arnot Robinson, while a governing director of the company. G

The share capital is in part preference shares and in part ordinary shares. The issued preference shares (there are 1,399 of them, each of £10) are held by nominees of Mr. Hansen. Each share confers upon the holder one vote, and there are associated with Mr. Hansen 12 holders of ordinary shares, holding between them 5,200 shares, of the nominal value of £36,496. H

The petition is opposed by Mr. Robinson and by two other shareholders, a Miss Cotter and a Mr. Larson. Mr. Robinson holds 2,503 ordinary shares, of the nominal value of £18,098, Miss Cotter holds

1 share, of the nominal value of £10, and Mr. Larson holds 566 ordinary shares, of the nominal value of £4,096. Mr. Larson owes money to the company, and his shares are deposited with the company as security for his debt.

- For many years the company was extraordinarily prosperous. In the course of its career it has paid a dividend on its ordinary shares amounting to as much as 1,575 per cent. free of tax. That was in a half-year which ended in Nov., 1914, and there are years before that when the rate of dividend on the ordinary share capital was very large. In recent years, however, since 1929, the business has not been conducted so profitably. It has paid no dividend on its ordinary shares since 1928, and the dividend on the preference shares is in arrear since Nov., 1934. Mr. Hansen has retired from his office of governing director. He retired, I think, in 1931. The present board consists of Mr. Robinson, Mr. Bryant, who is a solicitor, and a Mr. Pitts, his managing clerk. Mr. Hansen has not exercised the power which the articles of association give him of appointing a governing director under the provisions of art. 69, which I have read. Mr. Robinson claims that, the board being constituted as it is, he, as a governing director, has, under art. 67, the powers which that article gives to a governing director.
- The company is not insolvent, and I understand that in the financial year which has just ended it is probable that the company has made a small profit. The ground upon which it is suggested that the court ought to make a compulsory order is that it is just and equitable that the company should be wound up, which is sect. 168 (6). Sect. 168 provides as follows :

- A company may be wound up by the court if (1) the company has by special resolution resolved that the company be wound up by the court : (2) default is made in delivering the statutory report to the registrar or in holding the statutory meeting : (3) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year : (4) the number of members is reduced in the case of a private company, below two, or, in the case of any other company, below seven : (5) the company is unable to pay its debts : (6) the court is of opinion that it is just and equitable that the company should be wound up.

- At one time the view was held that before the jurisdiction given by sect. 168 (6) could be exercised, it must be upon some ground which is of the same kind as the grounds indicated in the previous five clauses. However, that is no longer the law, and sect. 168 (6) gives to the court a jurisdiction to wind up without taking into consideration any of the matters referred to in the earlier clauses. It stands by itself, saying that the court has to be satisfied before it can make a winding-up order that it is just and equitable that the company should be wound up.
- The grounds suggested in the petition for saying that it is "just and equitable" are, first of all, in para. 5 :

For several years past the company has suffered severe loss in the course of its business.

The second ground suggested, in para. 6, is that it has paid no dividend

in respect of its ordinary shares since 1928, and in respect of its preference shares since Nov., 1934. Then, under para. 8, it is suggested as a third ground that the majority of the shareholders (which I have already stated) are anxious that it should be wound up, and that they directed the directors to present a petition in order that it should be wound up. Next, it is suggested that there is friction owing to the fact that Mr. Robinson claims the right to exercise the powers which the articles confer upon him as governing director. Lastly, in para. 13, there is suggested the ground that there is now a large debt due to the company from Mr. Larson, the suggestion being that Mr. Robinson, during the absence from England of Mr. Hansen, acted without his authority or the authority of the board of directors of the company, or of the shareholders, advanced large sums of money out of the company's funds to Mr. Larson, an employee of the company. On those grounds, it is said that it is now just and equitable that the company should be wound up.

When the facts are examined, so far as Mr. Robinson is concerned, it is clear from para. 12 of his affidavit, which has been unanswered, that Mr. Larson incurred his debt to the company with Mr. Hansen's knowledge, and there is no ground whatever for suggesting any impropriety on the part of Mr. Robinson in having allowed Mr. Larson to become a debtor to the company in the sum which is referred to in the petition. When one gets down to the real facts of the case, the reason for which it is said that it has now become "just and equitable" to wind up this company is that the majority of the shareholders desire to have repaid to them the money which they have got tied up in it. Their money is not at the moment earning for them any interest or any dividend, and it is said that their reason for wanting it back is not capricious. That is the first ground. The second ground is that there is a state of deadlock and friction which makes it impossible for the business of the company to be carried on.

I think that it is clear from what was said by JAMES, L.J., in *Re Langham Skating Rink Co.* (1) that the mere wish of the majority of the shareholders, not being a three-fourths majority, to be repaid the money which has been advanced by them to the company is no ground whatever for making a winding-up order on the footing that it is just and equitable so to do. In *Re Langham Skating Rink Co.* (1), JAMES, L.J., says, at pp. 685, 686 :

The legislature has not authorised a mere majority to say that they will capriciously discontinue the undertaking which has been begun, it was not thought right that people when advancing money in undertakings of this kind should be left at the mercy of a mere majority of their brother shareholders, and those who wish to wind up must get a majority of three-fourths.

It is clear, therefore, to my mind, that the mere fact that a majority want to get their money back does not make it just and equitable that the company should be wound up in order that they may get it back. There must be something more than that. I think that one gets an

indication of what is required from what was said by LORD CLYDE, Lord President, in *Baird v. Lees* (2), a case which was cited in *Loch v. John Blackwood, Ltd.* (3). In the judgment of the Privy Council, delivered by LORD SHAW OF DUNFERMLINE, in the latter case, this is the passage which, at pp. 793, 794, is cited from the judgment of LORD CLYDE, Lord President, in *Baird v. Lees* (2), at p. 92 :

I have no intention of attempting a definition of the circumstances which amount to a "just and equitable" cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind up the company.

I do not think there is any case, or at least none has been cited to me, in which a court has made a winding-up order on the ground that it is just and equitable to make it unless it has been proved, either that some wrong has been done to the company and the company is deprived of its remedies in respect of it because the voting power has been so used as to prevent the company from having its remedy in respect of it, or that it is a case in which the sub-stratum of the company has gone, or that the case has been one in which it has been impossible, owing to the way in which the voting power is held and to the feelings of the directors towards one another, for the business of the company to be carried on. The present case has not been brought within any one of the decided cases. At least, that is my view of it. So far as any wrong done to the company is concerned, there is none here suggested. So far as friction between the directors or between the shareholders is concerned, which makes it impossible for the business of the company to be carried on, none has been proved, and, on the articles as they stand, Mr. Robinson, the governing director, has, I think, upon the true construction of the articles, the power, if he wants to exercise it, to overrule the views of those who at the moment are associated with him in the direction of this company.

It was suggested that Mr. Hansen, the largest shareholder, has the power of appointing somebody to act as a governing director with Mr. Robinson. It is true that he has, and it was suggested that, if he did exercise the right which he has, there might then be friction between the person so appointed and Mr. Robinson. Nobody can look into the future with certainty and say what will happen, and I do not think that there ought to be a winding-up order made now merely because there is that possibility. That position may never arise, and, the petitioners having failed, as I think they have, to establish that the facts bring the present case within any one

of the decided cases as to what is just and equitable, in my judgment this petition fails, and must be dismissed with costs.

Petition dismissed with costs.

Solicitors : *Roche, Son & Neale* (in support of the petition) ; *Timbrell, Deighton & Nichols* (in opposition to the petition).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.] -

ELLIS v. RAINE.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), January B
11, 1939.]

Practice—New trial—Claims under Fatal Accidents Acts and for loss of expectation of life—Nil assessment for loss of expectation of life—New trial in respect of both sets of damages.

Upon a trial with a jury of an action for personal injuries, in which the plaintiff claimed both under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934, the jury awarded £125 damages under the former Act and no damages under the latter. The judge had directed them to award damages under both heads. It was contended, in answer to an application for a new trial, that the order for a new trial should be restricted to the assessment of damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and that the award of £125 under the Fatal Accidents Acts, having been found upon a proper direction, ought to stand :—

HELD : it was clear that the jury had misapprehended the direction as to the assessment of damages, and there must be a new trial on both issues as to the amount of damages, but not on the liability for negligence.

[EDITORIAL NOTE. Previous cases, notably *Feay v. Barnwell*, [1938] 1 All E.R. 31 ; Digest Supp., and *The Aizkarai Mendi*, [1938] 3 All E.R. 483 ; Digest Supp., have considered the question of the overlapping of the damages given under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. Here it was beyond question that the jury had been fully and properly directed by the judge upon the mode of assessment and the necessity for separate assessment under the two heads. The Court of Appeal, however, were satisfied that the nil assessment under the Law Reform (Miscellaneous Provisions) Act, 1934, could only have been the result of a misapprehension on the part of the jury on the whole question of the assessment of damages, and that, therefore, upon a new trial, the whole question of the amount of damages must be reconsidered.

AS TO DAMAGES FOR PERSONAL INJURIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016 ; and FOR CASES, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to :

- (1) *Bailey v. Howard*, [1938] 4 All E.R. 827 ; Digest Supp.
- (2) *Shepherd v. Hunter*, [1938] 2 All E.R. 587 ; Digest Supp.
- (3) *Barnett v. Cohen*, [1921] 2 K.B. 461 ; 36 Digest 133, 887 ; 90 L.J.K.B. 1307 ; 125 L.T. 733.
- (4) *Rose v. Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

APPEAL by the plaintiff from a verdict and judgment at a trial before WROTTESELEY, J., and a common jury at Durham, on Mar. 3, 1938,

the plaintiff applying for judgment or a new trial. There was also a cross-appeal by the defendants. The action was brought by the father, suing for himself and the mother of a boy aged 8 who was killed on Oct. 16, 1936, by a motor car on a road between Stockton and Sunderland by the negligence of the driver, as found by the jury in the action.

A *G. Russell Vick, K.C.*, and *A. M. Hurwitz* for the appellant (the respondent on the cross-appeal).

C. Paley Scott, K.C., and *J. Charlesworth* for the respondent (the appellant on the cross-appeal).

Vick, K.C. : Since the Act of 1934 there must always be a substantial
B award for loss of expectation of life in the case of the death of a normal healthy child. After a careful direction by the judge, the jury have given their verdict under two heads. There has been no duplication of damages here and no confusion. The jury have definitely given nothing under the 1934 Act. On that point there must be a new trial. [Counsel
C referred to *Shepherd v. Hunter* (2) and *Bailey v. Howard* (1).] As to the cross-appeal, the £100 under Lord Campbell's Act is a proper award, which should not be disturbed. There is nothing to show that the jury took into consideration anything which they should not have done. [Counsel referred to *Barnett v. Cohen* (3).]

D *Paley Scott, K.C.* : The jury, I agree, have dealt with both heads of damages. It would be inconvenient to send the case for a new trial on one of the heads of damage alone. In *Rose v. Ford* (4), the House of Lords did not think that the same person would recover under both heads of damage. If the jury thought that this child's expectation of
E life was worth £100 and also thought that £100 was a proper award under Lord Campbell's Act, there must have been confusion. It was as if the boy had died entitled to £100. The two awards interact. It is a purely academic mistake. The jury may have given an award under a wrong head. If they had given the £100 for the loss of life, the court
F would not interfere. The jury must have misunderstood the summing up. The question of negligence was very doubtful. It is probable that the verdict was a compromise one. The case must be sent back for a full retrial, including a retrial of the question of liability.

G SCOTT, L.J. : There were two claims here, as is usual in these cases. One was under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, which gives to a person injured by negligence a right of action which passes to his executors or administrators. Under that cause of action, as we know, one of the elements of loss giving a right to damages is
H the loss of expectation of life caused by the accident, whether it merely shortens the life, the accident itself not causing the death, or actually produces death. In the event of death the cause of action possessed by the deceased person passes automatically to the personal representative. In addition there is the cause of action under the Fatal Accidents Act, 1846, which, as amended, subsequently (and particularly

in regard to funeral expenses) by the Act of 1934, allows funeral expenses to be brought into account as an element in the loss to the dependants.

In the present case the jury, as I have said, found that the accident was caused by the negligence of the defendant, whose car ran over the deceased boy in a road in the county of Durham in circumstances which led to his death very soon after the accident. The judge directed the jury in his summing up on the question of negligence, and, in my view, although, on the cross-appeal, it was contended by Mr. Paley Scott, on behalf of the respondent, that there ought to be a new trial on the issue of liability, it is quite clear that there was evidence upon which the jury were entitled to find, if they thought fit, that the accident was caused by the negligence of the respondent.

That leaves the question of damages as the issue upon which we have to consider the summing up of the judge to the jury. It is common ground on both sides here—and, whether or not it were common ground in this court, to me it is quite clear—that the judge directed the jury in terms which were wholly right, to which, in my view, no criticism could properly be applied. He urged them several times to fix moderate figures. He explained to them the difference between the two causes of action, using terms which were unexceptionable, and directed them to find a separate figure under each head. The jury, in fact, found a figure of no damage at all having been suffered by the estate of the deceased boy, and awarded “Nil” in answer to the judge’s question as to what was the proper figure for damages under that head. Under the head of Lord Campbell’s Act, they awarded £125, being £25 for funeral and testamentary expenses and the balance for damages for the loss to the dependants, the father and mother, resulting from the death itself, in the terms of Lord Campbell’s Act. Whether or not the whole of the £25 is covered by the phrase in the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (3), which says that, in an action brought under the Fatal Accidents Acts, 1846 and 1908, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought is a minor question, and I do not think it necessary to consider that in detail. The result of those two answers is that, although the jury were directed by the judge that they must find a figure for the claim for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the cause of action which the deceased boy had at the moment of his injury, when he was still alive, and which survived his death by reason of that Act, on that head the jury gave nothing at all, in spite of the judge’s direction to them that they were to find a figure. That being so, *prima facie* the jury failed in their duty to make a proper estimate of the damages suffered, and I can see no answer to the submission, on behalf of the appellant here, that there must be a new trial, so far as that head of damage is concerned.

- Mr. Russell Vick asks the court not to direct a new trial on the figure of £125 under Lord Campbell's Act, submitting that the jury had found that figure upon a clear and proper direction by the judge, and that, therefore, there was no ground for that figure being set aside and another jury being asked to investigate again what the loss of the dependants had been. Had the jury found a definite figure under the head of claim under the Law Reform (Miscellaneous Provisions) Act, 1934, that argument would have been very forcible, but, as it is clear to me that the jury misapprehended the judge's directions in regard to that cause of action, he having instructed them to find a figure and they having said that there was no loss, I am not satisfied that the jury understood what they were doing in fixing the £125 under the head of Lord Campbell's Act and nil under the other head of claim. In those circumstances, I think that it is essential to send back the assessment of damages on both heads, to be retried by another jury.
- Mr. Russell Vick asked the court to explain in its judgments the principles upon which either a jury or judge ought to quantify the damages for loss of expectation of life. I think that the proper answer to that request is to say that a general disquisition on damages to be given in various circumstances is not within the duty of the court. To give that kind of judicial advice would be a very dangerous course to adopt, and, in my view, wrong. The case has to be retried by another jury, and, difficult as it is for a judge to state the principles upon which expectation of life can be turned into a money figure, I think that the only safe course is to leave the case to be dealt with by a jury on the kind of direction that many King's Bench judges have now given. I said myself in *Bailey v. Howard* (1) that, in regard to that difficulty, I was very conscious of the difficulty, and felt that it was only the juries of the country who could really, under proper direction, form anything approximating to a scale of compensation for the loss of expectation of life. Whether Parliament, when they passed the Act of 1934, had thought out this exceedingly difficult problem of assessing the loss of expectation of life I express no opinion. It is possible that they did not. At any rate, whether they did or not, the problem set the courts of this country is one of quite extraordinary difficulty, and it is for that reason that it is, so to speak, a social question, turning upon the character of English society and the whole theory of politics of this country, and, that being so, I consider that the jury is a much better guide than the judges are. On the other hand, it is quite clear from the present case, as compared with some of the awards which have been given by juries, that juries are obviously not all acting on the same principles, and it may be that ultimately Parliament will have to intervene to give some further assistance. However, that is no reason for the judges of the country taking upon themselves the burden of attempting to lay down in advance anything approximating to a scale of the financial value of life, and, in spite of the persuasive appeal of Mr. Russell Vick, I do not

propose to make that attempt. The case will be sent back to be retried on the two issues of the amount of damages, but not on the issue of liability for negligence.

MACKINNON, L.J. : I agree, with regret. If the jury had said, " £25 under Lord Campbell's Act and £100 under the Law Reform Act," I A
 should have had no inclination to make any order by way of allowing
 an appeal, unless I felt myself compelled to do so by the decision of this
 court in *Shepherd v. Hunter* (2). As at present advised, I do not think
 that I should be so compelled, for I cannot regard that case as laying B
 down any rule of law that damages under the Law Reform Act must
 always exceed a certain figure. In fact, in this case the jury gave £125
 under Lord Campbell's Act and nothing under the Law Reform Act,
 thereby clearly disregarding the judge's clear direction that they must
 give something under the Law Reform Act. That being so, I think C
 that we have no option except to order a new trial as to the damages
 upon both grounds of claim. It will, of course, be open to, and, indeed,
 the duty of, the judge who presides at the new trial to point out to the
 jury that, as in this case the dependants under the Lord Campbell's Act
 claim are the same as the beneficiaries of the estate of the deceased under
 the Law Reform Act claim, any recovery under the latter Act may D
 diminish, and may well extinguish, any claim under the former Act, and
 those dependants or claimants must not to any extent be allowed to have
 their claim for damages twice over. I agree that there must be a new
 trial as to the damages.

E
 GODDARD, L.J. : I agree, and I desire to say, if I may, that I
 associate myself with every word that MACKINNON, L.J., has said with
 regard to *Shepherd v. Hunter* (2). With regard to the other point, it
 is suggested, I think, by both counsel that there is some difficulty as to
 the direction which a judge should give to a jury with regard to the F
 relationship which the damages under the two different Acts should
 bear to each other. I agree that there is tremendous difficulty in giving
 a jury any assistance upon how they are to quantify damages for loss
 of expectation of life. However, with regard to the relation that the
 damages given under one head should bear to those under the other, I G
 do not think that there is any real difficulty at all. I have always
 directed juries somewhat in this way : The Fatal Accidents Act deals
 with pecuniary loss only. If the parties who will benefit from the
 damages awarded under the Fatal Accidents Act are the same as those
 who will benefit from the damages awarded under the Law Reform Act, H
 the damages under the Fatal Accidents Act must be reduced by the
 amount which is given as loss under the Law Reform Act. If the
 amount given under the Law Reform Act is equal to, or exceeds, what
 the jury may give under the Fatal Accidents Act, they must give nothing
 under the Fatal Accidents Act at all. If, on the other hand, in any

particular case, a jury (as well may happen) should consider that the damages under the Fatal Accidents Act exceed the damages given under the Law Reform Act, then it may be necessary to assess both. In this particular case I think that the direction to be given to the jury is that they must consider what the parents have lost. Then they have to consider what the loss of expectation of life of the child is worth. They can consider those problems in whichever order they like. If they come to the conclusion, as, ordinarily speaking, they would, that the loss of the child's expectation of life is greater than the loss under the Fatal Accidents Act, then they would give no damages on that head. Since, as SCOTT, L.J., has pointed out, the verdict here is so unsatisfactory, and is one in regard to which it is impossible to speculate upon what the jury really meant, I think that it would be most unsatisfactory if we did not send the case back to be retried in whole, so far as damages are concerned.

C *Appeal allowed with costs.*

Solicitors: *Harris, Caine & Co.*, agents for *Sebag Cohen & Co.*, Sunderland (for the appellant); *Doyle, Devonshire & Co.*, agents for *Molineux, McKeag & Cooper*, Durham (for the respondent).

D [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

ed. CHURCH v. CHURCH.
2 All E.R. 441.

SIFTON v. SIFTON.

E [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
December 15, 16, 1938.]

Divorce—Desertion—Agreement for temporary separation—Wife's refusal to return—Husband continuing payment of separation allowance—Materiality of attitude of deserted spouse towards resumption of cohabitation.

F *Divorce—Cross-petition—Founded on adultery disclosed in Discretion statement—Availability to respondent—Matrimonial Causes Rules, 1937, r. 28 (5).*

G The husband petitioner in a petition for divorce relied solely upon desertion for a period of 3 years immediately preceding the presentation of the petition. He asked that the discretion of the court should be exercised in his favour, and put in a discretion statement admitting adultery in 1934. The respondent obtained leave to file an answer including an allegation of adultery based upon the petitioner's admission. The answer further denied desertion or alternatively justified it on account of the petitioner's conduct, and prayed for a dissolution of the marriage. In 1929, the parties had separated for 6 months by mutual consent, the respondent going to live with her mother. A separation agreement was entered into, and the petitioner paid his wife an allowance in accordance with its terms. At the end of this period, the petitioner asked the respondent to return, but she refused, and he continued to pay the allowance. In 1931, or 1932, he again asked her to return, and she again refused. In 1937, the respondent contemplated committing adultery, with her husband's knowledge and approval, in order that a divorce might be obtained, but the project was abandoned, as the parties decided to wait until the Matrimonial Causes Act, 1937, had been passed. It was found as a fact that the

petitioner during the 3 years immediately preceding the presentation of the present petition neither expected nor desired his wife to return to him. It was further found that the husband's conduct had not been such as to justify the respondent deserting him. The respondent was also asking that the discretion of the court should be exercised in her favour :—

HELD : (i) the discretion statement of the petitioner was available to the respondent as a proof of the petitioner's adultery, as it had been put forward in open court as evidence. A

(ii) in the circumstances of this case, the respondent had no justification for remaining away from the home after the period of 6 months had elapsed. She had, therefore, deserted the petitioner.

(iii) it is not incumbent upon a spouse who is relying upon desertion to show that he or she was at all times during the statutory period ready and willing to receive the deserting spouse back again. There is a presumption in favour of a deserted spouse. B

(iv) on the facts of the case, the court would exercise its discretion in the respondent's favour and grant her a decree *nisi*.

[EDITORIAL NOTE.] In *B. v. B. & G.* (2) a cross-petition alleging adultery founded on the discretion statement was struck out for want of particulars. Here, in the course the case took, the particulars were given in evidence by the husband when the suit came on as an undefended case. Having regard to the terms of the Matrimonial Causes Rules, 1937, r. 28 (5), the judge has decided that, in such circumstances, the adultery disclosed in the discretion statement is available to the respondent. Such circumstances are, of course, very unusual. It is still the rule in ordinary cases that such adultery is not so available. C

AS TO ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-662, paras. 972, 973; and FOR CASES, see DIGEST, Vol. 27, p. 300, Nos. 2766-2776.]

Cases referred to :

(1) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 159 L.T. 530.

(2) *B. v. B. & G.*, [1937] P. 1; [1936] 2 All E.R. 1254; Digest Supp.; 105 L.J.P. 90; 155 L.T. 322. E

(3) *Bowron v. Bowron*, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773.

PETITION by husband for divorce on the ground of desertion, the wife respondent in her answer denying desertion and pleading cruelty and adultery on the part of the petitioner, and in the cross-prayer asking for a divorce to be pronounced in her favour. Both parties prayed the discretion of the court. F

J. F. Compton Miller for the petitioner.

H. D. Baskerville for the respondent. G

HENN COLLINS, J. : This is a case which presents difficulties both of fact and of law. The difficulties are rather of fact than of law, because most questions of law, when they are ultimately resolved, turn upon exact ascertainment of the facts. The petition is one brought by the husband, and is founded solely upon desertion. The wife's answer alleges justification. She denies the desertion, first of all, and, alternatively, attempts to justify it by the husband's conduct. She relies upon that conduct as cruelty justifying the prayer of the answer for dissolution, alleging also adultery by the husband. H

The case has taken a very curious course. I do not suppose it is very likely that a similar course will be taken in any other case, and probably the first question which has been discussed before me will, therefore, not arise again. What happened, quite shortly, was this. The case originally came on as an undefended case. The husband was asking for the exercise of the discretion of the court, and he put in a discretion statement and deposed to adultery in the autumn of 1934. That case came on at a moment when the decision in a case of desertion on the question of adultery had not been reached, as it was shortly afterwards in *Herod v. Herod* (1). That case having been decided, this case might have been disposed of at once, but for the fact that the wife had obtained leave to put in an answer, which answer included an allegation of adultery founded upon the petitioner's admission.

When the case came on as a defended suit, it seemed to me at first that that evidence of adultery could not be available, but, having considered the authorities—*B. v. B. & G.* (2) and also the Matrimonial Causes Rules, 1937, r. 28 (5)—I was of the opinion, and I am of the opinion, that the evidence was available to the respondent. Rule 28 (5) provides as follows :

Neither the fact that a discretion statement has been lodged nor the fact that the said notice has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter except when that party has put in evidence in open court the discretion statement or the said notice or the contents thereof.

In view of that rule, I think that such evidence may be admitted, when placed before the court.

I now turn to the main question which has been discussed on the husband's petition. The parties were living unhappily together, and in 1929 there was a quarrel, about which I shall have more to say in a moment or two. As a result of the quarrel, they took counsel of the wife's father, and, in the result, they agreed, in terms which were ultimately reduced into writing, for a separation for 6 months on certain conditions. That agreement did not begin to operate immediately, because it took a month or so to close down the house, during which time they lived in the same house. In passing, I may say (to touch upon another part of the case) that the wife satisfied me that no sexual relations took place after the quarrel to which I have referred. The husband and wife having parted on the terms of this agreement, which specified the period at which it was to commence—namely, Dec. 2, 1929—and which expired on May 2, 1930, provision was made that the wife was to receive an allowance of £5 per fortnight on the understanding that she lived with her mother, that she was to have custody of the child for 3 months, and that, at the expiration of that time, the husband was to have the option of the custody, and if, after 3 months, the husband took the custody of the child, the allowance was to be reduced by 30s. per fortnight. There was a further provision that both parties should have free access to the child at all times. Under that agreement, they lived

apart, and, when the agreement for the 6 months' period was coming to an end, the husband invited the wife to return, but she did not. She had already expressed her intention to her mother of never returning, and, in fact, she never has returned. The husband, however, continued to pay the allowance, as he said—and I believe him—that he did not want to see the mother of his child in want. In 1932, or it may have been at the end of 1931, he appears to have written a letter to his wife (which I have not got), which she acknowledges in a letter of Jan. 10, 1932. She starts by saying, "Thank you for your letter," and then goes on to talk about the child. Then she says this :

You say in your letter (which I have mislaid at the moment) to the effect that "sooner or later we are bound to come together again so why not now." I want you to fully realise that not only would it be extremely distasteful to me, but *impossible* for Dina, the latter being the most important reason. . . . Perhaps this all sounds very selfish to you, but I have tried to explain it to you many times and you either can't or won't understand that violation of nature's dictates is prostitution and I must ask you to stop asking me to share life with you for the future.

Thus matters drifted on, the husband still paying the appropriate allowance and the wife not making any offer to return or changing her mind about returning at all. In 1935-1936, matters took a fresh turn. Apparently the wife had been augmenting her allowance by her own earnings, but those apparently ceased in about Apr., 1937, and she pressed for a greater allowance. That brought the parties together, in the sense that both wanted to put an end to the existing state of things, of which both were tired, neither being free to marry again. I think that they believed that the best way out of that position was divorce, and the wife, with the approval of her husband, contemplated committing adultery with someone with whom she was in love, and with whom she told her husband she was in love. However, before that purpose of hers was fulfilled, it became apparent to her that the bill which is now the Matrimonial Causes Act, 1937, might become law and enable a divorce to be obtained on the ground of desertion. She was, therefore, wise in time, and did not commit the offence which she was contemplating. If this suit had been founded upon adultery committed by the wife in those circumstances, there could be little doubt, I imagine, that a suit so founded could not be successful. However, although, as I think, she clearly had that in contemplation, that does not show at all that a subsequent suit would be collusive. The position at that time really was that the wife was saying to herself: "Well, I have done with this unseemly affair. I will bide my time until the Act, which will enable proceedings to be taken on the ground of desertion." I think, therefore, that, so far as this suit is concerned, collusion is out of the question. The negotiations between the parties in 1936 have to be considered in relation to the fact of desertion. These parties were living apart, as I have said, under the agreement, and continued to live apart, and the question I think I have to decide on that, apart from the allegation in the petition and answer, is whether they were, at all times after the

expiration of the 6 months, or, more particularly, for the 3 years immediately preceding the presentation of this petition—that is to say, Jan. 3, 1935, and onwards—living apart by mutual consent. It is upon that aspect of the question that I pause. I confess that it is by no means an easy matter to decide, but I have come to the conclusion that the position of the husband was this: “My wife tells me she is in love with another man. She has so far declined my invitation to come back, and I think that the matter is now hopeless. I do not think that she will come back.” I doubt whether, in those circumstances, he expected, or really wanted, her to come back, and I have had to consider what effect that has on the question of desertion. I think that the true position is (I am assuming for this purpose that the wife’s departure from the home cannot be justified at the moment, which is an assumption for the purpose of this part of the case) that, in those circumstances, the wife had no justification, when the terms of the agreement ran out, for remaining away from the home. In the words of SCRUTTON, L.J., in *Bowron v. Bowron* (3), at p. 195:

The intention [to desert] is presumed to continue, unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back.

The husband in that case was in the position of the wife in this case. I was inclined at one time to take the view that it was incumbent upon the husband, in the circumstances, to show that he was at all times during the statutory period up to the service of the petition ready and willing to receive his wife, but I am satisfied by the authorities that this is not so. When a spouse is deserted, he or she is in the position that the presumption is in his or her favour, and against the deserting spouse, and it is not until some offer to return is made by the other side that the question arises whether or not that is an offer which ought, in all the circumstances, to be accepted. As I pointed out in the course of the argument, if it were true to say that the deserting spouse must at all times be ready and willing to receive back the husband or wife, as the case may be, *Herod v. Herod* (1) could not have been decided as it was, because no court would hold that, when a man was living in adultery, as in the case of *Herod v. Herod* (1), he was ready and willing that his wife should return. Subject, therefore, to the wife’s answer to the question of desertion, I find that she was the deserting party.

That brings me to the allegations which she makes in her answer, allegations which, I think, are used for a dual purpose. They concern four incidents, three of which have undoubtedly been condoned and the fourth of which, I am of opinion, has been condoned by cohabitation. If the last were not condoned, and were an act of cruelty, it would, of course, revive the earlier pleas. I think that that is equally true whether one regards the allegations in the light of a matrimonial offence or merely as a means of defence—that is to say, as a justification for leaving the matrimonial home. It follows from that that one must examine very closely the circumstances, more particularly those of the last offence.

The incident of which the wife complains, one about which there is a conflict of testimony, is referred to in the following words :

That in or about Sept., 1929, at 25, Mill House Lane, St. Albans, aforesaid, the petitioner without just cause or reasonable excuse falsely and maliciously accused the respondent of committing adultery in the matrimonial home during his absence whereby she was caused great pain and distress of mind.

Her brother-in-law had been staying in the house, and, according to her, the husband, knowing full well that there was no sort or kind of justification for the charge, accused her of having committed adultery with her brother-in-law. She did not take that seriously at first, according to her account, possibly (as I think she would have me believe) by reason of the enormity of the charge. Nothing of the kind had preceded it in the married life, and, according to her account, it was done with a purpose. According to her account, in accordance with her present recollection, it was a wanton charge on his part, designed, as she says, to make life in his house impossible for her. The other side of the picture is this. The husband says : " I had reason to believe, and did believe, that she had resorted to the practice of having her breakfast in her brother-in-law's room after I had left the house. As I thought it was wrong, I said so to her, and she took offence." That was what led up to the consultation with the father, and the agreement to which I have referred.

I have to choose between these two stories, and, having watched the witnesses with great care, I have come to the conclusion that the truth of the matter lies with the husband. I think that, in the circumstances as he believed them to be, he was justified in remonstrating with his wife in the way in which he says he did, which I believe.

The other incidents alleged by her cross-prayer were not incidents which one is entitled to regard as cruelty on the part of the husband. I do not think that they amounted to cruelty, or such conduct as would justify the wife in going away and staying away. The other episode was, of course (taking it as she tells me), a much more serious matter, for the reasons I have already indicated. I think that her view of it has altogether changed, and I do not think that the husband went beyond what he believed to be the necessities of the case. In the circumstances, I think that the wife was the deserting party.

I therefore find the position to be that the husband is entitled to the prayer of his petition, subject to the question whether or not discretion should be exercised in his favour. His adultery is used by the wife in her answer as supporting her prayer for a decree in her favour. There, again, her prayer is subject to the discretion of the court being exercised in her favour in respect of the adultery which she has committed, and I confess that I find it extremely difficult to decide which of these two parties is entitled to a decree. If the husband obtained a decree, it would be most clearly a case where he would be required to make a substantial compassionate allowance. If, on the other hand, the wife got a decree, she would, no doubt, be entitled to support from him, and,

therefore, as a practical question, it does not appear to me to matter very much which way the decision of the court goes on any question of finance. It seems to me that the question is rather a question of the respective demerits of the two discretion statements. It is by no means easy to weigh them up, but I think that the merits of those two lie rather with
 A the wife than with the husband, and, in the result, I grant a decree on the prayer of her answer, exercising the discretion of the court in her favour.

Solicitors: *Church, Adams, Tatham & Co.* (for the petitioner);
Turner & Co., agents for *S. J. Weaver*, Watford (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN T. D. BAILEY, SON & CO.
 AND ROSS T. SMYTH & CO., LTD.

C [KING'S BENCH DIVISION (Branson, J.), December 14, 1938.]

Sale of Goods—Rejection—Sale of 15,000 units of corn—"Separate documents for each 1,000 units, and each 1,000 units to be considered a separate contract"—Notice of appropriation for about 15,444 units—First provisional invoice for 15,444 units—Amended provisional invoice for 15,000 units—Validity of first tender—Whether withdrawn by amended provisional invoice—Validity of second tender.

D A contract dated Aug. 3, 1938, provided for the purchase of 15,000 units, 2 per cent. more or less of No. 2 yellow American corn, with an option to the seller of shipping a further 3 per cent. more or less on contract quantity. At the foot of the contract were the words "separate documents for each 1,000 units, and each 1,000 units to be considered a separate contract." In pursuance of this contract, the
 E sellers wrote to the buyers on Aug. 27 giving notice of appropriation of about 15,444 quarters of corn as per "Generton" bill of lading, and on Sept. 6 sent a provisional invoice for 15,444 $\frac{2}{3}$ quarters, amounting to £17,471 10s. 6d., and the provisional invoice stated that there were 15 bills of lading dated Aug. 26, each for an amount of bushels equivalent to 1,000 units, and one for an amount equivalent to 444 $\frac{2}{3}$ units. On Sept. 7, the buyers rejected the provisional
 F invoice as not being in accordance with the contract, and on the same day the sellers sent an amended provisional invoice for 15,000 quarters amounting to £16,968 15s., and stating that there were 15 bills of lading dated Aug. 26, each for a number of bushels equivalent to 1,000 units. This provisional invoice was received by the buyers on Sept. 8, and it was then arranged that the matter should proceed to
 G arbitration:—

HELD: (i) the contract was in the beginning single and indivisible, but, upon an appropriation being made, it became 15 separate contracts by reason of the words printed at the foot.

(ii) the sending of the provisional invoice amounted to a tender under the contract, but this was withdrawn by the sending of the
 H amended provisional invoice.

(iii) the amended provisional invoice was a valid tender although it did not include the 444 $\frac{2}{3}$ quarters, since each 1,000 was made a separate contract.

[EDITORIAL NOTE. The contract in this case is in a form not unusual in such transactions, and its construction is, therefore, of importance. A contract in this form, it would seem, is to be treated as a number of separate contracts after there

has been an appropriation in respect of it. Thus the tender of 1,000 units for each of the separate contracts to sell 1,000 units, as the contract then became, was a good tender under the contract.

AS TO QUANTITY OF GOODS TO BE TENDERED, see HALSBURY, Hailsham Edn., Vol. 29, pp. 126-130, paras. 153-156; and FOR CASES, see DIGEST, Vol. 39, p. 496, Nos. 1131-1138.]

APPEAL by way of case stated from an award of the appeal committee of the London Corn Trade Association, Ltd. The facts and arguments are fully set out in the judgment.

H. U. Willink, K.C., and *W. L. McNair* for the appellants.

A. T. Miller, K.C., and *Cyril T. Miller* for the respondents.

BRANSON, J.: The dispute in this case arises under a contract dated Aug. 3, 1938, and made between Ross T. Smyth & Co., Ltd., as sellers, and T. D. Bailey, Son & Co., of Hull, as buyers, for the purchase of 15,000 units, 2 per cent. more or less, of No. 2 yellow American corn. The dispute arises out of the fact that, when the sellers sent a provisional invoice to the buyers, the buyers rejected upon the ground that the provisional invoice was not in accordance with the contract, and thereupon the sellers delivered an amended provisional invoice, which again the buyers rejected. There was an arbitration clause in the agreement, and an arbitration was held. The umpire found that the buyers were not entitled to reject, the appeal committee found that the buyers were entitled to reject, and the question for this court is whether the decision of the appeal committee was correct.

The contract having been entered into on Aug. 3, 1938, on Aug. 27 the sellers wrote to the buyers giving notice of appropriation of about 15,444 quarters of corn per the "Generton" bill of lading. The material provisions of the contract are these. It is provided that the quantity under the contract is to be 15,000 units, 2 per cent. more or less, and the contract goes on to provide that the seller

... has the option of shipping a further 3 per cent. more or less on contract quantity, excess or deficiency over the above 2 per cent. to be settled at the c.f. and i. price at the date of bill of lading, and on the quantity thereof.

The notice of appropriation reads as follows:

According to cable advice received from sellers about 15,444 quarters corn have been shipped per "Generton" bill of lading dated ——— which we appropriate in fulfilment of the above contract.

On Sept. 6, the sellers sent to the buyers a provisional invoice for 15,444²¹⁴/₄₈₀ quarters, amounting to £17,471 10s. 6d., and the provisional invoice stated that there were 15 bills of lading dated Aug. 20, each for an amount of bushels which is equivalent to 1,000 units, and one bill of lading for an amount of bushels which is equivalent to 444²¹⁴/₄₈₀ units. That invoice, as found in the case, was received by the buyers on the morning of Sept. 7, and the buyers telephoned to the sellers rejecting the tender on the ground that the documents were not in accordance with the contract. On the same day, the buyers wrote to the sellers confirming

that they rejected the documents, and saying that the contract must be considered repudiated in its entirety, and that, should the matter proceed to arbitration, they nominated Mr. Henderson to act on their behalf. On the same day—namely, Sept. 7—the sellers sent the buyers an amended provisional invoice for 15,000 quarters amounting to £16,968 15s., and stating that there were 15 bills of lading dated Aug. 26, each for a number of bushels equivalent to 1,000 units. This provisional invoice was received by the buyers on the morning of Sept. 8, and on that morning the buyers telegraphed to the sellers asking the sellers to instruct their arbitrator for the arbitration to proceed on the following day.

The sellers thereupon telegraphed to the buyers appointing Mr. Crombie to act as arbitrator, and it was arranged on the telephone that the arbitration should proceed on Sept. 9. The buyers wrote to the sellers on Sept. 8 confirming this arrangement, and the sellers wrote to the buyers on the same day saying that they did not agree with the buyers' contention that the documents tendered were not in accordance with the contract, and they appointed their arbitrator.

The arbitration took place on Sept. 9. The arbitrators disagreed, and the umpire awarded that the buyers were not entitled to reject the goods. From that award the buyers appealed to the appeal committee. The contentions before the appeal committee are set out in the award, and they are in substance the contentions which were urged before me upon this appeal. It was contended on behalf of the buyers that the notice of appropriation of Aug. 27 made the contract one for 15,444 units ex "Generton," and that therefore the tender of 15,000 units by the provisional invoice dated Sept. 7 was bad. They also contended that the first tender of Sept. 6 was withdrawn by the subsequent provisional invoice, but, in any case, that that was also bad, because the extra 444 units should have been equally spread over the 15 bills of lading. On the sellers' behalf, it was contended that the first tender was valid, and had never been withdrawn, and that, if the first tender was bad, or had been withdrawn, the second tender was valid, as the notice of appropriation was for about 15,444 units, the word "about" allowing a variation of not more than 3 per cent., and the contract provided that each 1,000 units should be considered a separate contract.

Upon those contentions, the appeal committee found the following answers to questions which are partly questions of fact and partly questions of law. They held, first, that the notice of appropriation of Aug. 27 was an exercise by the sellers of their option to ship 2 per cent. more or less and a further 3 per cent. more or less on the contract quantity, making the contract one for about 15,444 units. Secondly, they held that the word "about" in the notice of appropriation does not reserve to the sellers a right to re-exercise their option, but allows only a variation of fractions or of quarters, and in the argument before me I did not understand either side to contend that either of those two decisions was wrong. The third decision was that the provisional

invoice of Sept. 6 tendering 15 bills of lading each for 1,000 units and one for $444\frac{214}{480}$ units was a valid tender in accordance with the custom and practice of the trade and the terms of the contract. With regard to that, Mr. Miller contends that that was right, and Mr. Willink, on the other hand, contends that it was wrong. The next finding was that the sending of the provisional invoice dated Sept. 7 amounted to a withdrawal of the provisional invoice of Sept. 6, and a waiver of the buyers' breach of contract. There Mr. Willink, for the buyers, contends that that was correct, and Mr. Miller, on the other hand, says that it was a wrong conclusion. Then the next one is that the tender by the provisional invoice of Sept. 7 was invalid because it was not a tender of the contract quantity as declared by the notice of appropriation, and the provision in the contract that each 1,000 units were to be considered as a separate contract does not affect the obligation of the sellers to tender such contract quantity. Those are the decisions of the appeal committee, and the question that I have to determine is whether, in coming to those conclusions, they were right or wrong upon a matter of law—that is to say, upon the construction of this contract.

I turn, then, to the contract, to see what is to be made of it. I have already read the clause relating to quantity, and, if it were not for a new clause added in type at the foot of the contract, the present dispute could never have arisen. At the foot of this contract, which is obviously, when one reads the printed part of it, a single and indivisible entity, one has the following words :

Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract.

If any meaning is to be given to that language, it follows that a contract which is single and indivisible in its beginning must at some period undergo a metamorphosis, and become a number of separate contracts. I think that the real question which has to be decided is the moment at which that metamorphosis takes place. According to the finding of the appeal committee, the notice of appropriation makes the contract one for about 15,444 units, and that view is assented to by both the parties to the dispute. Thus, it appears, on the view that both sides put forward, that the division of this contract, from one into several, does not take effect until some time after that appropriation. If it were otherwise—if one were to consider the effect of the added clause to be that in every respect the contract was to be treated as if there were one contract for each 1,000 units, and that everything had to be done as if one had got, where 15,000 units are mentioned, 15 different contracts—it would follow that there would have to be 15 appropriations, as well as 15 bills of lading and 15 sets of documents. However, nobody suggests that that is the true result of what has been done in this case. The committee, in dealing with the sending of the first provisional invoice, obviously take the view that the contract remains a single contract down to the point when the provisional invoice is sent showing the form in

which it is intended to make tender under the contract, for they have held that the proper provisional invoice is one referring to 15 bills of lading for 1,000 units each, and one for 444 quarters and a fraction, because, they say, that is a valid tender in accordance with the custom and the practice of the trade and the terms of the contract. Unless

A there is any reason to foresee that the true interpretation of the contract makes it clear that the one contract has become 15 contracts at some earlier period, it seems to me that the committee were entitled to take that view. The change must take place somewhere, and, if that is the way in which, according to their finding of fact about the custom of the

B trade, persons doing this business are in the habit of reading these somewhat inconclusive words, I can find nothing in the contract to entitle me to say that it is an impossible construction, and one, therefore, that no custom can put right. Therefore I agree with the appeal committee in the view which they express in their third finding—

C namely, that that provisional invoice indicated a tender which, if made in accordance with it, would be a valid tender under this contract.

The next matter which arises is as to whether or not that tender was withdrawn. That appears to be a question of fact, and it is a question which the committee has found. It was withdrawn, they say, and,

D when one looks at the documents, if it is open to me to express an opinion, again I agree with them. The provisional invoice sent on Sept. 7 is headed "Amended Provisional Invoice," and, if persons send one invoice and then send an amended one in different terms, it follows that they are withdrawing the invoice which they have originally sent.

E Mr. Miller says, however, that the rejection by the buyers of the provisional invoice sent on Sept. 6 was a breach of contract, and gave an immediate right of action, had the sellers chosen to exercise it, in regard to a wrongful rejection of the goods under the contract. I do not agree, because it appears to me that these provisional invoices do

F not in law amount to a tender. What they really amount to is a statement by the seller of the form in which, and the accompaniments with which, he proposes to tender the goods in accordance with his contract. Therefore, the refusal to accept that provisional invoice was no more than what is called an anticipatory breach of contract.

G I think that the position of the sellers, when they were told that their provisional invoice was rejected, was that they might, had they chosen, have said: "Very well. If you propose to reject a tender of this sort, we will accept it now as a breach of contract, and we will proceed to arbitration, or to bring an action about it." However, that is not what

H they did. They said: "Very well. If you say this is wrong, we will try again." They then sent an amended provisional invoice.

Therefore, I think that the question really turns upon whether or not under the contract the amended provisional invoice was a valid tender (using the expression in the way in which it is used in the case) of the goods under the contract. That provisional invoice specified 15 bills of lading

each covering 1,000 units, and there was no inclusion of the odd 444 units and a fraction. The appeal committee have come to the conclusion that it was bad because it did not include that 444 units and a fraction. In my opinion, in coming to that conclusion, the appeal committee were wrong. They were wrong in taking the view that the provision in the contract that each 1,000 units was to be considered a separate contract did not affect the obligation of the sellers to tender such contract quantity, and for that reason this was not a good tender. It is to be observed that the added clause says:

Separate documents for each 1,000 units, and each 1,000 units to be considered a separate contract.

It appears to me that the view that the committee have taken is that what those words provide is no more than that separate documents for each 1,000 units shall be supplied. In other words, they give no meaning at all to the rest of the added clause—namely, that part of it which begins and goes on: “and each 1,000 units to be considered a separate contract.” If all that was intended to be achieved was that separate sets of documents should accompany each 1,000 units, the added clause could have been left with the first branch of it, and there was no need to go on and add the second branch about each 1,000 units being considered a separate contract.

I think that the result of it is that, giving the meaning which the committee have given to the contract, treating it as one contract down to the time when the provisional invoices are to be sent, if one does not at that stage at least bring in the provision that each 1,000 units is to be considered a separate contract, there is no room for giving it any meaning at all in this contract of purchase and sale.

For these reasons, I have come to the conclusion that the committee were, to use their own words, erroneous in law in their findings in para. 5, and, therefore, that the result which the committee specify in that event should follow, and that the original award should be upheld and the award of the appeal committee set aside.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Middleton, Lewis & Clarke* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

INFIELDS, LTD. v. ROSEN.

[CHANCERY DIVISION (Simonds, J.), January 12, 1939.]

Evidence—Admissibility—Evidence of person beyond the seas—Not reasonably practicable to secure attendance—Available for cross-examination under letters of request—Document prepared expressly for being tendered in evidence—Person in court able to give same evidence not tendered as witness—Evidence Act, 1938 (c. 28), s. 1.

It was necessary to prove, in a case where there was an acute controversy of fact, whether or not a particular article was manufactured by a firm consisting of two partners. One partner was in England and was available to be called as a witness. The other partner was in Germany, but was available for cross-examination so far as that is permissible under letters of request. A statutory declaration made by the partner in Germany, and made for the purpose of being given in evidence in the suit, was tendered in evidence, a suggestion being made that the evidence of the partner who could be called as a witness was not to be relied upon:—

HELD: this was a case where the evidence of a witness who could be seen and cross-examined ought to be tendered to the court, and the court ought not to exercise its discretion under the Evidence Act, 1938, s. 1, and admit the statutory declaration. The declaration was, therefore, inadmissible.

[EDITORIAL NOTE. The language of the Evidence Act, 1938, does not exclude a document expressly prepared for the purpose of being given in evidence, but it is not primarily intended to include a declaration by a party who can be examined abroad. *A fortiori* it is not intended that oral evidence properly cross-examined to shall be excluded by a mere statutory declaration by a person whom the court has no opportunity of hearing or seeing.

AS TO DOCUMENTARY EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, p. 640, para. 708 *et seq.*; and FOR CASES, see DIGEST, Vol. 22, pp. 191, 192, Nos. 1615-1625. See also YEARLY SUPREME COURT PRACTICE, 1939, p. 626.]

RULING given as to the admissibility in evidence of a statutory declaration. The facts of the case are fully set out in the judgment.

K. E. Shelley, K.C., and H. C. Infield for the plaintiffs.

R. Moritz, K.C., Basil Drewe and Eric Walker for the defendants.

SIMONDS, J.: In this case, it is sought to adduce in evidence a statutory declaration made by one Emma Veith under the permission given for the first time by the Evidence Act, 1938, s. 1, which provides as follows:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say, (i) if the maker of the statement either (a) had personal knowledge of the matters dealt with by the statement . . . (ii) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

I will assume, for the purpose of my ruling upon this matter, that Mrs.

Emma Veith is beyond the seas and that it is not reasonably practicable to secure her attendance. The Act further provides by sect. 1 (5) :

For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances. . . .

Then follow other matters which do not appear to be material.

This is a statement which appears to me to have been made expressly for the purpose of its being given in evidence in this suit. Although, according to the language of the Act, that is within its purview, I have no doubt that that is the class of document to which the section is not primarily intended to apply, and the court must be exceedingly careful in allowing such a document to be used as evidence. Further, I have to bear this in mind. This is a statement in a document made by a lady who is in Germany and available for examination and cross-examination so far as that is permissible under letters of request. The party seeking to adduce that document in evidence did not so inform the other party to the suit. They were aware that suggestions had been made and not proceeded with for the examination, not only of Emma Veith, but also of another partner in the same firm, who was equally competent with her to give evidence. That, again, is a matter which I think I have to take seriously into consideration in determining whether or not I should allow such a statement to be sprung upon the defendants. Then I have also to bear in mind the circumstance that this is a case in which there is an acute controversy of fact, the particular aspect of that controversy of fact for this purpose being whether the firm of Veith, of which Emma Veith, I understand, is a partner, did manufacture and sell a certain kind of clip. Upon that fact I have had certain evidence called, but the materiality of this evidence is that Emma Veith apparently is prepared to say that her firm did not manufacture any such clips. There is another partner of that firm, who is in England, and who is, as I have been told, in this court, and I cannot think that it is right in the interests of justice that, where there are two partners of a firm, each of them competent to speak to the question as to whether or not a particular article was manufactured by that firm, I should have tendered to me the evidence of one of them who is in Germany and cannot be cross-examined, and not the evidence of that partner who is in court and can speak to the facts, and be examined and cross-examined upon them. It has, indeed, been suggested by Mr. Shelley, who seeks to adduce this declaration in evidence, that the testimony of that partner who is in court is not testimony to be relied upon. I cannot accept that view, formed, I suppose, by those who are instructing him, as a sufficient reason for not having the primary evidence upon which this court must rely—the evidence of a man who can be seen and upon whose demeanour I can form an opinion and who can be cross-examined—rather than that of a lady of whose circumstances I know nothing, but who makes a declara-

tion to which she cannot be cross-examined. In these circumstances, I shall, in the exercise of my discretion, decline to allow this declaration to be adduced in evidence in this case.

Solicitors: *Wm. White & Co.* (for the plaintiffs); *H. Baron & Co.* (for the defendants).

A

[Reported by E. FULLER BRISCOE, Esq., *Barrister-at-Law.*]

SHARPE v. TOPHAMS, LTD.

B

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **January 11, 1939.**]

Companies—Shares—Share certificate—Right of shareholder to certificates for altered subdivision of his shares.

C

The trustees of a will held 230 shares in a company, and from time to time they had requested that the share certificates should be altered to different amounts, each amount represented by a separate certificate. This request had been complied with on four occasions, but on the fifth occasion the directors of the company objected, and refused to alter the subdivision. It was provided by the articles that every member should be entitled to one certificate for all the shares registered in his name, or to several certificates, each for a part of such shares:—

D

HELD: the trustees, as shareholders, had the right to demand certificates for the subdivided amounts, and were entitled to a declaration to that effect.

Decision of SIR JOHN BENNETT, Vice-Chancellor of the County Palatine of Lancaster ([1938] 4 All E.R. 12) reversed.

E

[EDITORIAL NOTE.] The terms of the articles in the present case do not precisely follow those of Table A, but are not so different therefrom that the decision may not be useful in considering the duty of directors under Table A. Generally, a shareholder is entitled to the issue of one certificate free of charge, and, upon payment of a small fee and the execution of an indemnity, that a certificate may be replaced if it is defaced, lost or destroyed. It is convenient to persons in the position of trustees to have the division of the shares held by them altered from time to time as the beneficial interests in such shares change, or, as in this case, upon the transfer of a mortgage, and doubtless the directors of a company would within reason raise no objection to the issue of new certificates. Here the contention was that the shareholders were entitled as of right, subject only to a proper payment, to the issue of certificates for altered amounts. The Court of Appeal have decided in favour of this right, reversing the decision in the court below.

F

AS TO SHARE CERTIFICATES, see HALSBURY, *Hailsham Edn.*, Vol. 5, pp. 262, 263, paras. 455-458; and FOR CASES, see DIGEST, Vol. 9, p. 287, Nos. 1780-1782.]

G

Case referred to:

(1) *Hyman v. Elandslaagete Collieries, Ltd.* (1921), 42 N.L.R. 43; 9 Digest 287, case p.

H

APPEAL from an order of SIR JOHN BENNETT, Vice-Chancellor of the County Palatine of Lancaster, dated July 23, 1938, and reported [1938] 4 All E.R. 12, dismissing the action of the appellants, who were the plaintiffs in the court below.

The plaintiffs are the trustees of a will. The testator died on Dec. 30, 1932, and his will was proved on Feb. 14, 1933. The defendant company

carry on the business of racecourse proprietors and are the present lessees of the Aintree Racecourse, Liverpool. The company is a private one and was registered in 1899. It has a capital of £100,000 divided into 1,000 shares of £100 each. The testator at the date of his death held 230 of these £100 shares, which were the principal asset of his estate. At his death, he owed a substantial sum of money, of which nearly A £9,000 was owing to his bankers. The loan from the bank was secured by a deposit of 195 of the shares. The shares are valuable, and the income derived from them has been regular and substantial for a number of years. Under the provisions of the articles, the directors, on a transfer, have a right of pre-emption, at a figure which has to be fixed by an B auditor. By the will, these valuable shares were reserved for the estate. The trustees raised £7,000 by pledging 35 shares and also an additional 35 shares which the bank released out of its security of 195 shares. The £7,000 was raised by one mortgage. Some time afterwards, the £7,000 had to be repaid. To do that, the appellants had to enter into a number C of smaller mortgages with different individuals. For that purpose, they needed to pledge shares in small quantities. To carry out their plan of raising the money, the appellants from time to time requested the respondent company to give them share certificates for a smaller amount than those which they, or their mortgagees, then held. The first appli- D cation was on Jan. 20, 1937, when, at their request, a share certificate for 70 shares was subdivided into 2 certificates, one for 50 shares and one for 20 shares. The directors took 3 months to deliver the certificates, although the request was ultimately complied with. The second appli- cation was made on Nov. 22, 1937, when a certificate for 50 shares was E split into 3 certificates, 2 for 5 shares each and one for 40 shares. The third request was made in the same month—namely, Nov., 1937—when a certificate for 160 shares was split into 2 certificates, one for 5 and the other for 155 shares. The fourth request was made a month later, when a certificate for 40 shares was split into 4 certificates, for 5, 8, 10 F and 17 shares, respectively. Then, in Feb., 1938, in order to complete the administration, the appellants asked for the certificate for 17 shares to be split into one for 13 and one for 4 shares. The directors then took up the attitude that it was for them, and them alone, to say whether or not a shareholder in the company was entitled to have split certificates G issued to him in respect of any shares which he held. The facts were not in dispute.

W. P. Spens, K.C., and J. J. Somerville for the appellants.

Alexander Grant, K.C., and W. Lyon Blease for the respondent company.

Spens, K.C.: The directors have a personal right of pre-emption on H transfer, and it is undoubtedly a very valuable personal right. The appellants have taken the course they have taken in order to avoid having to submit transfers. There are two possible contrary constructions of the articles as regards the certificates. In one of the articles, it is expressly stated that it is at the option of a member whether he will

have one certificate or several certificates. The Vice-Chancellor has held that a member has a right to take one or more certificates, but he has taken the view that, if the shareholder elects to take more than one, he gets one certificate free but must pay 1s. each for the others. Shares are personal property, and the owner of them is entitled to deal with
A them as he thinks fit, subject, of course, to the articles of association. A question of construction ought to be decided in favour of the shareholder. [Counsel referred to *Hyman v. Elandslaagete Collieries, Ltd.* (1).]

Grant, K.C. : The articles, properly construed, are a good foundation for the decision of the Vice-Chancellor. The allotment of shares is to
B be under the control of the directors. They can dispose of the shares at such times and subject to such conditions as they think fit. By art. 10 the directors are not bound to recognise the right of a shareholder to raise as much money on his shares as he thinks fit. The directors are concerned with the shareholders, and with nobody else. Two methods
C are provided for getting shares into the hands of a shareholder—namely, allotment and transfer, with which is coupled transmission. These matters are provided for in a way which implies that this suggestion—namely, of splitting share certificates without transfer of the shares—is not provided for, and was not intended. The articles dealing with
D the restrictions on transfer are in common form. They provide for registration and the issue of certificates. A member may have one certificate for the whole of his allotment, or he may have as many certificates as he pleases. The transfer clauses enable a member to transfer the whole of his shares or any part of them. A shareholder is entitled
E to one certificate only, unless he elects to take more than one at the time he becomes a member. The matter of certificates is dealt with in PALMER'S COMPANY PRECEDENTS, 15th Edn., pt. I, p. 603, and one finds the same provision there. It is a common experience in company matters, and there is no suggestion there of the splitting of certificates in cases where
F there has not been a transfer. The allotment of shares is, of course, within the discretion of the directors, but the transfer of shares is not. There is nothing in the Companies Act, 1929, s. 67, to show that the legislature was recognising split certificates except upon a transfer. The Act does not provide for the division of certificates at all. In the present case,
G the company's articles make no provision about the matter except on transfer and transmission. The question is whether or not the appellants are entitled to this stream of new certificates for which they ask. On the true construction of art. 12, a shareholder is entitled to certificates to a reasonable extent only. The request of the appellants for a further
H issue was unreasonable, as they had had four new issues in 1937. There ought to be a business limit to a shareholder's right in this respect. The point is complicated by the fact that the law has been altered since the articles were drawn up. The businesslike way of construing the article is to say that the issue of certificates must be restricted to the ordinary incidents in the life of a company.

SIR WILFRID GREENE, M.R. : This appeal raises a short question of construction under certain articles in the articles of association of a private limited company, Tophams, Ltd., which was incorporated in 1899. The appellants, the plaintiffs in the action, hold, in a representative capacity representing a deceased shareholder, a number of shares in the company. The shares are of the nominal value of £100 each, and are clearly of substantial actual value. For reasons connected with the administration of the estate of the deceased member, the plaintiffs are anxious to have, or have been anxious to have, the certificate of title to the shares which they hold split into a number of certificates. This operation they have been successful in effecting on four occasions, but the fifth application for the issue of what, for convenience, may be called split certificates was refused by the board. A

The reasons which prompted the appellants to ask for the certificates to be split and the reasons which prompted the directors in refusing the last application are of no relevance to the present question. The sole question which we have to decide is a dry question of construction of the articles. If the plaintiffs are right, the object for which they desire this operation to be performed is immaterial. If the articles give the directors the power to do what they have done, their motive for so doing, at any rate in these proceedings, is totally irrelevant. The articles in question are a group of articles forming the second *fasciculus* in the articles of association of the company. The heading is "Certificates," and under that heading there are five separate articles. Art. 11, the first of them, provides as follows : B C D

The certificates of title to shares shall be issued under the seal of the company and signed in such manner as the directors shall prescribe. E

Then comes art. 12, which is the article most directly in issue in the present controversy :

Every member shall be entitled to one certificate for all the shares registered in his name or to several certificates each for a part of such share. F

Then it provides that every certificate of shares shall specify the numbers of the shares to which it relates.

It was held by the Vice-Chancellor, and it has been argued on behalf of the respondents in this court, that the sentence which I have quoted from art. 12 is confined in its operation to two points of time, (i) the point of time when a certificate falls to be issued to a person who has become a shareholder by allotment, and (ii) the point of time when a certificate falls to be issued to a person who has become a member by transfer. Of course, if that construction were correct, the articles, as so construed, would confer no right upon a shareholder to ask for his certificate to be split, but, in my opinion, it is not permissible to limit the language of that sentence in art. 12 in that way. First of all, the language used does not, in terms, so limit it. It is quite general, and is stating the rights of a member in respect of the documentary title to the shares which he is to hold. Further, if one is looking at the G H

matter of convenience, it would certainly be very inconvenient if a member had to decide, once and for all, without any possibility of obtaining an alteration suitable for changed circumstances, exactly how many certificates he wanted, and how he wanted to divide up his holding into blocks of shares. Of course, ordinarily, where there are no restrictions on transfers, considerations of that kind would not be of very great importance, because, if a member had not the right, under the articles, to split his holding in such a way as to receive two or more certificates in respect of it, he could always procure the same result by a transfer of a part of his holding to a nominee. In the present company, no such device would be possible, because, owing to very stringent restrictions on transfer, every transfer calls into operation the right of pre-emption of the directors, and, after them, of the other shareholders in the company. Accordingly, the construction which the Vice-Chancellor has placed upon these words would mean that a shareholder must decide, at the moment when he becomes a shareholder, whether by allotment or on transfer, once and for all, irrevocably, with no possibility of obtaining a change, the exact way in which his holding is to be divided up among the certificates, and it may very well be that the articles were framed in the general way in which they were framed with that consideration in mind. However that may be, I am unable to accept the suggested *argumentum ab inconvenienti*, because it seems to me that, on balance, the inconvenience lies on the side of the construction which has been adopted by the Vice-Chancellor. However, the matter does not rest there, because there are two other articles, to which I must refer. Art. 13, which I need not quote at length, provides for the issue of new certificates in place of worn out, defaced or destroyed certificates. Under that article, the directors are to issue a new certificate in lieu of the one which is worn out, defaced, lost or destroyed, as the case may be. That article contains no provision for a fee to be paid in respect of such a new certificate. Art. 14—again quite general in its terms—starts off by saying, Every member shall be entitled to one certificate *gratis*, and it continues in the following words :

... but for every subsequent certificate issued to him the sum of 1s. or such smaller sum as the directors may determine shall be paid to the company.

It is argued by Mr. Grant that that provision referring to "every subsequent certificate" is limited to the case of new certificates issued under art. 13 in place of worn out, defaced, lost, or destroyed certificates. I can find no justification for reading the quite general words of art. 14 under any such limitation. If it had been intended that those words referring to the issue of subsequent certificates on payment of 1s. were to be confined to matters falling within art. 13, it is in art. 13 itself that one would have expected to find them. The fact that they do not appear in art. 13, but appear, in quite general language, in art. 14, which is dealing with the general question of whether or not a shareholder is to pay for a certificate, appears to me to be the strongest confirmation

of the view which I take of the actual words of art. 14 itself—namely, that they are intended to refer to some class of certificate which has been issued outside the limited case of new certificates under art. 13. If that be right, what further class of certificates can there be to which the words can refer? They clearly, in my judgment, do not refer to a case where the shareholder, having obtained one block of shares, and having his free certificate for that, afterwards obtains another block of shares and asks for a free certificate for that. In such a case, the certificate for the second block of shares would, quite clearly, in my judgment, not be a subsequent certificate under art. 14, but would fall within the opening words of art. 14, and the member would be entitled to have a certificate *gratis* for the new block of shares so acquired by him. That is the only other limited scope for the words “subsequent certificate” which could I think be suggested—and to do Mr. Grant justice, it was not he who suggested it, it was one which I think arose during the opening of the case—because, when I asked Mr. Grant whether he had an alternative argument to address to the court on the hypothesis that the words “subsequent certificate” in art. 14 are not to be limited to the certificates issued under art. 13, he indicated quite clearly that he had no such alternative argument to adduce. In my opinion, the only possible meaning that can be given to art. 14 is the plain meaning of the words as they stand, “but for every subsequent certificate issued to him the sum of 1s. . . . shall be paid . . .”, words which contemplate that there may be issues of subsequent certificates not limited to cases falling under art. 13. That fits in exactly with the construction which I have placed upon art. 12, and, in my opinion, confirms that construction. That really disposes of the case. It is a pure question of construction, and I myself find no difficulty about it.

Mr. Grant did submit a further argument, to the effect that, assuming that there is a right in the member to call from time to time for his certificate to be split, that is a right which he is only entitled to exercise to a reasonable extent. That is an argument which I am quite unable to accept. It would involve reading into art. 12, by implication, a proviso to that effect. On no canon of construction is it possible, in my judgment, to read in such a proviso, and I decline to do so. In the result, the appeal must be allowed, with costs here and below. The actual form of the order asked for has not hitherto been expressly dealt with, but, if necessary, we can discuss that after FINLAY and LUXMOORE, L.JJ., have delivered their own opinions.

FINLAY, L.J. : I am entirely of the same opinion, and I do not want to add anything.

LUXMOORE, L.J. : I also agree.

Spens, K.C. : We have asked for a form of declaration, but I am not at all sure, on the words of your Lordship’s judgment, that we really want a declaration at all in this case, and I am not sure whether we had

not better take a specific order on the company to issue two certificates for 13 and 4 shares respectively, in place of the certificate No. 174 for 17 shares which was forwarded to the company by the letter dated Feb. 8, 1938.

A LUXMOORE, L.J.: It will be sufficient to have a declaration. If you have any particular form of splitting that you require, and the company do not comply with the declaration, then the company will have no remedy.

Spens, K.C.: There could be liberty to apply.

B SIR WILFRID GREENE, M.R.: You will not be able to do anything under that, because the only specific wrong which the company have done is, first of all, denying your right, and, secondly, refusing an application. You can get a declaration which deals with the first one, but you could not, under liberty to apply, deal with some matters which might raise different issues of fact altogether.

C The declaration was later settled in the following form: *That the appellants, as registered holders of fully-paid shares in the respondent company, are entitled, pursuant and subject to the articles of association of the company, upon request and upon payment of such sum as shall be payable under art. 14 of the company's articles of association, and upon the*
D *surrender of any certificate or certificates already held by them, to have issued to them in respect of the shares comprised in such surrendered certificate or certificates such a number of certificates, not exceeding one per share, as they from time to time require.*

Appeal allowed with costs in both courts.

E Solicitors: *Kenneth Brown, Baker, Baker*, agents for *Evans, Lockett & Co.*, Liverpool (for the appellants); *B. Trayton Kenward*, agent for *Radcliffe-Smith, Abercromby & Co.*, Liverpool (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

F

PITT v. JACKSON.

[KING'S BENCH DIVISION (Croom-Johnson, J.), January 11, 1939.]

G *Negligence—Licensee—Guest—Concealed trap or danger—Polished linoleum—Injury by slipping.*

The plaintiff, who was the sister-in-law of the defendant, in passing along a passage in the defendant's house slipped upon some polished linoleum, fell and sustained injuries. The plaintiff had observed that the linoleum was polished, but had not suspected it of being slippery. It was agreed that the plaintiff was present in the defendant's house as a licensee:—

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HELD: the linoleum did not constitute a trap, and there was no failure by the defendant in any duty owed to a licensee. The plaintiff, therefore, could not succeed in the action.

[EDITORIAL NOTE.] The present case should be compared with that of *Weigall v. Westminster Hospital* (3). It might have been thought, that after the decision in that case, the plaintiff was entitled to succeed here, but after the decision

in this case, it is clear that a plaintiff must adduce evidence to show that a floor or linoleum is polished to such a degree that it becomes a dangerous thing. It is quite insufficient to rely upon the fact that the plaintiff, walking upon it with ordinary care, slipped merely because the floor or linoleum was polished.

AS TO DUTY TO LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 609-612, paras. 859-863; and FOR CASES, see DIGEST, Vol. 36, pp. 45-49, Nos. 282-306.]

Cases referred to :

- (1) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 36 Digest 15, 59; 92 L.J.K.B. 479; 129 L.T. 34.
- (2) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 36 Digest 37, 213; 92 L.J.K.B. 50; 128 L.T. 386.
- (3) *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232; Digest Supp.

ACTION for damages for personal injuries received when the plaintiff slipped and fell upon a polished floor in the house of the defendant. The facts are fully set out in the judgment.

Frank Soskice for the plaintiff.

J. W. Morris, K.C., and *Charles L. Henderson* for the defendant.

CROOM-JOHNSON, J. : On May 12, 1937, Miss Marion Jessie Pitt, the plaintiff, received a letter from her sister, the wife of Charles Hilditch Jackson, addressed from Madeley Cottage, Sherwood Road, Oxhey, Hertfordshire. That letter contained an invitation to the plaintiff to go over to Madeley Cottage on Wednesday, May 19, 1937. In pursuance of that invitation, on May 19, 1937, the plaintiff went over to the house where her sister was residing, and she spent the day there. She had been accustomed at various times during holiday periods to pay similar visits. The plaintiff, who is a school-mistress by profession, is apparently a successful one, and has for some time been headmistress of an elementary school. When the time came for the plaintiff to make her journey home again, she desired to go upstairs to the bathroom to fit herself for her journey home. The bathroom is approached by a flight of stairs which reaches what has been called the half-landing, but what is virtually the top of the staircase. One then turns left along this small landing and up two more steps, and from that point, from the top of those two final steps of the staircase, there is a short passage or corridor which leads directly to the bathroom-door. The distances are approximately 6 ft. 10 ins. to the newel post at the top of the rail which protects anyone from falling down into the aperture up which the staircase ascends, and 18 ins. from that point to the bathroom-door. Hitherto that floor space had been covered by a rug or runner of carpet, and the plaintiff had on earlier visits gone up in just the same way, treading on the runner when she got on to the top of the staircase to proceed into the bathroom. On previous occasions, the sister had accompanied the plaintiff to the bathroom, but on this occasion, assigning a domestic reason for not doing so, she did not accompany her sister. I mention that fact, but I do not think that it has any real bearing on the problem which I have to consider.

On this day, the rug was not down upon the landing. Evidently the rug, in the ordinary way, was exposed to the view of anybody who walked there. On this particular day, the linoleum was, in fact, polished. The plaintiff walked from the top of this staircase as far as the newel post without mishap. She did not tell me whether she caught hold of the bannister in that distance, and I must assume that she did not. She then passed the newel post, and, when she had gone to a distance approximately halfway between that and the bathroom, but a little nearer to the bathroom-door than to the post, to use her own expression, she saw a polished floor. She did not remember the slipperiness coming into her head; she remembered walking along the landing, and the next thing was, she said: "I just crashed with my left leg under me. I had got quite near to the bathroom door." The result of the fall was that she sustained a fracture of the left femur, and it is quite apparent that the injury which she sustained was one which incapacitated her and will continue to incapacitate her.

Before examining the question which really falls for determination, I think that it will be convenient if at this stage I just indicate, very briefly, the result of this calamity to the plaintiff herself. She was taken to hospital, where she stayed for some time. She ultimately went to Brighton, and she was not able to resume her duties at all at the school until Nov. 4, 1937. Then she was fitted with a caliper, with the aid of which she has been obliged to walk ever since. She is still obliged to use it, and I am satisfied that she will have to continue to use it for several months. She says until about next August, but at all events it is quite obvious that she will have to continue to use it for some time. There has been a shortening of the leg by $1\frac{1}{2}$ ins., and it is manifest, therefore, that the plaintiff has been permanently incapacitated. I do not think that it is necessary to go into greater detail, except to say that it is manifest that there must be not only a great deal of inconvenience but also a great deal of pain and suffering to her, and also that there must be a good deal of inconvenience in the future. She was apparently very active at that time, and she found that useful on working days, but now it is very difficult for her to walk much. In those circumstances, the plaintiff has been put to a great deal of out-of-pocket expenditure, and has also suffered loss of earnings, which has been agreed at the sum of £215. For the purpose of assessing the damages, I must add to that something in respect of the pain and suffering, and something for the incapacity both with regard to the time which has elapsed and with regard to the future. Also, I must take into account all trouble which she is likely to have in the future with regard to her inability to walk. Professionally, she does not seem to have suffered at all. So far as this action is concerned, the only item of special damage which has been questioned at all is the item of £2 2s. per week charged in respect of taxi-cabs on the ground that the plaintiff lives 9 miles from the school where she is at present employed, her former school

having apparently been closed. I am not satisfied that that, within the rule in *Mersey Docks & Harbour Board v. Procter* (1), is something which has followed this injury so that I can take it into account in assessing damages. It seems to me that, that other school having been closed, she elected to take a new employment in a district where it was manifest that it would be very difficult to find accommodation. She told me that A she could not get accommodation near by, by reason of the fact that she wore a caliper. Giving every weight to that, and having seen the lady and come to the conclusion that she is obviously a woman of strong character, I think that she did everything she could to get accommodation, and I do not find myself satisfied that that particular item ought to be B taken into account. However, with regard to all the other items, I assess the damage at the sum of £750, to include pain and suffering and any inconvenience and trouble which she is likely to sustain in the future—that is to say, a total of £965, subject to the question of liability.

Upon that question, the accident having been sustained on Feb. 25, C 1938, the plaintiff brought this action, making the defendant in this action her sister's husband—that is to say, her brother-in-law, Charles Hilditch Jackson—the owner and occupier, with his wife, of the house where the accident happened. This claim, as launched, is upon the basis that the plaintiff was an invitee at Madeley Cottage, or, alternatively, D the licensee of the defendant at Madeley Cottage, and that, as a consequence, the defendant, Mr. Charles Hilditch Jackson, owed a duty to the plaintiff to take care. What the precise nature or extent of that duty was I will examine in a moment or two. There was a further claim put quite formally that the defendant had been guilty of negligence. E As I pointed out quite early in the case, negligence must be connected with, and be a breach of, a duty to take care, and that merely brought it back again to the original problem of the capacity in which the lady was on the premises on May 19, 1937, for it is impossible to ascertain the nature of the duty to take care; until that capacity has been ascertained. F It is quite plain that, in the broad social sense of the term, Miss Pitt was on the premises by the invitation of her sister in the letter which I have read. It is also, I think, quite plain that on that occasion she was not there as an invitee in the legal sense of the term, and indeed Mr. Soskice, who is very experienced in this, and, indeed, in every, G class of case, quite early in the case, after the conclusion of his own case, indicated that he accepted the position that the plaintiff was on the premises as a licensee. I accept what the plaintiff has said to me as to what happened. I accept the position that this was a polished surface, and I have to examine at a later stage in this judgment whether H sufficient has been proved to establish a liability. At the conclusion of the plaintiff's case, Mr. Morris, representing the defendant, stated that he called no evidence. He submitted that there was no case made out, and he based his argument on what I say is now the fairly well-known position with regard to a person who is a licensee. He accepted

the situation that the plaintiff was a licensee on the premises, and he said that his only duty was a duty not to lay a trap for, or expose the plaintiff to, a danger not obvious, or not to be expected, in the circumstances of the case.

A I do not think that it is necessary for the purpose of my judgment in this case that I should indulge in a number of long citations from decided cases as to what the position is. It seems to me that for present purposes I can rest my judgment on the passage which has been cited to me from the opinion of LORD SUMNER in *Mersey Docks & Harbour Board v. Procter* (1), at p. 274 :

B A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself : if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it.

D I do not gather that Mr. Soskice really disputes that proposition. I think that really what he puts to me is that, in the circumstances of this case, the high polish which was on this floor, as he says, was one which made it so slippery that a reasonable person being the owner would, in the taking of reasonable diligence to prevent his premises from misleading a licensee, give a warning to persons embarking on the voyage across this perilous place. He says further, as I understand his argument, that this state of affairs—namely, the high polishing of linoleum on the top landing of a house conducted by an efficient lady, the sister of the efficient plaintiff that I have seen—is such a thing as a licensee using reasonable judgment and conduct could not reasonably foresee. In *Fairman v. Perpetual Investment Building Society* (2), LORD WRENBURY gave a little exposition as to what is a concealed danger which might amount to a trap. He said, at p. 96 :

G If the danger is not obvious, if it is a concealed danger, and the licensee is injured the owner is liable. But something must be said as to the meaning of “obvious.” Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words “reasonable care” are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them.

H He then instances the case of a staircase with a missing stair, or a ladder in which a rung has been removed, and he goes on to say that no reasonable person would expect that a step or a rung had been removed, but that (at p. 96) :

... he has nevertheless suffered from what has generally been called “a trap,” although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out

for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him.

As I see it, looking at those two passages from those two cases together, there must be something unexpected in the particular danger which has been encountered, something which a reasonable man would neither expect nor suspect, to use the words of LORD SUMNER, and something A
which there was nothing to indicate to the person who was going there that he ought to be on his guard. If that is the right test, as I think it is, what is the position in the present case? We are dealing with something which is perfectly well known. I suppose I am entitled to have regard to ordinary everyday facts and circumstances which B
are supposed to be known to all of us. One of those facts and circumstances is that a careful housewife is apt in these times, in the desire for cleanliness and hygiene in the household, to administer a very high degree of polish to a good many surfaces, and I suppose I am entitled to have regard to the fact that linoleum, when highly polished, is apt C
to become extremely slippery. This plaintiff had observed that this was a polished floor. I am asked to say, from the facts that have been proved before me, that it was so polished as to be dangerous. I think that that must mean, not merely dangerous to one particular person who in fact walks along there, but dangerous to any reasonable person D
who walks along there in a reasonable way. I find great difficulty, in the facts that have been proved to me, in coming to the conclusion that this linoleum had been polished to such a degree as to make it dangerous to all and sundry. I find it much more difficult to say that, even if that had been established, the mere fact that the polished linoleum, E
though seen to be polished, amounted to a concealed trap or danger. It seems to me that the position here was that a reasonable person seeing a polished surface would have looked to see what degree of polish it had received. I find one other difficulty. The plaintiff had perfectly safely F
walked across more than 6 ft. of this floor—probably about 10 ft., as nearly as I can make out—without any mishap whatever. Unfortunately, the plaintiff is not able to give me any other evidence except a statement that she just crashed down and that her leg was injured. However, if I am to give effect to the idea that this linoleum had been polished to such an extreme degree as to make it a really dangerous article, I think G
that I should require to have a great deal more evidence as to the state of the surface than I have received up to now. It seems to me that to draw the inference, from the plaintiff's really unexplained fall on this day, that the thing was dangerous to other people, or dangerous in itself, would be to draw an inference which the facts do not justify. I must H
bear in mind the fact that the defendant and his wife were living in this place. I must remember that the plaintiff had observed that it was a polished surface. I remember that she had previously walked upon this place when there was a rug or runner of carpet upon it. It is to my mind apparent that the fact that there was no other floor-covering there

on this day must have attracted her attention, and that was how it was that she came to observe the condition. In these circumstances, applying the test which I think I must apply, I am not satisfied, by the evidence to which I have listened, that this place had been left in such a condition as to make it a concealed trap or danger on this particular day.

- A I ought to add that there are a number of other pleas in the case. One of them is that the plaintiff had voluntarily incurred the risk of accident at this place in such a way as to disentitle her to recover against the defendant because she had by express conduct or by necessary inference agreed that she would not make him responsible for the risk.
- B I can see no evidence which leads me to any such conclusion, and, indeed, Mr. Morris has in substance said that he does not really rely upon that. There is also a plea of contributory negligence. Inasmuch as I do not find that there is any breach of such duty as there was on the part of the defendant to take care, it does not seem to me that he ever established
- C any negligence.

- I do not think that it is necessary that I should deal in any detail with the other facts of the case. It seems to me that, if every time one has polished linoleum in a house and somebody falls down the inference is to be drawn that the polish has achieved a very high degree, such as was
- D proved in *Weigall v. Westminster Hospital* (3), to which my attention was directed by Mr. Morris, it would indeed be adding to housewives a burden in addition to all those burdens which they already have to bear under our modern conditions of civilisation. The result is that, in my judgment, the contention that Mr. Morris advanced at the conclusion
- E of the plaintiff's case is right, and I give judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors: *William Hurd & Son* (for the plaintiff); *Sayle, Carter & Co.* (for the defendant).

- F [Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

Re MUSCOVITCH AND MUSCOVITCH, *Ex parte* MUSCOVITCH AND MUSCOVITCH, BANKRUPTS *v.* OFFICIAL RECEIVER.

- G [COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), January 13, 1939.]

Bankruptcy—Appeal—Appeal from county court—Notice of appeal—Delivery of copy to registrar—"Forthwith"—Bankruptcy Rules, 1915, rr. 132, 385, 386.

- H On Oct. 21, 1938, an order was made in the county court at Cardiff suspending the discharge of a bankrupt for a period. On Oct. 25, an appeal was entered in London, and a notice of appeal was sent to the solicitors at Newport and was received by them on Oct. 26. A copy of the notice of appeal was given to the registrar of the county court on Oct. 28. No reason was given for the delay, but it was not shown that any injustice was caused by the delay:—

HELD: (i) the copy of the notice of appeal was not given "forthwith"

to the registrar of the county court, as required by the Bankruptcy Rules, 1915, r. 132.

(ii) the failure to comply with the rule was not a mere irregularity that could be cured under the Bankruptcy Rules, 1915, r. 385.

(iii) the court had no power to extend the time for service of the notice under the Bankruptcy Rules, 1915, r. 386, as no special circumstances had been proved to exist.

Decision of the Divisional Court in Bankruptcy (FARWELL and MORTON, J.J.) ([1938] 4 All E.R. 570) *affirmed*. A

[EDITORIAL NOTE.] The Court of Appeal have reluctantly found themselves bound to dismiss this appeal from the Divisional Court in Bankruptcy. The point here is quite a short one, and turns upon the meaning of the word "forthwith" in the Bankruptcy Rule above referred to. It appears from this case that a copy of the notice of appeal must be delivered to the registrar of the county court at the earliest possible moment. B

AS TO BANKRUPTCY APPEALS FROM COUNTY COURTS, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 398, 399, para. 541; and FOR CASES, see DIGEST, Vol. 4, pp. 531, 532, Nos. 4867-4884.] C

Cases referred to :

- (1) *Re Southam, Ex p. Lamb* (1881), 19 Ch.D. 169; 4 Digest 532, 4876; 51 L.J.Ch. 207; 45 L.T. 639.
- (2) *Re Vitoria, Ex p. Spanish Corpn., Ltd.*, [1894] 1 Q.B. 259; 4 Digest 531, 4869; *sub nom. Re Vitoria, Ex p. Vitoria*, 63 L.J.Q.B. 161; 70 L.T. 141.
- (3) *Re Silence, Ex p. Silence* (1877), 7 Ch.D. 238; 4 Digest 532, 4874; 47 L.J.Bey. 87; 37 L.T. 676. D
- (4) *Re Green, Ex p. Donnithorne* (1879), 40 L.T. 660; 4 Digest 532, 4875.
- (5) *Re Lyon, Ex p. Lyon* (1882), 45 L.T. 768; 4 Digest 532, 4878.
- (6) *Re Jones, Ex p. Williams* (1882), 46 L.T. 242; 4 Digest 532, 4877.
- (7) *Re Dallmeyer* (1906), [1909] 1 K.B. 105, n.; 4 Digest 575, 5283.

APPEAL from an order made by the Divisional Court sitting in Bankruptcy, dated Nov. 21, 1938, and reported [1938] 4 All E.R. 570, dismissing an appeal by the bankrupts from an order made by the judge of the Cardiff and Barry County Court. The appeal was dismissed by the Divisional Court on a preliminary objection, taken on behalf of the Official Receiver, that the Bankruptcy Rules, 1915, r. 132, had not been complied with. E

G. F. Kingham for the appellants.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *V. R. Aronson* for the respondent. F

Kingham : The order of the judge was signed on Oct. 21, 1938. The debtors had 21 days in which to appeal. They could have entered their appeal on Nov. 11, but the appeal was in fact entered, and the deposit paid, on Oct. 25, 1938. Rule 386, says that the time can be extended. By the Bankruptcy Act, 1914, s. 159, power is given to the court to extend the time upon such terms as the court thinks fit. Rule 385, provides that non-compliance with the rules shall not render any proceedings void unless the court shall so direct. There is a right to serve a notice of appeal within 21 days, even though the appeal be entered on the earliest possible day. The notice of appeal G

- was served on the registrar on Oct. 28, 1938. In *Re Sillence, Ex p. Sillence* (3), it was held that the meaning of the rule requiring a copy of the notice of appeal to be sent to the registrar "forthwith" must be taken to be within 21 days. In *Re Green, Ex p. Donnithorne* (4), the court refused to admit evidence to explain the delay. In *Re Lyon, Ex p. Lyon* (5), the 21 days had expired, but in the present case the registrar received the notice within the 21 days. In *Re Jones, Ex p. Williams* (6), where the county court offices were closed when the notice of appeal was sent, it was held, on appeal, that there had been compliance with the rules in the circumstances.
- A *The Solicitor-General*: This appeal is, in substance, an appeal from the exercise by the county court judge of his discretion. It is laid down mandatorily in the Bankruptcy Act, 1914, s. 108 (2) (c), that no appeal shall be entertained except in conformity with the rules. The Court of Appeal means any court to which an appeal in a bankruptcy matter can
- C be taken. Rule 132, does not state that it is subject to the power of the court to extend the time. The Act says "forthwith." If one act can be done by the same post as the other, one is assisted in determining the meaning of the word "forthwith." SIR GEORGE JESSEL, M.R., said, in *Re Southam, Ex p. Lamb* (1), that the meaning
- D must be determined in accordance with the circumstances in which it is used. In the present case, the Divisional Court had no alternative but to come to the conclusion to which it did come. Sect. 147 has nothing to do with a case of this kind because it is not an instance of a formal act or of an irregularity. I do not say that there are no
- E circumstances in which the meaning of the word "forthwith" could be taken into consideration. That was done in the case where the county court offices were closed: *Re Jones, Ex p. Williams* (6). It is possible to conceive other special circumstances. It is sufficient in the present case that, not only was the court right, but also it was
- F inexorably driven to the conclusion that no other order could be made. The OXFORD DICTIONARY defines "forthwith" as meaning "immediately, at once, without delay or interval."

- Kingham*, in reply: The word "forthwith" is not defined in the same way as has just been stated, in *Re Southam, Ex p. Lamb* (1), where
- G it was held that the word must be construed with regard to the circumstances and the objects of the case. As regards *Re Dallmeyer* (7), it seems extraordinary that the court can extend the time for payment of a deposit, but cannot extend it where there has been a very short delay in the service of the notice of appeal upon the
- H registrar. In the present case, there has been a sufficient compliance with the rule.

SIR WILFRID GREENE, M.R.: I share the regret expressed by the Divisional Court in finding myself unable to allow the appeal, so far as this preliminary point is concerned, because it seems to me that the

language of the relevant bankruptcy rule, as construed by this court, is too strong to enable me to say that the appellants are entitled to succeed on this point. I cannot help thinking that the language of the relevant rule is nowadays somewhat anachronistic, because it was introduced at a time when procedure was in many important respects different from what it is now. If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered. However, as the law stands at present, it seems to me that we are precluded by authority from acceding to the argument put before us by Mr. Kingham. A

The short point is this. The appellants appealed from an order under which their discharge from bankruptcy was suspended for 6 months. B The order was completed on Oct. 21, 1938, and accordingly there were 21 days from that date for the entering of the appeal and the serving of the notice of appeal. That period of 21 days would have expired on Nov. 11. The appeal was in fact entered and the deposit lodged on Oct. 25, 1938. On entering the appeal, the appellants came under the C duty which is imposed by the Bankruptcy Rules, 1915, r. 132. That rule provides as follows :

Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the registrar of the court appealed from, who shall mark thereon the date when received and forthwith file the same with the proceedings. D

The object of that rule is to enable an appeal to be entered in the country—not entered in the formal sense, but recorded in the country—for the information of all concerned. The question in the present case is whether the sending of the notice under that rule which was in fact made was effected forthwith. It was effected on Oct. 28 in Cardiff, and on the E same day as the notice of appeal was served on the respondent, the Official Receiver. What prejudice can be suffered by anybody as the result of the 3 days, or the 2 complete days, being allowed to expire between the entering of the appeal and the serving of the notice I cannot myself imagine. Nevertheless, the rule peremptorily says that the notice F must be “sent forthwith.” The first question, therefore, which arises is whether the serving of that notice on Oct. 28, when the appeal was entered on Oct. 25, was a sending “forthwith” of the notice. As long ago as 1881, this court had to consider the meaning of the word “forthwith” in the then existing bankruptcy rule, which in this respect is G the same as the present rule. That was *Re Southam, Ex p. Lamb* (1). SIR GEORGE JESSEL, M.R., pointed out, at p. 173, the object of the rule, which was to enable the other side to ascertain whether or not there is to be an appeal, and he found that, on the facts of that case, the sending of the notice had not been forthwith. On the facts of that case, the H appeal was entered on the last day available for the purpose, and the copy of the notice of appeal was sent by post to the agents for the solicitors, who sent a copy to the registrar of the county court. There were in point of fact 3 hours available in London to get the requisite notice into the post in time. It was held that the fact that those 3 hours

were available and were not taken advantage of prevented the sending of the notice from being a sending forthwith. LUSH, L.J., construed the rule in this way. He said, at p. 174 :

The entry of the appeal in London and the giving notice to the registrar in the country were one continuous act, which was to be done within a reasonable time.

- A When one looks at the circumstances of the present case, there was no reason at all why the notice should not have been sent at once, as soon as the appeal was entered. Having regard to the construction which was put upon the word "forthwith," which is peremptory, and admits of no interval of time between the entry of the appeal and the sending of the notice save such as may be imposed by circumstances which cannot be avoided, I find it impossible in the present case to say that the notice was sent forthwith within the meaning of the rule.

- Then the question arises as to whether the court has any power, on the facts of this case, either to waive the irregularity or formally to extend the time for service of the notice. It was suggested that, under the general power which the court has, under sect. 147 (1) of the Act, to dispense with irregularities, the delay might be overlooked. However, we are precluded, in my opinion, from so holding by the decision of this court in *Re Vitoria, Ex p. Spanish Corp'n., Ltd.* (2). That was a case where the Divisional Court had entertained an appeal notwithstanding the fact that no notice had been sent to the registrar of the county court. In other words, they waived compliance with the rule, treating non-compliance as a mere irregularity. When the matter came before the Court of Appeal, two suggestions were made for getting over the difficulty. One was that it was an irregularity, as the Divisional Court had held, and the other was that the time might be extended. This court, I think, quite clearly negatived the view that failure to comply with that rule was a mere irregularity. It is perfectly true that in that case there had been no notice sent at all, but the language used by this court precludes me from saying that a service not effected forthwith would still be a mere irregularity. This court held that the rule means what it says, and has to be complied with. Therefore, in my judgment, that authority compels us to say that the failure to send the notice forthwith is not a mere irregularity which can be cured under that section. Nor do I think that it is an irregularity which can be cured under the Bankruptcy Rules, 1915, r. 385, the scope of which, I think, is confined, as in the corresponding rule of the Supreme Court, to irregularities.

- The only remaining question is whether or not this court can retrospectively extend the time. With regard to that, the relevant section of the Act is sect. 109 (4), which gives power to extend time on terms without any express reference to special circumstances. However, the rule which provides for extending time, which is r. 386, provides as follows :

The court may, under special circumstances and for good cause shown, extend or abridge the time appointed by these rules or fixed by any order of the court for doing any act or taking any proceeding.

As appears from *Re Vitoria, Ex p. Spanish Corpn., Ltd.* (2) (and I think it is regarded as settled), notwithstanding the absence of words in the section referring to special circumstances, reading the section and the rule together—and the rule is to be treated as part of the Act, as appears from sect. 132 of the Act itself—special circumstances have always been required to be shown before an application for extension of time can be granted. In *Re Vitoria, Ex p. Spanish Corpn., Ltd.* (2), it was held that special circumstances were required to extend the time, and that no special circumstances existed in that case. In the present case, there is no suggestion of special circumstances at all. There was no reason whatever why the notice should not have been sent, and no explanation is given which can in any way amount to what the court is accustomed to treat as special circumstances sufficient to enable the time to be extended. On those grounds, therefore, although, as I have already said, with regret, finding myself bound by what, on the facts of this case, is a pure technicality, hurting nobody, I am constrained to decide that the appeal fails, and must be dismissed with costs. A B C

FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Solicitors : *Hancock & Willis*, agents for *David Morris*, Newport, Mon. D
(for the appellants) ; *The Solicitor, Board of Trade* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

JONES v. MEATYARD. E

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 17, 1939.**]

Street Traffic—Certificate of insurance—False statement to obtain—Gain or advantage to proposer.—Road Traffic Act, 1930 (c. 43), s. 112 (2). F

The respondent was charged with having made a false statement for the purpose of obtaining the issue of a certificate of insurance, contrary to the Road Traffic Act, 1930, s. 112 (2). The respondent admitted that, having purchased a small car, he registered it and licensed it in the name of J., who was non-existent, and that, for the purpose of paying a lower rate of insurance, he gave a false address. The magistrate dismissed the charge, on the ground that the respondent did not obtain any gain or advantage by the false statement :— G

HELD : as the subsection does not contain a proviso that a false statement is permitted when no gain or advantage accrues, the respondent was guilty of the offence charged.

[EDITORIAL NOTE. In this case the magistrate thought that it was an implied ingredient of the offence that the accused should have made some gain out of his deception ; but the High Court have ruled that there can be no such implication, and, therefore, no such requisite being found in the section itself, there is no materiality in whether or not any gain or profit accrued to the accused. H

AS TO OFFENCES UNDER THE ROAD TRAFFIC ACT, 1930, see HALSBURY, Hailsham Edn., Vol. 31, pp. 794-797, paras. 1243-1250 ; and FOR CASES, see DIGEST, Supp., Street Traffic, No. 250a *et seq.*]

APPEAL by way of case stated from a decision of one of the magistrates for the metropolitan police area. The facts are fully set out in the judgment of LORD HEWART, L.C.J.

E. J. P. Cussen for the appellant.

The respondent was not represented.

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LORD HEWART, L.C.J. : In this case an information was preferred by a police constable of the metropolitan police against the respondent for that on a day in Mar., 1938, he did for the purpose of obtaining the issue of a certificate of insurance make a false statement contrary to the Road Traffic Act, 1930, s. 112 (2). The magistrate, having heard the information, dismissed it, and dismissed it, as he says, without calling on the respondent to answer. It is a little difficult to appreciate the reason for that proceeding. The words of the Road Traffic Act, 1930, s. 112 (2), are, one would have thought, abundantly clear. They provide as follow :

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If any person for the purpose of obtaining the grant of any licence to himself or any other person knowingly makes any false statement, or for the purpose of obtaining the issue of a certificate of insurance or of a certificate of security under Part II of this Act makes any false statement or withholds any material information, he shall be liable to a fine not exceeding £50 or to imprisonment for a term not exceeding 6 months, or to both such imprisonment and fine.

D

The part with regard to penalty shows clearly enough how seriously the legislature regards the possibilities that might arise from such an offence.

In this case, it was not denied that the respondent did, for the purpose of obtaining the issue of a certificate of insurance, make a false statement. The evidence (which is set out in this case) and the findings of fact are perfectly clear. A certificate of insurance was obtained, and for the purpose of obtaining it a false statement was made. For some reason, as to which it is not profitable to conjecture, the respondent, whose name is Stanley James Meatyard, having purchased and taken delivery of a small motor car, registered it and licensed it in the name of another person, in the name of R. Jones. Not content with so doing, he telephoned to the agents for the underwriters that a friend of his, a Mr. R. Jones, living at Cranwell, required insurance in order to license a car, of which he was taking delivery. Then he set out the horsepower and the number of this car, and said that the respondent required the cover note to be forwarded to him. In consequence of those statements, a cover note of insurance, purporting to cover the car for a period of 14 days, was in fact despatched to the respondent. In that cover note the name of the proposer is given as R. Jones, whose address is given as Cranwell, and his occupation or trade is described as being that of a clerk. Afterwards, on Mar. 27, the respondent himself was seen and stopped by the police officer when he was actually driving this motor car in Hampton Court Road. The police officer pointed out that the car was not carrying a revenue licence, and the respondent replied that

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it was in the post, that he had sent it up on the previous Friday with a certificate of insurance, and that a friend of his said that it would be all right if he took the car out. On the following day he produced the cover note, and he informed the underwriters that R. Jones had insured elsewhere, and that he was therefore returning the cover note. Afterwards, on Apr. 12, the respondent was questioned by a sergeant of the metropolitan police. He was asked whether he was the owner of the car, and he replied that he was. The sergeant then informed him that the car was registered with the Surrey County Council in the name of Reginald Jones of 38, Ember Court, Molesey. To that statement the respondent answered :

On Mar. 26, I sent the money for the revenue licence in the name of Jones, who is a workmate of mine. He knows nothing about this, and I do not know his address. The address I gave is that of my brother, and the correct address should read : 38, Ember Gardens, Molesey. I did this because I wanted to keep on the cheap rate of insurance.

Finally, before the magistrate, it was admitted that there was no such person as R. Jones.

In those circumstances, it is a little difficult to appreciate why the information was dismissed, and was dismissed without the calling of any answer from the respondent. Indeed, when one observes the finding of fact with regard to the purpose of this—"I did this because I wanted to keep on the cheap rate of insurance"—it is a little difficult to exclude wholly the notion of gain or advantage. It is not necessary, according to this section, that any gain or advantage should be derived in order that the offence may be complete.

The magistrate says, and I read his very words :

I found that the respondent had obtained a valid insurance policy in the name of "R. Jones" using the said name . . . as his own, and that no gain or advantage had accrued to him thereby. I therefore dismissed the said information.

It is a little difficult to understand the meaning, in those circumstances, of that word "therefore." The subsection does not contain a proviso that a false statement is permitted in circumstances in which it is established that no gain or advantage has accrued to the defendant from making the false statement. I repeat that it is not possible to understand this decision. The offence was manifestly committed. I think, therefore, that this appeal must be allowed, and that the case must go back to the magistrate, with the direction that the offence which was charged was proved.

CHARLES, J. : I agree.

SINGLETON, J. : I agree.

Appeal allowed.

Solicitor : *Solicitor for the Metropolitan Police* (for the appellant).

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

DARK v. WESTERN MOTOR & CARRIAGE CO.
(BRISTOL), LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 11, 1939.**]

- A** *Street Traffic—Motor vehicles—Licence—General trade licence—Motor ambulance—Used for towing trailer laden with motor-boat—Whether vehicle used for unauthorised purpose—Roads Act, 1920 (c. 72), s. 12—Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29D.*

The respondents were charged with using a vehicle upon a public road under a general trade licence for a purpose other than a purpose for which the vehicle was authorised to be used under such licence—namely, the towing of a trailer laden with a motor-boat, contrary to the Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29D, and the Roads Act, 1920, s. 12. The justices dismissed the charge, holding that the use of the vehicle for the conveyance of the motor-boat to the premises of the respondents for the purpose of overhauling the propeller-shaft and the exhaust system and of either fitting a new engine or overhauling the existing engine was a purpose connected with the respondents' business as repairers of mechanically propelled vehicles, within the meaning of the regulations. Thereupon this appeal was brought :—

HELD : as the motor-boat was not connected with the business of a manufacturer or repairer of mechanically propelled vehicles within the meaning of the regulations, the offence charged was proved.

- EDITORIAL NOTE.** This case emphasises the fundamental condition under which a general trade licence is granted to a motor dealer or repairer, and in compliance with which the vehicle so licensed must be used. The user of the vehicle under such a licence must be strictly a user *qua* manufacturer or repairer of mechanically propelled vehicles, and it is not sufficient that the user is in connection with an ancillary business—in this case, the repair of internal combustion engines and the sale and repair of motor-boats.

AS TO GENERAL TRADE LICENCES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 426, 427, paras. 924, 925 ; and FOR CASE, see DIGEST, Supp., Street Traffic, No. 188a.]

- F** Case referred to :

(1) *Westover Garage, Ltd. v. Deacon* (1931), 145 L.T. 357 ; Digest Supp.

APPEAL by way of case stated against a decision of the justices for the petty sessional division of Blandford in the county of Dorset. The following facts were proved or admitted.

- G** The respondents, the Western Motor & Carriage Co. (Bristol), Ltd., were the holders of a general trade licence. Upon Friday, Feb. 25, 1938, their trade plates under that licence were exposed upon a Bedford motor ambulance not otherwise licensed which was then being driven on the Shaftesbury Road at Steepleton Preston in the county of Dorset,
- H** and attached to such motor ambulance was a two-wheeled trailer, laden with a motor-boat. The road upon which the Bedford motor ambulance was being driven was a public road, and the ambulance was so driven under the express instructions of the respondents. The only purpose of such journey was the conveyance of the motor-boat from Poole in the county of Dorset to the respondents' premises at Bristol, where it was

intended that the engine of the motor-boat should be overhauled and repaired in the ordinary course of the respondents' ancillary business. The respondents carried on at Bristol their principal business of motor car sales organisation, and, in addition to such business, stocked motor-boats, and were engaged in repairing and manufacturing internal combustion engines, including marine engines. They also did general A. garage work. Also, the respondents had frequently made use of vehicles under a general trade licence in circumstances similar to those disclosed in the information.

On behalf of the appellant, it was contended (i) that the use of the general trade licence for such a purpose—namely, the conveyance of a B motor-boat—was not a purpose within the meaning of the Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29D (4), inasmuch as the vehicle in respect of which the licence was being used was not at that time being used for a purpose connected with the business as a manufacturer or repairer of, or dealer C in, mechanically propelled vehicles of the holder of such licence; (ii) that reg. 29D (4) was to be construed strictly in its qualifying effect upon reg. 29D (3), and that such strict construction implied that the words “any purpose connected with the business” referred only to the purposes of the business of the holder of such licence in relation to motor D vehicles—in other words, motor cars, etc.—and not to the numerous other ancillary purposes which may be, and are, connected with the business of manufacturers or repairers of, and dealers in, mechanically propelled vehicles—namely, such a business as that of a marine engineer; (iii) that this interpretation of the meaning of the regulation was supported by a certain passage in the judgment of the late AVORY, J., in E *Westover Garage, Ltd. v. Deacon* (1); (iv) that reference should be made to the title of the regulations—namely, the title provided for in reg. 1, the Road Vehicles (Registration and Licensing) Regulations, 1924—and that the words “Road Vehicles” govern the words of reg. 29D (3), (4), F and prevent any wider interpretation; and (v) that a motor-boat was not a mechanically propelled vehicle within the terms of the regulations.

On behalf of the respondents, it was contended (i) that the use of the vehicle, a Bedford motor ambulance, under such licence for the conveyance of a motor-boat was a purpose connected with the business G of the holder of such licence—namely, the Western Motor & Carriage Co. (Bristol), Ltd.—as manufacturers or repairers of, or dealers in, mechanically propelled vehicles; (ii) that *Westover Garage, Ltd. v. Deacon* (1) referred to by the appellant could not be applied to the present case; (iii) that the qualifications contained in reg. 29D (3), (4), should be H interpreted in a wide manner; and that the words “any purpose connected with the business as manufacturer or repairer of, or dealer in, mechanically propelled vehicles of the holder of such licence” were intended to include any ancillary or closely connected business carried on in connection with the holder's business as a manufacturer of, or

repairer of, or dealer in, mechanically propelled vehicles, and that such businesses might include those of a marine engineer, repairers of internal combustion engines, etc.

Sir Shirley Worthington-Evans for the appellant.

L. Herrick Collins for the respondents.

A LORD HEWART, L.C.J. : In my opinion, this case, in the course of the argument, has been made perfectly clear, and this appeal ought to be allowed. The question arises in the following way. An information was preferred by the present appellant against the respondents for using a vehicle contrary to the Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), and contrary to the Roads Act 1920, s. 12. The particulars of the information were stated in the following terms :

B For that they, the said Western Motor & Carriage Co. (Bristol), Ltd., on Friday, Feb. 25, 1938, in the parish of Steepleton Preston in the county of Dorset, did by the hand of their servant use a vehicle, to wit, a Bedford motor ambulance, on a public road, namely, Lower Shaftesbury Road under a general trade licence [of a certain number] for a purpose other than the purpose for which the said vehicle was authorised to be used under such licence, namely, for the purpose of the towing of a trailer laden with a motor-boat.

C The justices, having heard the information, dismissed it, and the question for us is whether, in taking that course, they came to a correct determination in point of law.

D The case finds in fact that the respondents were the holders of a general trade licence, and that on this day in Feb., 1938, the trade plates were exposed upon a Bedford motor ambulance, not otherwise licensed, on the Shaftesbury Road, and that attached to that motor ambulance there was a two-wheeled trailer, which in its turn was laden with a motor-boat. Then followed this finding of fact :

E The only purpose of such journey was the conveyance of the motor-boat from Poole in Dorset to the respondents' premises at Bristol. Further, it was intended that the engine of the motor-boat should be overhauled and repaired in the ordinary course of the respondents' ancillary business.

F The regulations under which this trade licence was granted are the Road Vehicles (Registration and Licensing) Regulations, 1924 (S.R. & O., 1924, No. 1462), reg. 29. By reg. 29 it is provided that certain regulations shall apply to general trade licences. It is not necessary, I think, to re-read the earlier part of the article, but we come to art. D :

G (1) A general trade licence shall not be used upon any vehicle other than a vehicle which is in the possession of the holder of such licence in the course of his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles. . . . (3) No vehicle shall be used upon a public road under a general trade licence for any purpose other than a purpose for which such vehicle is authorised by this article to be used under such licence.

H Then, finally, by para. (4) it is provided as follows :

Subject to the provisions of paras. (1) and (2) of this article, a vehicle may be used upon a public road under a general trade licence for any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles of the holder of such licence. . .

The limit, therefore, is to be found in "the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles."

The particular purpose for which this general trade licence was being used on the occasion referred to in the information was the towing of a trailer laden with a motor-boat, and the point of connection which is suggested between that which was being done and that which the respondents claim that they were entitled to do is to be found in the fact that in a motor-boat there are certain things which have some affinity to various other things. For example, it may be that there are wheels that go round, or it may be that there is, as was rather suggested to be found here, a propeller-shaft or exhaust system. The argument is that, because of those incidental matters in the thing which was being carried, therefore the trailer which was so laden, and presumably also the motor vehicle which was towing the trailer, came into the protection provided by the words of para. (4). It is an interesting argument, having regard to the words "for any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles." The trailer might well have been said to be connected with the business of a manufacturer or repairer of mechanically propelled vehicles, but I cannot understand the argument that therefore that which was being carried—it happened to be a motor-boat—was also connected with the business of a manufacturer or repairer of mechanically propelled vehicles. It might have been a small library. It might have been a gas engine. It might have been any one of ten thousand things. The only relation which that which was being carried upon the trailer had to the trade licence was that the trailer was being drawn by a motor vehicle for some purpose connected with some business carried on by the manufacturer, though it was not *qua* a manufacturer or repairer of mechanically propelled vehicles that he was employing the trailer laden with the motor-boat. The fact that there was a motor-boat in the trailer was something quite irrelevant to the business of the manufacturer or repairer, and the justices seem to have come to the conclusion that, because there was some conceivable mechanical affinity between some internal part of the motor-boat and a mechanically propelled vehicle, they could entirely disregard the fact that the motor-boat was not a mechanically propelled vehicle, and, further, that that which was being done was being done by and *qua* a manufacturer or repairer of or dealer in mechanically propelled vehicles.

In my opinion, the argument which was made on behalf of the appellant was perfectly sound. It was argued that reg. 29D (4) was to be construed strictly in its qualified effect upon reg. 29D (3), and that such strict construction implied that the words "any purpose connected with the business" referred only to the purposes of the business of the holder of such licence in relation to motor vehicles—in other words, motor cars, etc.—and not to the numerous other ancillary purposes which may be, and are, connected with the business of a manufacturer or repairer of or dealer in mechanically propelled vehicles. The crucial words, in my opinion, are the words "the business as a manufacturer or repairer of

or dealer in mechanically propelled vehicles." The fact that a man does carry on such a business and is a manufacturer or repairer does not give him unlimited latitude with regard to the use of a general trade licence for any other conceivable purpose.

A The case, I think, is abundantly clear, and I refer, only by way of confirmation, to the judgment of this court in *Westover Garage, Ltd. v. Deacon* (1). In that case, if I may be excused for repeating the words I used, I said, at p. 360 :

B One has to remember the purposes for which these licences were granted ; they were granted in order that the manufacturer or dealer in mechanically propelled vehicles, in order to show a vehicle of the kind for the purposes of sale, need not have a licence for each separate vehicle, but might have a general licence. If he takes out a limited trade licence the use to which he can put the vehicle is exceedingly and manifestly restricted ; if he takes out a general trade licence he can use the vehicle for any purpose connected with his business as manufacturer or repairer of or dealer in mechanically propelled vehicles, and I think that the subsequent words were not intended to mean and do not bear the construction that the vehicle so licensed may be used for some totally different and collateral purpose as, for example, for the purpose of the lucrative business of the intended or contemplated purchaser.

C In the same way in the same case AVORY, J., uses these words, at p. 360 :

D The question therefore is, for what purpose was the vehicle in question authorised to be used in this case ? Now I think in order to answer that question it must be borne in mind that the essential difference between a general trade licence and the ordinary licence for a motor vehicle is that the general trade licence is a special thing intended for the use of manufacturers and dealers in motor vehicles : it is not intended to be used for the ordinary purposes of trade in other respects than in the trade of motor vehicles.

E So, to go back to the words of the regulation, the important words are " any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles of the holder of such licence," and it seems to me to be quite unreasonable to suggest that, therefore, because a person is a manufacturer or repairer of or dealer in mechanically propelled vehicles, he may make use of a general trade licence for some wholly alien, different, and unrelated business or purpose.

F The argument really comes to this—that, because a person has a licence connected with his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles, he may therefore make use of it for any other purpose whatsoever that the fertility of commercial imagination may suggest. In my opinion, the decision was manifestly wrong. The

G appeal should be allowed and the case should go back to the justices with a direction that the offence which was charged was proved.

CHARLES, J. : I entirely agree. The matter seems to me so clear that I do not desire to add anything.

H SINGLETON, J. : I agree.

Appeal allowed with costs.

Solicitors : *Burchells*, agents for *C. P. Brutton*, Dorchester (for the appellant) ; *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. TRING INVESTMENTS, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), November 11, 14, 1938.]

Income Tax—Undistributed income—"Member"—Permanent director with option to take up shares—Finance Act, 1922 (c. 17), s. 21 (7)—Finance Act, 1937 (c. 54), s. 14 (3).

The respondent company was a private company with a capital of £155, divided into 3,100 shares of 1s. each. These shares were divided into 600 five per cent. cumulative preference shares, 500 ordinary shares entitled to a dividend of 10 per cent., and 2,000 deferred shares. The articles provided for two persons to be first directors of the company, and they were empowered to appoint a permanent director for life, upon whom were conferred very large powers, including one to remove any other director from office without notice. Five days after the registration of the company, Q. was appointed permanent director, and, in consideration of £5, an option was given to him to take up at par any of the ordinary shares of the company. On the same day, 10 deferred shares at a premium of 19s. per share were allotted to P. Trust, Ltd., and 2 other preference shares were allotted at the same meeting. Eleven months later, the company went into liquidation, and, apart from the above 12 shares, the only shares allotted were 10 ordinary shares allotted to Q. immediately before the winding up. Shortly after the registration of the company, Q. entered into a deed of covenant to pay to the company for a period of 7 years or the remainder of his life, whichever should be the shorter period, an annuity of £11,000 per annum free of tax. That annuity was the only asset the company ever possessed, and the company received one payment of £11,000 (which, being free of tax, represented a gross sum of £14,426 4s. 7d.) before the date of the winding up. The commissioners gave a direction under the Finance Act, 1922, s. 21, and made an apportionment on Q. under the Finance Act, 1937, s. 14 (3), of £14,426 4s. 7d. It was contended that Q. had no right to the assets of the company unless and until he had exercised his option to take the ordinary shares, which he had not done:—

HELD: (i) Q. was a member of the company within the meaning of the Finance Act, 1922, s. 21 (7), since he had an interest in the capital of the company.

(ii) the apportionment was correct, except that the small sums in respect of revenue and expenditure of the company ought to have been taken into account.

[EDITORIAL NOTE.] In the ordinary way, the term "a member of a company" is synonymous with the term "shareholder," but, for the purposes of the statutes relating to income tax, the term has been specially defined as "any person having a share or interest in the capital or profits or income of a company." Even this definition was further extended in 1936, but that extension is not in question here. In the present case, the person sought to be assessed to tax had not at the material time any shares in the company, but had only an option to take up shares at par. It is held that such an option, given to the permanent director of what was virtually a one-man company, was an interest in the capital or profits or income of the company within the meaning of those words in the Finance Act, 1922, s. 21 (7).

As to "MEMBER" OF A COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674r-674t.]

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, s. 149, and the

Finance Act, 1922, Sched. I, para. 10, for the opinion of the King's Bench Division of the High Court of Justice.

On behalf of the Inland Revenue Commissioners, it was contended as follows :

- A (i) that under the said direction all the income of the respondent company—namely, £11,000 paid free of tax by the Marquess of Queensberry (*i.e.*, £14.426 *4s.* 7*d.*)—was deemed to be available for distribution and should be apportioned as in a winding up of the respondent company ; (ii) that at Apr. 5, 1937, the Marquess of Queensberry was and could be the only person interested in the respondent company's surplus assets in the event of a winding up since by virtue of the option granted to him or by the powers under the articles of association given to him as a permanent director he could possess himself of the company's ordinary shares at any time ; (iii) that the commissioners who made the apportionment had rightly assumed that at Apr. 5, 1937, the person entitled to the assets was the Marquess of Queensberry ; (iv) that the said apportionment should be confirmed.

On behalf of the company, it was contended as follows :

- C (i) that on Apr. 5, 1937, the Marquess of Queensberry had not exercised his option to take up shares and therefore had no interest in the assets of the respondent company ; (ii) that the apportionment to the Marquess of Queensberry was wrong and should be discharged.

The commissioners decided as follows :

- D . . . that the Marquess of Queensberry had no rights to the assets of the respondent company unless and until he had exercised his option to take the shares, and that since the option had not been exercised within the period under review in this case the apportionment could not be sustained. We therefore discharged the apportionment.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellants.

- E *A. M. Latter, K.C., and F. Heyworth Talbot* for the respondents.

- F MACNAGHTEN, J. : On Dec. 10, 1936, the respondents, Tring Investments, Ltd., now in liquidation, were registered under the Companies Act, 1929, as a private company limited by shares, with the modest capital of £155, divided into 3,100 shares of 1*s.* each.
- G By art. 3 of the articles of association, these shares were divided into 600 cumulative preference shares, 500 ordinary shares and 2,000 deferred shares. By art. 30 of the articles of association, the preference shares were entitled to a dividend at the rate of 5 per cent., the ordinary shares were entitled to a dividend at the rate of 10 per cent., and the deferred
- H shares were entitled to the remainder of the profits distributed by way of dividend. By art. 36, in the event of a winding up, the surplus assets of the company remaining after paying the debts and liabilities of the company and the costs of liquidation were to be applied in repaying to the holders of the preference shares the amounts paid up on the shares held by them, and the arrears of dividend up to the commencement of the winding up, to the holders of the ordinary shares the amounts paid up by them on the ordinary shares, and to the holders of the deferred shares the sum of 1*s.* for every deferred share held by them respectively. The balance remaining after those payments had been made belonged to the holders of the ordinary shares.

The subscribers to the memorandum were a Mr. Hannaford and a Mr. Fisher. They had each subscribed the memorandum for one preference share. By art. 15 of the articles of association, it was provided that the first directors should be a Mr. Robert Hunter and a Mr. Todd. By art. 16 of the articles of association, the directors were empowered to appoint a permanent director for life, on whom the most ample powers were conferred, including the power to remove any other director from office without any notice. A

The company, as I have said, was registered on Dec. 10, 1936. Five days later, on Dec. 15, Mr. Hunter and Mr. Todd, the directors appointed by the articles of association, met at 1 p.m. In exercise of their powers, they at once appointed the Marquess of Queensberry to be permanent director. At the same time, they resolved that, in consideration of the sum of £5 received from the Marquess of Queensberry, an option should be given to him to take up at par any of the ordinary shares of the company, and Mr. Robert Hunter was authorised to sign the option agreement on behalf of the company. At 1.30 p.m. on the same day, a second meeting of the board of directors was held, at which were present the permanent director (the Marquess of Queensberry) and Mr. Todd. In the meantime, Mr. Hunter had resigned from the office of director, and had assumed that of secretary, an office to which he had been appointed by art. 37 of the articles of association. Mr. Hunter, in his capacity as secretary, reported that an application had been received for 10 deferred shares at a premium of 19s. per share from Peverell Trust, Ltd., and it was resolved that this offer should be accepted. The shares were allotted accordingly. It was also resolved that the seal of the company should be affixed to certificate No. 1 for the 10 deferred shares in the name of Peverell Trust, Ltd., to certificate No. 2 for one preference share in the name of Mr. Hannaford, and to certificate No. 3 for one preference share in the name of Mr. Fisher. The company in fact went into liquidation in Nov., 1937. Those 12 shares were the only shares that were in fact issued by the company until, shortly before the winding up, 10 ordinary shares were allotted to the Marquess of Queensberry. B C D E F

The resolution to give an option over the ordinary shares to Lord Queensberry was duly carried out by a deed of covenant, dated Jan. 4, 1937, expressed to be made between the Marquess of Queensberry, called the grantor, of the one part, and the company, of the other part. It recited as follows : G

... the grantor being desirous of securing to the company such annual sums as are hereinafter mentioned to commence on Apr. 1, 1936 [before the registration of the company] now this deed witnesseth that in pursuance of the said desire the grantor hereby covenants that he will pay to the company annually for a term of 7 years to be reckoned from Apr. 1, 1936, or throughout the remainder of the life of the grantor whichever shall be the shorter period such an annual sum as after deduction of income tax at the appropriate rate or rates from the full amount thereof will leave a clear annual sum of £11,000 per annum. The said annuity shall be payable at the registered office of the company as to the amount due in respect of the year ended Apr. 1, 1937, upon Mar. 1, 1937, without apportionment H

and thereafter on Apr. 1 in each succeeding year throughout the currency of these presents.

A The annuity so granted by the Marquess of Queensberry was the only asset that the company ever possessed. On Mar. 31, 1937, the Marquess of Queensberry, pursuant to his covenant, paid to the company £11,000 free of tax. The gross sum required to produce £11,000 free of tax was £14,426 4s. 7d.

By the Finance Act, 1922, s. 21, it is provided as follows :

B With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows : (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members . . .

C The commissioners gave the "direction" prescribed in this section. They directed that, for the purposes of assessment to super-tax, the income of the company (which was, as I have said, the £11,000 free of tax, less, of course, the secretarial and other expenses, if any, of the company) should, for the year ended Apr. 5, 1937, be deemed to be the income of the members. The section goes on to say :

E . . . and the amount thereof [the amount of the income deemed to be the income of the members] shall be apportioned among the members and super-tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super-tax.

I do not think that it is necessary to read the remainder of that subsection, or to read any other part of the section, except subsect. (7), which provides as follows :

In this section the expression "member" shall include any person having a share or interest in the capital or profits or income of a company . . .

The Finance Act, 1937, s. 14 (3), provides as follows :

G Where a direction is given under the Finance Act, 1922; s. 21 (1), with respect to an investment company, the Special Commissioners, in determining the respective interests of the members for the purpose of apportioning income in accordance therewith under Sched. I, para. 8, to that Act, may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

H The Income Tax Commissioners made an apportionment on the Marquess of Queensberry under the Finance Act, 1937, s. 14 (3), in respect of the income of the respondent company amounting to £14,426 4s. 7d. for the year of assessment 1936/37, and that income was apportioned by them to him. There was no appeal, as I have said, against "the direction" given by the commissioners, but there was an appeal to the

Special Commissioners against the apportionment. The Special Commissioners who heard the appeal held that the Marquess of Queensberry had no rights to the assets of the respondent company unless and until he had exercised his option to take the ordinary shares, and, since the option had not been exercised within the period under review—that is, the year ended Apr. 5, 1937—the apportionment could not be sustained. A They accordingly discharged the apportionment. It is from that discharge that the appeal is brought to this court.

There are two questions to be considered. First of all, was Lord Queensberry a “member” of the company within the definition given in the Finance Act, 1922, s. 21 (7)? Then, if he was, did the sum B apportioned to him correspond

... to his interest in the assets of the company available for distribution among the members in the event of a winding up?

It is the first question that formed the principal subject of argument before me. A member of the company, according to the definition C contained in the Companies Act, 1929, s. 25, is either a person who has subscribed to the memorandum of association or a “person who agrees to become a member of a company and whose name is entered in its register of members.” The Marquess of Queensberry did not subscribe to the memorandum, nor had he, by Apr. 5, 1937, agreed to become a D member. Therefore he was not a member of the company within the definition contained in the Companies Act. Was he, however, a person who had “a share or interest in the capital or profits or income of a company”? If he was, then by sect. 21 (7) he is included under the definition of “member” for the purposes of that section. E

Mr. Latter argued that the words “share or interest in the capital or profits or income” ought to be read distributively, meaning “any person having a share in the capital or an interest in the profits or income of a company.” It seems to me that that argument cannot be sustained, since on that construction the section would then read: “In this F section ‘member’ shall include a person having a share in the share capital of a company.” A person having a share in the share capital of a company is a shareholder, and, if he is a shareholder, he is a member. Thus, the construction contended for by Mr. Latter would mean that the expression “member” should include a person who was a member, G which would not be sensible. I think that the words “share or interest in the capital or profits or income of a company” mean just what they say—anybody who has either a share in the capital or profits or income or has any interest in the capital or profits or income. I think the word “capital” there may cover, not only share capital, but also the H pecuniary capital of a company, its capital assets.

Had the Marquess of Queensberry a share or interest in the capital of the company? The company had given him an option over all the ordinary shares of the company. They had given it to him in considerations of £5, and by a deed under seal. He had a right to call upon the

company to allot to him the whole or any part of the ordinary share capital, on payment by him, of course, of the nominal value of the shares—namely, 1s. each. It was a legal right that he possessed. If one can imagine such a state of things as that the company were minded to issue the ordinary capital to somebody else (it is difficult indeed to

A imagine such a state of things, because the Marquess of Queensberry was the permanent director, and he was in a position to remove anybody else from the directorate, and the directors were the only persons who could make an allotment of shares), the Marquess of Queensberry had the right to come to the court and obtain an injunction against the
B company to restrain them from so doing. It seems to me, therefore, that it is plain that the Marquess of Queensberry was a person who had an interest in the capital of the company within the meaning of sect. 21 (7).

Then comes the second question. What interest had he in the assets
C of the company available for distribution among the members in the event of a winding up? I think that the argument of the Attorney-General is right, and that those words must be read as meaning: "What interest would he have had in the assets of the company available for distribution in the event of a winding up on Apr. 5, 1937?" On that
D date he was not a shareholder. He had a right to become the holder of all or any of the ordinary shares, a right which he could exercise by giving notice to himself before the liquidation or by notice to the liquidator after the resolution for winding up had been passed. If he gave that notice, he would be entitled to be put upon the register of members,
E and then he would get the whole of the assets of the company, after paying to the subscribers of the memorandum the 1s. due to each of them for their preference shares and to Peverell Trust, Ltd., the 10s. due to that company, and possibly some dividend on their deferred shares. He would be entitled to the whole of the remaining assets. If he failed
F to give notice, the result would be that the company would proceed to dissolution with £11,000 or thereabouts in its possession, and the Crown would have taken the whole of the money. I think that it is reasonable to assume that, even if the Marquess of Queensberry had not been the person who provided the fund, even if the money had come
G from some other source, the Marquess of Queensberry, if there had been a winding up on Apr. 5, 1937 (and that is the situation which is being contemplated), would, without any doubt, have exercised his option to take the ordinary shares, and would thus have put into his own pocket the sum of money which he had provided under his covenant. I think,
H therefore, that the commissioners ought to have held that the Marquess of Queensberry had an interest in the assets of the company, and that the apportionment was correct, except that the secretarial expenses ought to have been deducted and the 12s. taken into account as part of the assets of the company. In my opinion, therefore, this appeal ought to be allowed. The case must go back to the Special Commis-

sioners to confirm the apportionment made by the Income Tax Commissioners.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Palmer, Bull & Mant* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

HOMOLKA v. OSMOND.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 11, 1939.**]

Magistrates—Procedure—Limitation of time—Misdemeanour—Aiding and abetting—Accessory before fact a principal offender—Whether information out of time—Summary Jurisdiction Act, 1848 (c. 43), s. 5—Road Traffic Act, 1930 (c. 43), s. 7 (5).

H. was convicted for aiding and abetting G., who, being a person disqualified from holding or obtaining a driving licence, while disqualified, unlawfully drove a motor vehicle on a road, contrary to the Road Traffic Act, 1930, s. 7 (4), and the Summary Jurisdiction Act, 1848, s. 5. H. appealed to quarter sessions, on the grounds, *inter alia*, that the charge of aiding and abetting, being an offence only under the Act of 1848, was out of time by reason of sect. 11 thereof, the summons having been issued more than 6 months after the alleged offence, and that the Act of 1930 had application to the principal offences therein set out, and not to the offence of aiding and abetting those offences. The respondent at quarter sessions contended that the summons, having been issued within 3 months of the date on which the alleged offence came to the knowledge of the respondent, and within one year of the date of the alleged commission of the offence, was issued in time, and was valid by reason of the Road Traffic Act, 1930, s. 7 (5). The appeal was allowed, and thereupon the present appeal was brought:—

HELD: (i) the Summary Jurisdiction Act, 1848, s. 5, does not create an offence, but merely regulates procedure and punishment.

(ii) as an accessory before the fact to the commission of a misdemeanour is to be regarded in law, for the purpose of a conviction, as a principal offender, the summons was issued in time, and was valid by virtue of the Road Traffic Act, 1930, s. 7 (5).

[EDITORIAL NOTE. The Summary Jurisdiction Act, 1848, s. 5, provides for the punishment of aiders and abettors, and sect. 11 of that Act provides the statutory limitation of time of 6 months in the case of complaints before justices. It was argued that, therefore, an information brought against an aider and abettor more than 6 months after the date of the offence was out of time. This argument fails to give effect to the legal principle that an accessory before the fact to the commission of a misdemeanour is in law a principal offender, and therefore the time within which a complaint must be made is not necessarily regulated by sect. 11 of the Act of 1848, but it must also be considered whether the Act creating the principal offence also enacts a special limitation of time. In the present case, in respect of the principal offence, the Road Traffic Act, 1930, s. 7 (5), establishes a limitation of time of one year, subject to the summons having been issued within 3 months of the date on which the alleged offence became known to the respondent. To determine whether the complaint was in time, therefore, regard must be had to the Road Traffic Act, 1930, and not to the Summary Jurisdiction Act, 1848, s. 5.]

AS TO LIMITATION OF TIME, see HALSBURY, *Hailsham Edn.*, Vol. 21, pp. 598, 599, para. 1043; and FOR CASES, see DIGEST, Vol. 33, pp. 325-327, Nos. 392-395.]

Case referred to :

(1) *Gould & Co. v. Houghton*, [1921] 1 K.B. 509; 14 Digest 75, 431; 90 L.J.K.B. 369; 124 L.T. 566.

- A APPEAL by way of special case stated from a decision of the county of London quarter sessions. A person disqualified from holding a driving licence was driving a car while so disqualified. The car was stopped by the police. Seated beside the driver was the accused, who heard the driver give a wrong name and address but sat there and said nothing.
- B The merits of the case were not gone into, and the only question arising is one of the limitation of time within which the information should have been laid.

Vernon Gattie for the present appellant.

J. Scott Henderson for the present respondent.

- C LORD HEWART, L.C.J. : This case is really too clear for argument, and apparently the point was decided *per incuriam* in the absence of the relevant authorities. It is not necessary to read the case again. The point is that it was contended that the summons against the woman—
- D that is to say, the appellant at quarter sessions—was out of time. To take the words which are set out in the case, it was contended on behalf of the appellant :

... that the summons against her in respect of aiding and abetting the said Guy as aforesaid, disclosed an offence under the Summary Jurisdiction Act, 1848, s. 5, but disclosed no offence against the Road Traffic Acts, and that therefore the said summons against the appellant was, by reason of the Summary Jurisdiction Act, 1848, s. 11, out of time, having been issued more than 6 months after the alleged offence.

- E That contention having been made and answered, the court of quarter sessions held that the offence alleged against the appellant was an offence under the Summary Jurisdiction Act, 1848, s. 5, and that the Road
- F Traffic Act, 1930, s. 7 (5), had application only to the principal offences set out in sect. 7 (4), and not to the offence of aiding and abetting those offences.

- G There are only two observations to be made upon that finding. First of all, with regard to the statement that the offence alleged against the appellant was an offence under the Summary Jurisdiction Act, 1848, s. 5, the fact is that sect. 5 of the Act of 1848 does not create an offence. It merely regulates procedure and punishment. With regard to the second limb of the proposition—namely, that sect. 7 (5) of the Act of
- H 1930 “ had application only to the principal offences set out in subsect. (4), and not to the offence of aiding and abetting those offences ”—that statement is manifestly at variance with the law, so clearly laid down in *Gould & Co. v. Houghton* (1). In that case, the EARL OF READING, L.C.J., said, at p. 518 :

From these authorities [the authorities cited by him] it is, in my judgment, conclusively established that an accessory before the fact to the commission of a

misdeemeanour is to be regarded in law for the purpose of conviction as a principal offender.

It seems clear, therefore, that this appeal on the part of the respondent must be allowed.

CHARLES, J. : I agree.

SINGLETON, J. : I agree.

Appeal allowed with costs, and case remitted back to quarter sessions.

Solicitors : *Solicitor for the Metropolitan Police* (for the appellant) ;
Blyth, Dutton, Hartley & Blyth (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

MARSHALL v. MATTHEWS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 13, 1939.**]

Weights and Measures—Sale of bread—Weight—Whether every precaution taken to ensure that loaves of bread of correct weight—Whether deficiency of weight due to bona fide mistake or accident—Sale of Food (Weights and Measures) Act, 1926 (c. 63), s. 6 (2).

The respondent was charged with unlawfully having in his possession for sale, or delivery under a contract of sale, by retail 64 loaves of bread which were not of the net weight of 1 lb. or an integral number of pounds contrary to the Sale of Food (Weights and Measures) Act, 1926, s. 6 (2). The case stated contained no finding of fact that the respondent had discharged the onus of proving that the deficiency of weight was due to a *bona fide* mistake or accident, but merely a contention on behalf of the respondent to this effect. The justices dismissed the charge, holding that the respondent had taken every precaution to ensure that the loaves were of correct weight :—

HELD : on the materials contained in the case stated, the justices were not entitled to find that the respondent had taken every precaution to ensure that the loaves were of correct weight. In any event, such a finding would be inadequate unless the respondent had satisfied the court that such deficiency was due to a *bona fide* mistake or accident.

[**EDITORIAL NOTE.** The case stated in this appeal contained no finding by the justices that the defendant had proved to the court that any deficiency in weight was due to *bona fide* mistake or accident. At one stage of the hearing of the appeal, it was thought that the case ought to be sent back to the justices for re-statement, but, it subsequently appearing that the professional advisers on both sides had considered and revised it, and that the justices, upon consideration, had made a further slight alteration, the case was treated as final, and not remitted for re-statement.

AS TO SALE OF BREAD BY WEIGHT, see HALSBURY, Supp., Weights and Measures, para. 967; and FOR CASES, see DIGEST, Vol. 25, pp. 117-120, Nos. 397-420.]

APPEAL by way of case stated from a decision of the justices for the borough of Richmond in the North Riding of Yorkshire. The facts and the arguments are fully set out in the judgment of LORD HEWART, L.C.J.

Vernon Gattie for the appellant.

George Avgherinos for the respondent.

LORD HEWART, L.C.J. : The case arises out of an information preferred in June, 1938, by the present appellant, an inspector of weights and measures under the North Riding County Council, against this respondent, a baker and confectioner in Market Place, Richmond. The information alleged that on June 2, 1938, the respondent unlawfully had
A in his possession for sale or delivery under a contract of sale by retail 64 loaves of bread which were not of the net weight of 1 lb. or an integral number of pounds, contrary to the Sale of Food (Weights and Measures) Act, 1926, s. 6 (2). The justices, having heard the information, dismissed it, and the question raised by this case is whether in so doing they
B came to a correct determination in point of law.

The facts which are found in the case may be very shortly re-stated. It was proved or admitted, according to the case, that on that day in June, 1938, the appellant, the inspector, visited the premises in Market Place, Richmond, and, in his presence, a number of loaves were weighed,
C 13 one-pound loaves, 54 two-pound loaves, and 9 four-pound loaves, all those being loaves of bread at that time in the respondent's possession for sale. It was found, as a result of that weighing, that the 13 one-pound loaves were each deficient in weight, the deficiencies varying from $\frac{1}{2}$ dram to 1 oz. $7\frac{1}{2}$ drams. Of the 54 two-pound loaves, it was found
D that 12 were correct in weight, or slightly in excess of weight, while the remaining 42 showed deficiencies varying from 1 dram to 1 oz. 6 drams. Finally, with regard to the four-pound loaves, every one of those loaves was found to be deficient in weight, and the deficiencies varied from 1 oz. 7 drams to 3 ozs. 15 drams.

E The case further finds, in a paragraph purporting to set out facts proved or admitted, that the respondent had recently supplied the baker he employed with a new type of scales constructed for the purpose of weighing dough, and, more than that, that the baker he employed had been that day using a new kind of flour. Finally, the statement of facts
F finds that it is a custom of the bread and confectionery trade to allow an amount of 1 lb. 2 ozs. of bread dough for a one-pound loaf of bread, and 2 lbs. 4 ozs. of bread dough for a two-pound loaf, in order to provide for loss of weight during baking and to ensure that, when baked, the loaves will weigh 1 lb. and 2 lbs. respectively.

G On that statement of the facts, the justices came to a conclusion which they have expressed in these words in para. 9 of the case :

We were of opinion that the respondent had taken every precaution to ensure that his loaves were of correct weight, and that the loaves would have the ordinary variation of bread in the trade, and accordingly dismissed the information.

H It is quite obvious, when one looks at that paragraph in the case, that it is a reminiscence or a fragment of sect. 12 (2) of the Act. That subsection provides as follows :

In any proceedings under this Act in respect of an alleged deficiency of weight or measure or number, if the defendant proves to the satisfaction of the court that such deficiency was due to a *bona fide* mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken and all due

diligence exercised by the said defendant to prevent the occurrence of such deficiency, or was due to the action of some person over whom the defendant had no control, the defendant shall be discharged from the prosecution.

This para. 9, setting out the opinion of these eight justices, is manifestly a reminiscence and a variation of a portion of that subsection. There is a further finding that it was proved to the satisfaction of the court that the deficiency was due to a *bona fide* mistake or accident or other causes beyond the respondent's control. The justices begin the sentence in the middle, but the passage in the middle of the subsection is :

. . . and in spite of all reasonable precautions being taken and all due diligence exercised by the said defendant to prevent the occurrence of such deficiency. . . .

Instead of using those words, they say that the respondent had taken every precaution to ensure that the loaves were of correct weight, and that the loaves would have the ordinary variation of bread in the trade. It is a curious and truncated paraphrase of subsect. (2).

It is quite obvious that, if the case stood there, there were no materials which entitled the justices to dismiss the information, or, to employ correctly the words of the subsection, to discharge the defendant from the prosecution. However, it has been suggested in argument that the case is inartistically stated, and that, on a fair view of what is contained in the case, it would appear that the things which are now comprehended under the head of contentions ought to be transferred to the part of the case which appears under the heading of findings of fact. I am not suggesting for a moment that that course can, or ought, to be taken, when it is admitted from the bar that the case as stated, with all its imperfections on its head, is the combined work of the solicitors on both sides. Nevertheless, to examine for a moment what is faintly suggested, one finds that the respondent contended, among other things, that the amount of overweight in dough allowed by the custom of the trade in making bread is reasonable and sufficient to balance any loss of weight during the baking of the dough. It is reasonable and sufficient to balance it, but it did not happen in this case. It is further contended :

. . . that the baker employed by the respondent weighed the dough, before baking it, upon the special scales provided for that purpose and allowed the amounts of overweights of 2 ozs. and 4 ozs., as is customary in the trade.

It is very curious, if that was so, that the result was what I have already summarised, culminating in the fact that every one of the four-pound loaves was deficient, with a deficiency varying from 1 oz. 7 drams to 3 ozs. 15 drams. It is further to be found among the contentions of the respondent that :

. . . the deficiency in weight was caused either by executive loss of weight by evaporation of moisture during the baking of the bread or by a chemical change or similar reason.

It is further contended that the baker employed by the respondent had been using a new kind of flour, which might account for the deficiency—an indication of a possibility, a conceivable hypothesis, a possible explanation—which might account for the deficiency, no light being thrown

upon the nature or the origin of that flour. It was contended also that the respondent had supplied his baker recently with a new type of scales.

A In those circumstances, the justices arrived at the fragmentary opinion which I have already read, and, arriving at it, dismissed the information. I can hardly imagine anything more unsatisfactory. It is quite obvious that, for the purposes of their opinion, they have dealt only with a portion of that which, according to sect. 12 (2), must be found by the justices on behalf of the defendant, if the defendant is to be discharged from the prosecution.

B Treating this case, as I think, in the circumstances, we are bound to treat it, as being a considered statement of the case approved by the solicitors on both sides, and approved by these eight justices, it is apparent that, on the materials before the justices, there was no possible justification for arriving at the conclusion at which they did arrive. On the

C materials contained in the case, it is not possible to find that the respondent had taken every precaution to ensure that his loaves were of correct weight. Even if it had been so found, that would obviously not have been enough, because it ignores the other requirements which are to be found in this cumulative subsection. I think that it is quite clear, and indeed counsel for the respondent frankly admitted, that, on this case as stated, the appeal must succeed. There was a

D moment when it appeared to be suggested that the fair and proper course would be to let the case be remitted to the justices for further consideration or revision, but, when we learn that this case as stated is the result of the combined labours of the legal representatives on both sides, that course seems to be quite impossible, and it would not be right to go out of our way to afford an opportunity for those afterthoughts arising in the circumstances which have now been explained and explored. I

E will only repeat that, in my opinion, as we have said in this court in a series of cases arising out of this class of transaction, where bread is concerned, the provisions of this part of the Act are of the utmost importance for the protection of purchasers of bread. Of course, it is also of the utmost importance that the trader should have those opportunities of defence which the statute provides in proper cases. That is a very

G different thing from saying that there ought to be found or imagined defences which are not there, or that further opportunities should be given to a respondent to revise a case which has been duly agreed. I think that, in the circumstances, the only possible course is to allow this appeal.

H CHARLES, J.: I agree. It is perfectly plain that, upon the case as stated, the allowance of the appeal is inevitable. It does appear that the case, which contains, as is usual and proper, facts proved or admitted, sets forth the appellant's case—that is, the inspector's case—and no more. The respondent's case, so far as one can understand the

case at all, is included among the contentions of the respondent. Some of those contentions are patently evidence, for they are so stated to be. In one particular matter it is said that evidence was given to the effect of the contention, and, if it had appeared to me personally that any injustice were done—that is to say, any injustice to the trader, in that his defence was not properly considered and put forward—I should have A been inclined, without any other intervening matters, to have suggested that the case should go back for further consideration, or, if necessary, re-statement. However, I do not consider, upon this case, when it is carefully considered in all its aspects and with all its imperfections, that any injustice has been done. One is greatly fortified by the fact that B the case was not only considered by the appellant's solicitor, but was also submitted to the respondent's solicitor, and was considered and approved by him. So considered and approved by both solicitors, it was passed to the eight justices who signed the case, who have their adviser. They considered it. They did not simply accept what was C given to them, but they made an alteration of their own—small, it is true, but indicating that they had given the matter their consideration—and so the case in that shape comes before us. It therefore comes before us in a shape which makes the allowance of the appeal inevitable.

SINGLETON, J.: I agree that this appeal must be allowed. The justices in para. 9 of the case say:

We were of opinion that the respondent had taken every precaution to ensure that his loaves were of correct weight, and that the loaves would have the ordinary variation of bread in the trade and accordingly dismissed the information.

A trader who is prosecuted under this Act may have the benefit of some part of sect. 12, the section which is headed "Safeguards to traders," but, before the point which is expressed in the justices' opinion becomes material, it must be proved, as LORD HEWART, L.C.J., has pointed out, by the defendant to the satisfaction of the court that such F deficiency is due to a *bona fide* mistake or accident or other causes beyond his control. On that aspect of the case there is no finding whatever by the justices, and that of itself is enough to cause this appeal to succeed. However, the finding of the justices in para. 9 of the case and certain matters which occur in other parts of the case rather led one to think G at one stage that the case was not very fully stated, and that this court might, if it thought fit, say that the case should go back for re-statement. That is very occasionally done in order to make sure that the full facts are before the court. At one stage, I thought that it might be better that that should be done in this case, so that the justices' views might H be more fully expressed than they appear to be in some parts of the case. I do not see, for instance, how they could have arrived at the conclusion which they expressed in para. 9 of the case on the bare statement of the facts as found by them earlier. I thought that they must have found other facts as well. However, we are assured by counsel

that the case was drafted on the one side, sent to the other side, there revised, and then sent, with that revision on behalf of the respondent, to the justices themselves, who made a slight alteration in the case. As it was so fully considered, I am of opinion that this court ought to treat it as final, and that the respondent cannot succeed. I agree that

A this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Hubert G. Thornley*, Clerk of the Northallerton County Council (for the appellant); *Reynolds, Miles, Barnes & Drake*, agents for *Hudsons, Hart & Dent*, Richmond, Yorkshire (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

C SWETTENHAM v. SWETTENHAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
December 21, 1938.]

D *Divorce—Maintenance—Lunatic spouse—Principles to be applied—Purchase of annuity out of patient's capital—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Matrimonial Causes Act, 1937 (c. 57), s. 10 (2).*

E The registrar's report as to the maintenance of a lunatic wife recommended that the husband should covenant to pay an annuity of stated amount during the joint lives of himself and the wife, and should secure a named sum for her benefit during her life, and that £1,500, being accumulations of the wife's capital in the hands of her receiver, should be expended in the purchase of an annuity for her benefit. The registrar added: "I have endeavoured to ensure that she shall have all the care and reasonable comforts and amusements that she has had for the last 8 years, or is likely to need; and have paid special regard to ensuring the continuation of this should the husband predecease her." The husband was nearly 90 years of age and the wife nearly 80 years of age:—

F HELD: (i) the statement of principle by the registrar was the correct one to be followed in such cases.

(ii) the court had power to order a receiver of the patient to expend moneys in his hands in the purchase of an annuity for the wife.

G [EDITORIAL NOTE. The judge, without discussing the proper construction of the Matrimonial Causes Act, 1937, s. 10 (2), or making a general pronouncement on the principles to be followed in granting maintenance to a spouse of unsound mind, has adopted the statement of the registrar as to the principles which guided him in making his report. Upon the second point, the judge has based his decision on the words "as having regard to her fortune" in the words: "the court may order that the husband shall . . . secure to the wife such gross sum of money or annual sum of money for any term not exceeding her life, as having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, the court may deem to be reasonable." It is held that these words give a power to the court to order the receiver to purchase an annuity out of accumulated sums belonging to the patient in his hands.

AS TO MAINTENANCE, see HALSBURY, *Hailsham Edn.*, Vol. 10, p. 785-788, paras. 1244-1249; and FOR CASES, see DIGEST, Vol. 27, pp. 500-510, Nos. 5355-5480.]

APPLICATION by the husband petitioner to confirm the registrar's report as to maintenance. This was the first contested application for maintenance made on behalf of a lunatic spouse in pursuance of the Matrimonial Causes Act, 1937, s. 10 (2), extending the application of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190.

The Supreme Court of Judicature (Consolidation) Act, 1925, A s. 190 (1), (2), provides as follows :

(1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument, to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

(2) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsect. (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable : Provided that (a) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit ; and (b) where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

The Matrimonial Causes Act, 1937, s. 10 (2), provides as follows :

The said sect. 190 shall apply in any case where a petition for divorce or judicial separation is presented by the wife on the ground of her husband's insanity as if for the references to the husband there were substituted references to the wife, and for the references to the wife there were substituted references to the husband, and in any such case and in any case where a petition for divorce, nullity, or judicial separation is presented by the husband on the ground of his wife's insanity or mental deficiency, the court may order the payments of alimony or maintenance under the said section to be made to such persons having charge of the respondent as the court may direct.

The report of the registrar stated that the husband was nearly 90 years of age, the wife being nearly 80 years of age. The wife was quite capable of ordinary social activities, shopping and simple amusements. The provision asked for was neither the maintenance payable to a successful petitioner nor the compassionate allowance sometimes given to a guilty wife. It was submitted that the husband should covenant to pay during their joint lives a named annual sum, and that a sum of £1,500, being accumulations of the wife's capital in the hands of her receiver, should be expended in the purchase of an annuity for her benefit. There should also be a named sum secured for her life.

Melford Stevenson, for the husband petitioner, moved to confirm the registrar's report.

Noel Middleton, K.C., and *W. Latey* for the wife respondent : The proper course is for the husband to continue to pay the allowance he has been paying for their joint lives, and for a named sum to be secured for the wife's life. The court has no power to order that the wife's capital

shall be sunk in an annuity, although the master in lunacy can spend or realise her capital.

HENN COLLINS, J.: I do not feel that I am called upon to make any general pronouncement upon the construction of, or the practice
A to be followed in all cases under, the Matrimonial Causes Act, 1937, s. 10 (2), although, of course, this application does arise under that section, and is, I understand, the first that has been brought into court. If there is a general principle, I do not think that it can be better expressed than the registrar has expressed it. He reports :

B I have endeavoured to ensure that she shall have all the care and reasonable comforts and amusements that she has had for the last eight years, or is likely to need ; and have paid special regard to ensuring the continuation of this should the husband predecease her.

On that principle he has based his report.

C It is said as to one recommendation of his report—or, rather, that the trend of his report is such—that it will go beyond the intention of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, which is applied by the Matrimonial Causes Act, 1937, s. 10 (2), to causes for divorce on the ground of insanity. It is said that, if the registrar's

D report is adopted, it will in effect compel the receiver to apply a sum of £1,500 in his hands to the purchase of an annuity and that that is not within the intention of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. That that is the intention of the court is undoubted, because the submission is made on the basis that the receiver will, within two

E months of the official order on this report, spend not less than £1,500 which has accumulated in his hands on an annuity for the wife. I think that the court has power to deal with that matter, and I found myself on the words :

F The court may . . . order that the husband shall . . . secure . . . such [sums] of money for any term, not exceeding [the life of the wife] as having regard to her fortune . . . the court may deem to be reasonable. . . .

I think that the words “ as having regard to her fortune ” impart that the court shall also have regard to the uses to which it can most properly be put. In the view of the registrar, if that is put to the use of the
G purchase of an annuity, it will be the safest and securest way. I have no doubt that the court is competent to adopt a report to the extent and intent that the receiver shall apply the sum in his hands for that purpose. I therefore adopt the report of the registrar.

Solicitors: *Gordon, Dadds & Co.* (for the husband petitioner);
H *Lowe & Co.* (for the wife respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

ULLSTROM *v.* NAAR.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.J.J.),
December 5, 1938.]

Practice—Referring action to an official referee—Claim based on conspiracy to defraud—Some accounts involved—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 89.

The claim of the plaintiff was based upon an allegation of conspiracy to defraud the defendants by selling to them worthless shares. During the opening speech of counsel, the judge, forming the opinion that investigation of accounts was involved, referred the case to an official referee for trial. None of the parties consented to the reference:—

HELD: such a reference could only be made in this case upon the ground that the dispute consisted wholly or in part of matters of account. As this was not shown to be the case, the action ought to be tried in the usual way before a judge.

[EDITORIAL NOTE. Prolonged investigation of matters of account cannot be tried before a judge without undue public inconvenience. At the same time, it is in the public interest that a charge of fraud should be heard in public. The public and the press have, of course, access to the courts of the official referees, but those courts, having regard to nature of the matters usually tried there, do not attract the same amount of public interest as the ordinary courts. It is of importance, therefore, that the class of cases sent to the official referees should not be unduly extended.

AS TO REFERENCE TO AN OFFICIAL REFEREE, see HALSBURY, Hailsham Edn., Vol. 26, p. 87, para. 158; and FOR CASES, see DIGEST, Practice, pp. 567, 568, Nos. 2250-2253. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 613-615.]

APPEAL from an order of LORD HEWART, L.C.J., referring this action for trial before an official referee. The plaintiff claimed damages against four defendants for fraudulently obtaining a large sum of money in connection with the sale of shares in a company, with an alternative claim for money had and received. The case was originally in the special jury list. On the suggestion of LORD HEWART, L.C.J., before whom it came, the parties appearing agreed to the jury being dispensed with. In the course of counsel's opening, LORD HEWART, L.C.J., expressed the opinion that the case was one which should be tried by an official referee in view of certain questions of account which were indicated, and made an order accordingly remitting it. Subsequently, on the application of the plaintiff's counsel, the Court of Appeal gave leave to appeal against that order.

A. S. Comyns Carr, K.C., and *T. F. Davis* for the plaintiff.

Hume Boggis Rolfe for the defendant Naar.

G. O. Slade and *C. M. Cahn* for the defendant Petter.

The other defendants were not represented.

Comyns Carr, K.C.: This is a case which should be heard in a more public court than would be the case if it were heard before an official referee. We rely on fraud, and the accounts which may have to be dealt with are such as can be considered by a judge without undue public

inconvenience. None of the parties has expressed a desire that the case should be remitted. A hearing in the referee's court will involve substantial delay before the case can come on for hearing, and the parties are now ready.

Boggis Rolfe supported the appeal.

- A *Slade*: The accounts would have to be referred to, but I have no objection to the case being heard before a judge.

MACKINNON, L.J.: I am of the opinion that this appeal must be allowed. At an early stage in the hearing of this case, LORD HEWART,

- B L.C.J., said:

I am satisfied that this is a case for an official referee.

The power of the court to refer a case for trial to an official referee is derived from the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89. The power under that section rests upon one of the following events:

- C (a) If all the parties interested who are not under disability consent; or (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers; or (c) if the question in dispute consists wholly or in part of matters of account.

- D In this case, the parties did not consent, and the only question was whether or not the matters in dispute consisted, in whole or in part, of matters of account. Counsel for one of the defendants has supported the appeal, and counsel for the other defendant, while stating that there were accounts which would have to be referred, raised no objection to the case itself being heard before a judge.

- E I am satisfied that there is no prolonged investigation of accounts involved in this case, and, in my opinion, it does not come within the class of cases that should be sent to an official referee. The order appealed against ought not to have been made, and the case must be ordered to go into the non-jury list for trial on the earliest day practicable. In these circumstances, the appeal will be allowed, the case restored to the non-jury list, the plaintiff to apply to the judge in charge of that list as to putting it into the list.

- G GODDARD and DU PARCQ, L.JJ., agreed.

Solicitors: *Samuel Price & Sons* (for the plaintiff); *H. Bueno de Mesquita* (for the defendant Naar); *Teff & Teff* (for the defendant Petter).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

HIBERNIAN BANK, LTD. v. GYSIN & HANSON.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), January 16, 17, 1939.]

Bills of Exchange—Bill payable to order of payee only—Crossed “not negotiable”—Negotiability—Bills of Exchange Act, 1882 (c. 61), ss. 8 (1), 81.

The plaintiff bank was the holder for value of a bill of exchange drawn for £500. The defendants, in the course of their business with the drawers, the Irish Casing Co., Ltd., accepted the alleged bill, due 3 months after date, and made payable to the order of the company “only.” It was also crossed “not negotiable.” At the due date the drawers had become indebted to the acceptors in a sum greater than the value of the bill. On presentation, the defendants instructed the bank at which it was payable not to pay, claiming a right to set off the balance due to them. In view of the indorsement “not negotiable” and the order to pay to the order of the drawers “only,” it was contended for the defendants that the plaintiffs had no better title to payment than had the drawers against whom the acceptors had the above set-off:—

HELD: (i) construing the document as indicating the intention of the parties, it had been accepted on the basis that it was “not negotiable.”

(ii) the effect of the words requiring payment to the order of the company only was to limit payment to an agent for the company, or for the purposes of the company, and did not negative the words “not negotiable,” which must here be given their literal meaning.

(iii) the document being non-transferable, the plaintiffs, as holders of the bill, had no right of action.

Decision of LEWIS, J. ([1938] 2 All E.R. 575) *affirmed*.

[EDITORIAL NOTE.] The Court of Appeal, in affirming the decision of LEWIS, J., herein, have not dealt at any length with the special meaning given by the Bills of Exchange Act, 1882, s. 81, to the words “not negotiable” when written on a cheque. The main discussion turns upon whether the instruction to pay to the order of the payee only can in any way modify the meaning of the words “not negotiable” and give them some meaning other than the obvious one. It is held that, in the case of a bill in the form here in question, the words “not negotiable” have their literal meaning only and the holder in due course is not entitled to sue upon the bill. The instruction to pay to the order of the payee only authorises a direction to pay to the agent of the payee, but it does not make the bill transferable.

AS TO RESTRICTIONS ON NEGOTIABILITY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 625, 626, para. 857; and FOR CASES, see DIGEST, Vol. 6, pp. 442, 443, Nos. 2843-2852.]

Case referred to:

- (1) *National Bank v. Silke*, [1891] 1 Q.B. 435; 6 Digest 443, 2846; 60 L.J.Q.B. 199; 63 L.T. 787.

APPEAL from a decision of LEWIS, J., dated May 2, 1938, and reported [1938] 2 All E.R. 575. The facts of the case are fully set out in the judgment of SLESSOR, L.J.

Harold L. Murphy, K.C., and *C. E. Rochford* for the appellants.

H. U. Willink, K.C., and *Valentine Holmes* for the respondents.

Murphy, K.C.: The form of this bill must involve one transfer, at any rate. It was made payable to the order of the Irish Casing Co. and marked “not negotiable” That meant that it could be indorsed, but

once only, and that by the Irish Casing Co., and to the order of no one else. It had a limited negotiability. The words "not negotiable" may have the same meaning as that which they have on a cheque, by virtue of the Bills of Exchange Act, 1882, s. 81. They are not words entirely prohibiting transfer. [Counsel referred to *National Bank v. Silke* (1).]

- A *Willink, K.C.* : The plaintiffs must show that they had a negotiable instrument. There is printed across the face of it, however, the words "not negotiable." If the parties intended the bill to be not negotiable, it is hard to see how they could better have expressed their intentions.
- B *SLESSER, L.J.* : In this case, the Hibernian Bank, Ltd., brought an action against a firm known as Gysin & Hanson as acceptors of a bill of exchange for £500, dated Feb. 23, 1937, drawn by the Irish Casing Co., Ltd., upon, and accepted by, the defendants, payable at Barclays Bank, West Smithfield, as holders for full value. The bill, on presentation for payment, was dishonoured, and there is a claim for the principal, the interest and certain internal charges. The substance of the defence is this. The defendants deny that the Hibernian Bank, Ltd., have any title to sue as holders of this bill for them. Under the Bills of Exchange Act, 1882, s. 31, it is provided that a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. The bill in question in this case (if it be a bill) is of a very curious nature, for, having, as I have said, provided that 3 months after date to the order of the Irish Casing Co., Ltd., only the sum of £500 effective value received shall be the sum payable,
- E it has written across it the words "not negotiable." The bill is accepted by the defendants, but it is accepted on the basis of the document which, among other things, provides that it is "not negotiable." I am quite unable to see, construing the document as indicating the intention of the parties, that there was any acceptance of the bill except
- F upon the basis that it was "not negotiable." If that be so, then it is difficult to see how the plaintiffs in this case can show any title to sue at all, because it is by reason, and by reason only, of the bill being capable of being transferred in such a manner as to constitute them the holders of the bill that they could have any title to sue. If the matter ended
- G there, and if the only words for consideration were the words "not negotiable," then I think that the case would clearly fall within sect. 8 (1) of the Act, that, when a bill contains words prohibiting a transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. However, it is said
- H that those words "not negotiable" must be read subject to the other words—that the bill is payable to the order of the Irish Casing Co., Ltd., only—and Mr. Murphy seeks, as I understand him, to reconcile those words by saying that it is not negotiable after the order has been given by the Irish Casing Co., Ltd., and that the absence of negotiability must exclude the giving of the first order by the Irish Casing Co., Ltd. I

am unable to accept that construction. I think that the words "not negotiable" are affirmative, and govern the whole tenor of the instrument. The matter then comes to this. Either the words, "not negotiable—pay to the order of the Irish Casing Co. only," make the whole instrument really no bill at all, or some other and more limited meaning must be given to the words "to the order of the Irish Casing Co. only." A

The surrounding circumstances of the case support a view which CLAUSON, L.J., has suggested, and which has been adopted by Mr. Willink—namely, that those words "to the order of the Irish Casing Co." are, so to speak, words of convenience, requiring payment to an agent of the Irish Casing Co., Ltd., but that they do not, when they are read subject to the words "not negotiable," amount to constituting the bill a bill payable to order within the meaning of sect. 8 at all. FRY, L.J., in *National Bank v. Silke* (1), says, at p. 439, that he is B

. . . inclined to think that sect. 8 divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer. . . . C

In my view, adopting that classification, this is a bill not negotiable, and, when FRY, L.J., goes on to say ". . . so that a bill payable to order must always be negotiable," he supports, I think, my conclusion that, in so far as this bill is not negotiable, it is not a bill payable to order within the meaning of the Bills of Exchange Act, and must have some lesser, and more conditional, effect. I think that that effect may be carried out by limiting it to cases where the order is merely for money to be paid to an agent for, or for the purposes of, the Irish Casing Co., Ltd., and no more. In that case, the instrument does not become irreconcilable or impossible of interpretation. It remains a non-negotiable instrument drawn by the Irish Casing Co., Ltd., and accepted by the defendants, but limited as to the effect as between those two parties. It is not transferable. It produces no rights of action in the Hibernian Bank, Ltd., at all. Therefore, I think that the judge was right in refusing to allow the Hibernian Bank, Ltd., to make a claim as holders of this bill. In my opinion, therefore, this appeal fails, and must be dismissed with costs. D E F

CLAUSON, L.J.: I agree. G

DU PARCQ, L.J.: I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords on terms.

Solicitors: *Stibbard, Gibson & Co.* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondents). H

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

ADAMS v. UNION CINEMAS, LTD.

[KING'S BENCH DIVISION (Stable, J.), **January 19, 1939.**]

Master and Servant—Contract of service—Necessity for writing—Modification of previous employment—Request and promise to reduce contract into writing—Statute of Frauds, 1677 (c. 3), s. 4.

A *Master and Servant—Contract of service—Determination—Notice—Reasonable notice—Controller of cinemas.*

The plaintiff entered the employ of a cinema company, one of a group of companies, in 1934. In Dec., 1936, upon a reconstruction, he became the servant of the defendant company, but in fact continued, save for the change in the companies, in his old employment. On June 25, 1937, by way of promotion he was offered the position of controller of 120 cinemas at £2,000 per annum. In answer to his inquiries as to the length of the new service, he was told that he could make his arrangements for two years, but this was qualified by the statement: "You will see how you get on with the work." In 1937 the control of the defendant company passed into other hands, and on Nov. 5, 1937, his employment was determined upon one month's notice. It was contended on behalf of the defendant company that this was a contract of service for two years and required to be evidenced in writing under the Statute of Frauds, s. 4. The plaintiff had repeatedly asked for a contract in writing, which had from time to time been promised to him, but, in fact, was never executed:—

B **C** **D** **E** HELD: (i) the transactions of June 25, 1937, did not in law amount to a contract binding anyone, and amounted to no more than an offer on behalf of the defendant company to modify the plaintiff's employment in certain respects. This offer was not then accepted, the modification only becoming binding upon June 28, 1937, when the plaintiff undertook his modified duties. No definite term of 2 years was proved. Such a modification is not within the Statute of Frauds, s. 4.

(ii) the nature and importance of the plaintiff's employment entitled him to 6 months' notice.

F [EDITORIAL NOTE. The judgment in this case, while in no way dissenting from the main decision in *Vernon v. Findlay* (2), makes certain observations on the final result in that case. It is suggested that, where a contract is in law unenforceable, a plaintiff may still recover upon a *quantum meruit*, and this would appear to be the result of the decision of the Court of Appeal in *Craven-Ellis v. Canons, Ltd.* (4), though the facts there were not in point with those in *Vernon v. Findlay* (2).

AS TO NECESSITY FOR WRITTEN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 124-126, paras. 207, 208; and FOR CASES, see DIGEST, Vol. 12, pp. 123-125, Nos. 806-824.]

G Cases referred to:

- (1) *Britain v. Rossiter* (1879), 11 Q.B.D. 123; 12 Digest 123, 810; 48 L.J.Q.B. 362; 40 L.T. 240.
- (2) *Vernon v. Findlay*, [1938] 4 All E.R. 311; Digest Supp.
- (3) *Scarisbrick v. Parkinson* (1869), 20 L.T. 175; 12 Digest 166, 1214.
- (4) *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403; [1936] 2 All E.R. 1066; Digest Supp.; 105 L.J.K.B. 767; 155 L.T. 376.

H ACTION for arrears of salary and damages for wrongful dismissal. The facts and arguments are fully set out in the judgment.

Sir Patrick Hastings, K.C., and *Valentine Holmes* for the plaintiff.
H. St. John Field, K.C., and *A. Aiken Watson* for the defendants.

STABLE, J.: In this case, the plaintiff, Mr. Ernest Ralph Adams, sues the defendants, a limited company called Union Cinemas, Ltd., for arrears of salary, being the difference between salary at the rate of £2,000 per annum and the salary that was actually paid to him between June 28, 1937, and Dec. 5, 1937, and damages for wrongful dismissal.

The defendants have not called any evidence, and the defence is in substance that Mr. Adams is precluded from recovering anything because the agreement, if there was an agreement, under which he worked had not been reduced to writing. There is a subsidiary or secondary defence, to the effect that in truth and in fact the employer was a limited company called Cinema Developments, Ltd., and not the particular company that has been sued.

The facts of the matter are not in dispute. Mr. Adams was apparently largely interested in a company which owned some cinemas at King's Lynn. A powerful cinematograph group, which traded in the usual way through a number of limited liability companies, but which was a group which apparently was controlled and managed and, to use an everyday expression, run by Mr. Bernard, in 1934 acquired the King's Lynn cinemas, and, as so often happens, it was part of the arrangement that was made in 1934 that Mr. Adams should enter the service of this group of cinematograph companies.

It is perfectly clear, in my judgment, that the employer at that time was what I may call the parent company, which was incorporated under the name of the Union Cinemas Co., Ltd. To pursue the history of that company, it appears that the company went into voluntary liquidation, and on Dec. 16, 1936, a new company was incorporated, called Union Cinemas, Ltd., and that company I have been told, though there is really very little evidence about it, but it is common ground, became the parent company. It absorbed the old parent company, and one or two other businesses or concerns as well, and, as from Dec. 16, 1936, the legal entity which was Mr. Adams' employer was Union Cinemas, Ltd. There was a subsidiary company, and, for all I know, there may have been dozens of subsidiary companies. There was one called Cinema Developments, Ltd., and that company was incorporated on Jan. 27, 1936. I am told that its capital consisted of the sum of 40s., and that is all that I have been told about it. The memorandum and articles of association I have not seen, but it has been faintly suggested in this case that at some stage or another that company entered into a contract of employment with Mr. Adams. It is sufficient to say that, in my judgment, it did nothing of the kind. There is not a scintilla of evidence to that effect, the real fact of the matter being that all these companies are separate entities, the subsidiary companies existing really for the purpose of inter-departmental convenience. That aspect of the case, therefore, can be left in the obscurity from which it has hardly emerged.

To pursue the story of Mr. Adams' connection with the group, having to some extent been responsible for the management of the King's Lynn

theatres, and having apparently made a favourable impression on Mr. Bernard—who was then, but I gather no longer is, the controller, or effective director, of the defendant company—Mr. Adams came to London, and his first engagement in London was as assistant theatre-controller. In point of fact, he never had a written agreement, and
A throughout the years that he served this company—although the nature of the work which he did, the amount which he received and was entitled to receive, and the weight of responsibility which he had to bear varied from time to time—the relationship of master and servant was, in my judgment, one and indivisible.

B The question as to when the variation of the terms of a contract constitutes a fresh contract and cases in which it is a mere modification of an existing contract are really cases which involve the splitting of hairs, and are a mere question of words. Here the relationship of master and servant which subsisted was a continuous relationship, although the
C obligations on either side, as happens every day in the case of master and servant, from time to time varied. I think that everyone would be astonished if they were told that, when an employee is put to more responsible work, or given a rise of salary, that constitutes an entirely new contract, and constitutes an entirely new relationship, and that the
D law, whatever that may mean, presumes that, whenever something of that sort takes place, there is a new hiring, it may be for a year or for some other period. However it may be in this case, Mr. Adams' connection with the company was unbroken.

In June, 1937, he was asked to come and see Mr. Bernard. In fairness
E to Mr. Bernard, it should be said that, so far as I know, Mr. Bernard is not personally seeking in any way to go back on the promises that he made to Mr. Adams in June, 1937. What happened was this. Mr. Bernard sent for Mr. Adams. He told him that he was going to appoint him to the very responsible position of theatre-controller, and, not un-
F naturally, Mr. Adams was gratified. He was told that his duties would be to manage all the Union theatres. He was told that his remuneration would be not less than what Mr. Holderness had been getting, and he was told by Mr. Bernard that he, Mr. Bernard, believed that Mr. Holderness was getting £2,000 per annum. Mr. Bernard was right, in that
G it has been proved in this case that Mr. Holderness was getting £2,000 per annum. Equally, as one would expect when two business men are discussing a business relationship, Mr. Adams wanted to know how long this new service on which he was about to embark was likely to last—no doubt he wanted to know whether it was a matter of weeks or months,
H and so on—and Mr. Bernard told him that at all events he, Mr. Adams, would be able to make his arrangements for two years.

It has been suggested that that amounted to an agreement which bound the company to employ Mr. Adams for two years, and was an agreement which bound Mr. Adams to serve the company for two years. In my judgment, it amounted to nothing of the kind. I think that both

these gentlemen would have been astonished if anyone had said at that conversation : " You are pledging yourself to employ this man, whatever happens, for two years." I think that it was the perfectly natural forecast that Mr. Bernard was making as to how long, at all events, this relationship would continue, provided that everything went well and that the company was satisfied with Mr. Adams as the theatre-controller A and Mr. Adams was satisfied with the company.

That, I think, is emphasised by the fact that Mr. Adams has told me that Mr. Bernard qualified the observation about making his arrangements for two years by saying : " Well, you will see how you get on with the work." In my view, on June 25, quite apart from whether there B was a new agreement made or whether it was merely a modification of an existing arrangement, nothing transpired that bound anyone.

In my judgment, the true position in law was that Mr. Bernard, on behalf of the defendant company, put forward an offer to Mr. Adams which Mr. Adams was at liberty either to accept or to refuse. I have no C doubt that everyone expected Mr. Adams to accept, but, on the evidence before me, I see no indication whatever that Mr. Adams said or indicated more than that the terms which Mr. Bernard had put up to Mr. Adams were agreeable to him. In my view, the contractual relationship was finally established when Mr. Adams accepted the offer by undertaking D the work on June 28. Mr. Bernard told Mr. Adams that these terms had been agreed, and these terms which he, Mr. Bernard, was offering Mr. Adams should be reduced into a regular service agreement. I have no doubt that that was a promise which Mr. Bernard honourably intended to perform, and that the reason why the company did not keep that promise E and reduce the matter to the terms of a written service agreement was the reason that Mr. Bernard on two or three occasions expressed—namely, that he was so busy with other matters that he really had not time to go into it.

Mr. Adams took over this very important and very responsible work, F which, in a sentence, amounted to controlling some 120 cinemas. He was actually paid at his old rate of salary for the months that he did work, but Mr. Bernard on more than one occasion assured Mr. Adams that that matter would be put right, and that, when the service agreement was finally reduced to writing and put into shape, the arrears of G salary—which was the salary that the company had contracted to pay Mr. Adams—would be paid over to him.

In the result, in my judgment, the contract which was made, or the modification in the relationship between master and servant that became an effective and binding modification on June 28, 1937, imposed on the H company the obligation to pay Mr. Adams at the rate of £2,000 per annum. It imposed on Mr. Adams the obligation of faithfully serving the company to the best of his ability in the capacity of actual controller, and it imposed on each party the obligation to give adequate notice if they wished to determine the contract.

In the autumn of 1937, it appears that a Mr. Maxwell by some means or other acquired the businesses, cinemas and so on, that up to that date had been run by Union Cinemas, Ltd. The exact machinery by which he obtained control of the companies has not been proved, and it does not matter. On Nov. 5, 1937, in a letter signed by Mr. Crawshaw "for
A and on behalf of Union Cinemas, Ltd.," Mr. Adams was told that, owing to a general reorganisation of the company, it was not possible to retain his services, and he was given one month's notice to terminate his employment with the company.

Mr. St. John Field, with perseverance but great clarity, has urged
B upon me that I am compelled by the law to hold that Mr. Adams has neither the right to receive any notice, or to recover compensation for the lack of it, nor to receive any remuneration whatsoever for the months that he devoted to the discharge of these responsible duties, and this for the reason that the company omitted to perform the promise which it
C made when the duties were first undertaken. That promise was repeated on some two or three occasions, and was to reduce into writing the terms on which Mr. Adams was being employed. Mr. St. John Field has cited a number of authorities in support of that proposition. The first was *Britain v. Rossiter* (1), a very familiar case, which unquestionably decided
D that, where there is a contract of service which is unenforceable by reason of the provisions of the Statute of Frauds, 1677, s. 4, neither party to the contract can sue if the contract is determined without proper notice being given, the reason being that the obligation contained in the contract to give a proper notice is unenforceable by reason of the statute, and the
E courts cannot imply a promise where there is no express promise in fact.

If this relationship were a relationship which was affected by the Statute of Frauds, 1677, s. 4, I should, of course, be bound to hold that the claim, so far as it is a claim for damages, and not a claim for wrongful dismissal, and so far as it rests on the suggestion that the month's notice
F which was given was inadequate, must fail. It seems to me, however, that this case is miles away from *Britain v. Rossiter* (1), for the reasons that I have already endeavoured to indicate.

In support of his second proposition—that in any event, if the contract was within the statute, Mr. Adams could not even recover the proper
G remuneration for the work which he had done—Mr. St. John Field cited *Vernon v. Findlay* (2). In my view, that decision, so far as it decides that, where the contract is unenforceable because of the statute, the servant cannot recover anything for the services which he has given and which have been accepted, is contrary to the decision in *Scarisbrook v. Parkin-*
H *son* (3), and it is contrary to the *dictum*—true, only a *dictum*—of THESIGER, L.J., in *Britain v. Rossiter* (1), and contrary to the decision of the Court of Appeal in *Craven-Ellis v. Canons, Ltd.* (4). I do not think that I need discuss this matter further, because, as I have already said, in my view this contract does not come within the provisions of the Statute of Frauds, 1677, s. 4, at all.

The result is that Mr. Adams is entitled to recover the salary at the agreed rate—or, rather, the difference between what he was paid and what he was entitled to receive during the period when he was actually working for the company—and that comes to the sum of £548 9s.

In reference to the question of notice, in my judgment, 6 months' notice is the adequate and proper notice, but there is one month's notice included in the sum of £548 9s., and I am told that 5 months' notice comes to £833. I have added those two sum together, and there will be judgment for Mr. Adams for the amount of £1,381 9s., with costs.

Judgment for the plaintiff for £1,381 9s., with costs.

Solicitors: *Ernest C. Randall* (for the plaintiff); *H. S. Wright & Webb* (for the defendants).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

BEAUMONT-THOMAS v. BLUE STAR LINE, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J.), **December 6, 7, 20, 1938, January 20, 1939.**]

Carriers—Carriage of passengers—Passenger ticket—Conditions—Exclusion of liability—"All risk whatsoever of the passage"—Risk arising from negligence of servant—"From any cause whatsoever"—Ejusdem generis rule.

The plaintiff, while a passenger on the defendants' steamship, slipped on the floor of the corridor outside his cabin and sustained injuries. He then sued the defendants for damages for breach of an express or implied contract that the floor of the corridor should be safe, and for negligence on the part of their servants in washing the floor in such a way as to make it slippery and dangerous and a concealed trap to the plaintiff without warning him of the danger. The defendants denied negligence on the part of their servants, and contended that they were protected by the conditions set out upon the ticket. The jury found that the defendants, through their servants, had been guilty of negligence, and the question then remained whether their liability for this negligence was excluded by the terms of the ticket. The two conditions relied upon were Nos. 8 and 9, which it was agreed should be read together. Condition 8 provided that passengers took upon themselves "all risk whatsoever of the passage," including risks of embarking and disembarking, and condition 9 provided that, without restricting the generality of condition 8, neither the company, the master nor its agents should be held liable for loss or damage arising in certain specifically enumerated circumstances or from any other cause whatsoever. No mention was made of negligence of the defendants' servants:—

HELD: (i) the words in condition 8 "all risk whatsoever of the passage" were general words referring to the kind of risk, and not directing attention to its causes, and, on that condition considered by itself, the passengers did not take the risk arising from negligence of the defendants' servants.

(ii) conditions 8 and 9 referred to and dealt with the same subject-matter—"all risks whatsoever of the passage"—in the sense attributed to the language of condition 8, and condition 9 did not give any indication of departing from that meaning.

(iii) the final words of condition 9, "or any other cause whatsoever." must be read as "or any other cause whatsoever of this nature."

[EDITORIAL NOTE.] The main question in this case was the construction of the conditions themselves. There was also the question whether, having arrived at the conclusion that, upon their proper construction, the conditions related to the risks of the sea passage only, the accident here in question arose out of those risks or one of them. It is decided that a slippery condition of the corridor to a cabin due to the negligence of the servants of the shipowners is not one of the risks of the passage, and, that, therefore, the conditions did not apply, since upon their proper construction they applied only to the risks of the passage.

AS TO CONDITIONS LIMITING LIABILITY, see HALSBURY, Hailsham Edn., Vol. 30, p. 621, para. 780; and FOR CASES, see DIGEST, Vol. 41, pp. 306-308, Nos. 1678-1692.]

B Cases referred to :

- (1) *Taubman v. Pacific Steam Navigation Co.* (1872), 26 L.T. 704; Digest Supp.
- (2) *Haigh v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J.Q.B. 641; 8 Digest 103, 684; 49 L.T. 802.
- (3) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 8 Digest 44, 265; 73 L.J.K.B. 222; 89 L.T. 731; *affg.*, [1903] 1 K.B. 750.

- C**
- (4) *Travers (Joseph) & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 8 Digest 44, 266; 83 L.J.K.B. 1787; 111 L.T. 1088.
 - (5) *Manchester, Sheffield, & Lincolnshire Ry. Co. v. Brown* (1883), 8 App. Cas. 703; 8 Digest 63, 428; 53 L.J.Q.B. 124; 50 L.T. 281; *revers.* (1882), 10 Q.B.D. 250.

- D**
- (6) *Larsen v. Sylvester & Co.*, [1908] A.C. 295; 41 Digest 306, 1682; 77 L.J.K.B. 993; 99 L.T. 94.

- (7) *S. S. Knutsford, Ltd. v. Tillmanns & Co.*, [1908] A.C. 406; 41 Digest 522, 3504; 77 L.J.K.B. 977; 99 L.T. 399.

- (8) *Thorman v. Dorgate S.S. Co., Ltd.*, [1910] 1 K.B. 410; 41 Digest 307, 1685; 79 L.J.K.B. 287; 102 L.T. 242.

- (9) *Re Richardsons & Samuel (M.) & Co.*, [1898] 1 Q.B. 261; 41 Digest 306, 1680; 66 L.J.Q.B. 868; 77 L.T. 479.

- E**
- (10) *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730; 41 Digest 667, 4986; 93 L.J.K.B. 1053; 132 L.T. 207.

ACTION for damages for loss and injury sustained by the plaintiff, as he alleged, while he was a passenger for reward to the defendants on their steamship *Arandora Star* on May 14, 1937, by reason of the negligence and/or breach of contract of the defendants. The facts and arguments are fully set out in the judgment.

Norman Birkett, K.C., and *Robert Fortune* for the plaintiff.

H. I. P. Hallett, K.C., and *Cyril T. Miller* for the defendants.

G

LORD HEWART, L.C.J. : The plaintiff, who held a first-class passage for a cruise on the defendants' steamship *Arandora Star*, alleged that it was an express, or, alternatively, an implied, term of the passage that the floor of the corridor to his cabin, if and when cleansed or treated, should be so cleansed and treated as not to be unfit or to constitute a trap for the plaintiff. In breach of the said term and of their duty to the plaintiff, the defendants by their servants, as alleged in para. 4 of the claim :

... at a time when they knew the plaintiff would use the same caused the said floor to be cleansed and treated by being washed and to be so washed that when

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used by the plaintiff the same was in a wet, dangerous and slippery condition and constituted a trap for the plaintiff, and the defendants failed and neglected to warn the plaintiff thereof or to take any steps to see that the washing of the said floor was unaccompanied by danger to the plaintiff although the defendants were aware by previous experience of the danger in which they were thereby placing the plaintiff.

The defendants denied negligence, and also relied upon the terms of the passenger ticket which they had issued to the plaintiff. A

At the conclusion of the evidence given by and on behalf of the plaintiff, it was submitted by Mr. Hallett, on behalf of the defendants, (i) that there was no evidence of negligence, and (ii) that the defendants were protected by the conditions set out upon the ticket. I declined to withdraw the case from the jury, and thereupon Mr. Hallett stated that he called no evidence. Mr. Norman Birkett, on behalf of the plaintiff, and Mr. Hallett, on behalf of the defendants, then addressed the jury, and afterwards the jury returned a verdict for the plaintiff for the sum of £6,000. Some days later—namely, on Dec. 20—I heard the arguments of counsel upon the meaning and effect of the conditions contained in the ticket. B
C

The conditions relied upon by the defendants were numbered 8 and 9 respectively, and were in the following terms :

8. Passengers take upon themselves all risk whatsoever of the passage to themselves their baggage and effects including risks of embarking and disembarking and whether by boat or otherwise. 9. Without restricting the generality of condition No. 8 neither the company, the master nor its agents shall be held liable for loss, damage, injury, detention, delay or overcarriage (or maintenance or expense during the same) of or to any passenger or his or her luggage and property arising or resulting directly or indirectly from any act, neglect or default of pilot, master, officers, mariners, or of any other persons whatsoever whether in any way acting for or under contract with or in the employ of the company or not in the navigation or management of the ship or from the act of God, collision, stranding, enemies, hostilities, riots and civil commotion, robbers or thieves, strikes, lockouts or stoppage or restraint of labour from whatever cause whether partial or general by land or sea, whether on board or not, and whether in the service of the company or not ; restraint of princes, rulers or peoples, quarantine restrictions or sanitary regulations, from the perils of the sea, ports, rivers, canals and navigation ; from unseaworthiness or unfitness of the ship or her machinery, equipment, appliances or boats, tugs or tenders whether existing at the beginning of the voyage or at any time during the same, from fire steam or electricity, from acts of other passengers or other persons or of animals on board ; from unlighted or unguarded ladders, doors, gangways or openings, through any deck or the side of the steamer, whether in port or at sea or from any other cause whatsoever. D
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Both sides agreed in the view that these two conditions ought to be read together. Mr. Hallett, for the defendants, relied on both the conditions as protecting them from any loss arising from the negligence of their servants, and on condition 8 even if taken by itself. He contended that the words " all risk whatsoever of the passage " were wide enough to cover negligence of the defendants' servants, and were so intended by the parties. The words, he said, were intended to be general, and, when they were read with condition 9, which was expressed as not restricting the generality of condition 8, he said that it was evident that the defendants were protected by the final words from liability for loss arising from any other cause whatsoever. Condition 8, therefore, G
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was, if possible, even more general in its meaning. If it was contended that these words "from any other cause whatsoever" should be read subject to the doctrine or canon of *ejusdem generis*, it was argued that a category must be found in condition 9 in the enumerated exemptions, and that it was impossible to discover one. It was contended finally

A that the negligence found by the jury was of a like nature with the category, if it was held that there was one.

Mr. Birkett, for the plaintiff, contended that condition 8 meant, on its true conception, and was intended to mean, that passengers took all risk whatsoever of the sea passage, and that the words were intended

B to exclude negligence, and, on their correct interpretation, did so, and that condition 8 assumed a "passage" conducted with due care, that the matter in respect of which the jury awarded damages was not a risk of passage within the meaning of those words, properly construed as a sea passage, and that it was not within the contemplation of the parties

C that such a risk should be included. It was contended that a category was to be found in condition 9—a risk of sea passage—and that all the enumerated exemptions came within it, that the final words of that condition 9 were *ejusdem generis* with that category, and that the negligence found by the jury was not of the same nature.

D It is convenient in the first place to deal with condition 8 alone. The passage of which the passengers took upon themselves all risk whatsoever was a passage on a cruise in the *Arandora Star* from Southampton to the Royal Naval review and back to Southampton. On a reasonable construction of the words of condition 8, do they involve an exemption

E in favour of the steamship owner from the consequences of negligence by his servants during the passage? If it was intended to protect the defendants from loss arising from the negligence of their servants during the passage, it would have been easy to state it. The words "all risk whatsoever" are qualified by the word "passage," and these words

F would, in my opinion, in their ordinary English meaning, denote the marine risks to which the passenger would be exposed during the cruise. It would be possible to construe them as covering negligence of the defendants' servants, but the question is whether, reasonably construed, they include an exemption from negligence. To some degree, in my

G opinion, the words are intended to cover negligence of the defendants' servants. One of the risks a passenger would contemplate would be risk of collision—a marine risk—and, as collisions frequently arise from negligence, such negligence of the defendants' servants would be within a reasonable construction of the language. This circumstance explains

H the presence of the first exemption in condition 9—from loss arising from negligent navigation or management of the ship as a whole. The words of condition 8 are, in my opinion, not apt to cover such negligence as has been found by the jury in this case.

Mr. Hallett referred me to *Taubman v. Pacific Steam Navigation Co.* (1) and *Haigh v. Royal Mail Steam Packet Co., Ltd.* (2). I have considered

these cases. The language of the condition in the contract in the former case and that of the ticket in the latter case differs widely from the language in condition 8. The defendants in both cases were held to have protected themselves from negligence. In *Taubman's* case (1), they were not answerable for loss "under any circumstances whatever," and in *Haigh's* case (2) similar language was employed. The question in the present case is the meaning of the words in condition 8, and other words in other contracts are of little assistance. A

In my opinion, the language in condition 8 ought to be construed in accordance with the reasoning contained in the judgment of WALTON, J., in *Price & Co. v. Union Lighterage Co.* (3), to which I was referred by Mr. Birkett, where it was held that, the exemption being in general terms not expressly relating to negligence, the defendant was not exempt from liability for loss or damage caused by the negligence of his servants. The generality of condition 8 was put forward by Mr. Hallett as a ground for supporting the protection of the defendants in the case of their servants' negligence, and is expressly referred to in condition 9. B C

Mr. Hallett called my attention to *Joseph Travers & Sons, Ltd. v. Cooper* (4), where PHILLIMORE, L.J., makes some observation on the two lines of decision as to general words in contracts of carriage. One line is represented by *Price & Co. v. Union Lighterage Co.* (3), to the effect that by an exemption in general terms not expressly relating to negligence the carrier is not exempt from liability for a loss caused by the negligence of his servants. The other line is represented by *Manchester, Sheffield, & Lincolnshire Ry. Co. v. Brown* (5), where the words "all liability for loss or damage by delay in transit or from whatever other cause arising" were held to protect the railway company from liability for the negligence of their servants in accepting for carriage fish which they could not carry in time. D E

After examining and discussing other cases, and declining to accept as the distinction between the two lines of cases the broad principle that, where the bailee has the liability of a common carrier, the clause—the general words in a contract of carrying—would be satisfied by giving it the effect of relieving him from that liability, but making him still responsible for the absence of due care, while, on the other hand, where his only liability was to take due care, the words must be given a wider effect, PHILLIMORE, L.J., concludes that the distinction between the two lines of cases is a fine one. He says, at p. 101 : F G

If you say "any loss" you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say "any loss," "however caused" or "under any circumstances," you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants' negligence," or in the bill of lading phrase, "neglect or default or otherwise." H

In my judgment, the words in condition 8 of this ticket—"all risk whatsoever of the passage"—are general words referring to the kind of risks, and not directing attention to causes. I hold that by condition 8, considered by itself, the passenger does not take the risk arising from negligence of the defendants' servants.

- A Turning from the consideration of condition 8 by itself, I agree with both counsel that condition 9 must be read with it. Mr. Hallett read this condition and examined in detail the enumerated exemptions from liability for loss, damage, injury and so forth to passengers, their luggage and property, and, founding his argument on the decision of the House of Lords in
- B *Larsen v. Sylvester & Co.* (6) and *S. S. Knutsford, Ltd. v. Tillmanns & Co.* (7), and placing great reliance on the judgment of HAMILTON, J., as he then was, in *Thorman v. Dowgate S.S. Co., Ltd.* (8), submitted that full effect should be given to the final words of that condition, and that they relieved the defendants from liability for the negligence found
- C by the jury. He submitted that, when the parties used the words "from any other cause whatsoever," their intention was to exclude the rule or canon of *ejusdem generis*. He said that, before that rule can be applied at all, there must be discovered a category. A genus must be looked for, and it must be discerned what that genus is. He submitted that the
- D exemptions were of such variety that it was impossible to say that there was a category. He referred me also to *Re Richardsons & Samuel (M.) & Co.* (9), and to my own decision in *Jones v. Oceanic Steam Navigation Co.* (10). Mr. Birkett submitted that there was a category—a risk of the sea passage—and that all the exemptions came within it, and he went
- E through them on that footing.

In the words of HAMILTON, J., in *Thorman v. Dowgate S.S. Co., Ltd.* (8), at p. 416 :

The *ejusdem generis* rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used must all have due regard given to them . . .

- F In this case, the intention must be gathered from the terms and conditions of the passenger's ticket, and, if the true intention of the contract was to relieve the defendants from liability for loss, damage, injury, and the like, to any passenger arising from any cause whatsoever, effect
- G should be given to it. Referring to Mr. Hallett's observation as to the genus or category, I observe that HAMILTON, J., in his judgment in *Thorman v. Dowgate S.S. Co., Ltd.* (8), said, at p. 422 :

- I do not understand that anything is laid down in *S. S. Knutsford, Ltd. v. Tillmanns & Co.* (7) which determines that in all instruments and under all circumstances
- H the general words are referable to one category into which all the previously enumerated words must enter as component species, and I see no reason why either the nature of the instrument or the language used might not cause the general words to be referred to the specific words either collectively or in groups or individually according to the intention of the parties.

In my judgment, conditions 8 and 9 refer to, and deal with, the same subject-matter—"all risk whatsoever of the passage" in the sense of

that expression which I have attributed to the language of condition 8—and, in my opinion, condition 9 does not give any indication of departing from that meaning. Indeed, the contrary is to be inferred from the opening words.

The parties themselves have, by the language used, determined the category of which all the exemptions are species. Loss from the negligent navigation or management of the ship, from the act of God, collision, stranding, from strikes, lockouts, from restraint of princes, from perils of the sea, from unseaworthiness or unfitness of the ship or machinery or equipment, or of boats and tender, from fire, steam and electricity, from acts of other passengers or persons or animals on board, from unlighted or unguarded ladders, doors, gangways, or openings through the deck or side of the steamer—all these are covered by the common category “all risk whatsoever of the passage,” the risk of passage which might reasonably be contemplated on board the ship on the cruise or while the passenger was embarking or disembarking.

It is to be noted that in this enumeration of risks there is no mention of loss arising from the negligence of the defendants’ servants on board the ship in the discharge of their duties, or while the passenger is embarking or disembarking, except negligent navigation or management of the ship as a whole. It is not necessary that the common feature should be stated with precision. The category which covers all the exemptions in the business sense of this contract is “all the marine risks whatsoever of the passage” on the cruise, and the two conditions 8 and 9 are concerned with these risks. It follows, as it seems to me, that the final words of condition 9—“or any other cause whatsoever”—are controlled by this common feature, and must be read as “or any other cause whatever of this nature.”

It was submitted in an alternative by Mr. Hallett that, if the final words of condition 9—“or any other cause whatsoever”—are to be regarded as subject to the rule of *ejusdem generis*, the negligence here found by the jury was of a similar nature to the enumerated exemptions. He fixed upon the exemption of negligence in navigation and management of the ship as being of a similar nature to negligence in the washing of a floor. The common feature, it is true, is negligence, but the nature of the negligence in the one case is so far apart, and so different in character, from that of the negligence in the other case that, in my judgment, both common sense and business sense seem to be fatal to the view that they are in their nature similar.

I should like to add that I am much indebted to counsel on each side for the care and completeness with which they presented their arguments, and for their kindness in supplying to me a full transcript of the note of those arguments. I have considered them with care, and I do not think that the defendants in this case are entitled, by way of answer to the plaintiff’s claim, to rely upon the conditions contained in the contract. It follows that, in my opinion, the plaintiff is entitled to the damages

assessed by the jury, and accordingly I give judgment for the plaintiff for the sum of £6,000 and costs.

Judgment for the plaintiff for £6,000 and costs.

Solicitors : *Elvy Robb & Co.* (for the plaintiff) ; *William A. Crump & Son* (for the defendants).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

R. v. JONES.

B [COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 16, 1939.**]

Criminal Law—Habitual criminal—Numerous efforts to obtain work since release from prison—Facts not fully put before the jury—Onus of proof—Insufficiency of direction to jury.

C In addition to a charge of a substantive crime, the appellant was also charged with being an habitual criminal. On the hearing of this further charge, it was established that, since his release from prison some months previously, the appellant had made numerous efforts to obtain work. Upon appeal, it was objected that these facts had not been fully put before the jury, and that the jury had not been fully directed as to the onus of proof :—

D HELD : a charge of being an habitual criminal ought to be proved with the same thoroughness as a substantive charge is proved, and this is so even when the prisoner has previously been convicted of being an habitual criminal. The direction given to the jury was, therefore, insufficient, and the conviction was quashed.

E [EDITORIAL NOTE. Upon a charge of being an habitual criminal it must be proved that the accused had been persistently leading a dishonest or criminal life up to the date of his arrest. Any evidence of attempts shortly before his arrest to obtain employment are, therefore, very material, and their importance must be explained to the jury.

F AS TO HABITUAL CRIMINALS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 238-240, para. 337 ; and FOR CASES, see DIGEST, Vol. 14, pp. 484-489, Nos. 5291-5360.]

G APPLICATION for leave to appeal, treated as a final appeal, against a substantive conviction and sentence and against a conviction and sentence as an habitual criminal. The facts are fully set out in the judgment. The case is only reported upon the question of the conviction as an habitual criminal.

E. J. P. Cussen for the Crown.

H SINGLETON, J. [delivering the judgment of the court] : The appellant, William Jones, pleaded guilty at the Middlesex Sessions to a charge of breaking out and stealing. He was also convicted on a charge of entering a dwelling-house by night with intent to steal. He was subsequently charged with being an habitual criminal, and on that charge, too, he was found to be guilty. The deputy chairman passed upon him a sentence of 4 years' penal servitude and 6 years' preventive detention. The

appellant now asks for leave to appeal against the substantive conviction and sentence, and against the conviction as an habitual criminal. He has also at law a right to appeal against the sentence of preventive detention.

After the appellant had been convicted on the substantive charge, he was before the jury on the further charge of being an habitual criminal. A police officer gave evidence of his general history, which involved an earlier conviction as far back as 1928 for being an habitual criminal. The appellant is 38 years of age, and has 9 previous convictions, which were detailed by the police officer. It appeared that the appellant was released from prison on June 2, 1938. At the trial the appellant was represented by counsel, who cross-examined the police officer who gave evidence as to the appellant's previous history. It then appeared that the appellant had given to the police information as to where he had tried to get work after he left prison on June 2, 1938. Indeed, that matter was embraced in the notice under the Act. The officer was then asked :

Is what he told you about the applications that he made substantially correct, so far as your inquiries go ?—Yes.

The whole of it ?—Yes.

He said that he was not able to trace the different places where the appellant said he had been working in photography.

. . . but for the rest, which you can trace, about his wish to go to camp, to the Labour Exchange officer, the newspaper and the building people, that is true ?—Yes, the people have been approached.

Thus, the evidence given on behalf of the Crown was that this accused man had made efforts to obtain work after he had left prison on June 2, 1938, and had done a good deal in that way. Those efforts of his had been checked, and the officer who gave evidence said that they were true.

In those circumstances, there were matters which ought to have been put before the jury fully. A man charged in those circumstances ought to have his case put clearly to the jury, and the jury ought to be told where the onus of proof lies and what they should do if there is a doubt in the matter. The necessity for proof of a charge of being an habitual criminal ought to be insisted upon just as much as in any other class of case—indeed, if possible, more so—and the necessity is there just the same even though the appellant has been convicted of the same class of charge on an earlier occasion.

Having read the whole of the evidence and the summing up of the deputy chairman, and having heard all that Mr. Cussen, on behalf of the Crown, says, we think that the direction given in this case was insufficient, and that the conviction of being an habitual criminal cannot stand.

Solicitors : *Legal Department, Metropolitan Police* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

DURNELL v. SCOTT.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), January 17, 1939.]

Street Traffic—Speed limit—Driving at speed “dangerous to the public”—Motor van—Dangerous in circumstances of the case—Road Traffic Act, 1930 (c. 43), s. 11 (1).

The respondent was charged with having unlawfully driven a motor vehicle on a road at a speed which was dangerous to the public having regard to the circumstances, contrary to the Road Traffic Act, 1930, s. 11 (1). The vehicle was a 50-cwt. furniture van laden with furniture, for which the maximum speed allowed by law is 30 m.p.h. It was being driven along a main trunk road on a Sunday, when there was an amount of traffic on the road at the time of the test, at a speed varying from 35 m.p.h. to 50 m.p.h. along a part of the road where there were cross-roads and 10 bends. The justices held that, although the van was being driven at a speed in excess of the maximum speed for that class of vehicle, it was not, in view of the type of the road and the situation of the test, a speed dangerous to the public which was on the road, or to the public which might reasonably have been expected on the road, and they therefore dismissed the charge. Thereupon this appeal was brought:—

HELD: as, on the facts found, the vehicle was being driven at a speed which was dangerous to the public, having regard to the traffic “which might reasonably have been expected to be on the road,” the offence charged was proved.

[EDITORIAL NOTE. The justices here have apparently applied a wrong test, in that they have based their decision upon the fact that, in the events which happened, there was in fact no member of the public endangered. They did not state their decision in this way, but that appears to be the basis upon which it rests. Where a vehicle is driven across cross-roads and round bends at an excessive speed, there must be danger to the public which might reasonably be expected to be on the road.]

AS TO SPEED RESTRICTIONS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 669, 670, para. 979; and FOR CASES, see DIGEST, Supp., Street Traffic, Nos. 222a-222j.]

Case referred to:

(1) *Kingman v. Seager* (1937), 157 L.T. 535; Digest Supp.

APPEAL by way of case stated from a decision of the justices for the petty sessional division of Sandbach in the county of Chester. The facts are fully stated in the judgment of LORD HEWART, L.C.J.

S. R. Edgedale for the appellant.

B. J. M. MacKenna for the respondent.

LORD HEWART, L.C.J.: This case arises out of a prosecution of the respondent by the appellant under the Road Traffic Act, 1930, s. 11, which provides as follows:

(1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable [to certain consequences].

These seven justices, having heard the evidence in this case, dismissed the case, and our duty is to decide whether that was in accordance with

the law. I desire to avoid the use of any strong expressions in this case, but, if the decision is right—if the decision were thought to be right—one begins to despair of any useful results from the Road Traffic Act, 1930, whatever advantages are found from it. This respondent was a furniture-remover at Balham, and he was driving a Commer 50-cwt. furniture-van part of the enclosed portion of which projected over his cab. That van was laden with approximately 30 cwt. of furniture, including part of a bedroom suite, which was packed on the floor of the vehicle. The maximum speed allowed by law for this class of vehicle is 30 m.p.h. What happened? I will read the very words in this very remarkable case :

The vehicle was driven along Newcastle Road, Brereton, in the county of Chester for two-tenths of a mile at a speed of 45 m.p.h., which speed was then reduced to 35 m.p.h. for a further two-tenths of a mile whilst passing through Brereton, and then increased to 50 m.p.h. for $1\frac{4}{10}$ miles. The respondent then decreased the speed of the vehicle to 46 m.p.h. for two-tenths of a mile whilst passing over the cross-roads at Arclid, increased it to 48 m.p.h. for six-tenths of a mile and then decreased it to 40 m.p.h. for a further four-tenths of a mile.

Thus, apart from the fact that there had been cross-roads in this journey, the speeds are 45, 35, 50, 46, 48 and 40, the maximum speed for such a vehicle being 30 m.p.h. It might be said : "This was a very obscure road, a road on which a reasonable person might think that he could with impunity give the go-by to any speed limit, as suggested by counsel." Not at all. The road in fact is the main Manchester and Liverpool to London trunk road. Nor is that all. The next paragraph proceeds as follows :

There are 5 roads converging on this road which road is in every case the major road and there are 10 bends and 1 cross-road on the length of road covered during the test. The cross-road which is also a Class A road then had notices to halt on either side of its approach to the major road along which the respondent was travelling. Traffic-lights have now been installed. The day was a Sunday, and there was an amount of traffic on the road at the time of the test.

On that statement of facts as they were found, the justices arrive at the conclusion which they have expressed in these words :

We considered the facts proved or admitted before-mentioned, and we decided that, although the said van was being driven at a speed in excess of the maximum speed permitted by law for that class of vehicle, in view of the type of the road and the situation of the test the speed was not a speed which was in fact dangerous to the public which was on the road or to the public which might reasonably have been expected on the road, and that in fact there was nothing which distinguished this case from any ordinary case of exceeding the speed-limit.

The justices, having already expressed themselves in that way, state :

The question upon which the opinion of this court is respectfully desired is whether upon the above statement of facts we came to a correct determination and decision in point of law or whether having been informed and it having been proved or admitted that the vehicle was driven at an exceptionally high speed we were bound to convict for driving to the danger of the public even though in the circumstances we did not think there was in fact danger to public either on the road or which might reasonably have been expected on the road.

I do not think that the question for this court is the question which has been formulated in that remarkable sentence. The question for this court is whether, on this material, it was open to these justices to dismiss the information.

I am not going to read again the passages which have been read from, and the judgment of this court in, *Kingman v. Seager* (1), but justices must have regard, not merely to the actual danger at a given moment, but also to potential danger. The Act in itself is sufficient to indicate the necessity for that kind of examination, because the Road Traffic Act, A 1930, s. 11 (1), contains words which are extremely clear :

... at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road. . . .

B Thus, apart from all other considerations, it is necessary to have regard to the nature of the road and not only to the amount of traffic which is on the road at the time but also to that which might reasonably be expected to be on the road. Here the justices were dealing with the main Manchester and Liverpool to London trunk road, on to which C 5 roads converged, and before the part of the road referred to here was reached there were 10 bends. In *Kingman v. Seager* (1), I said, at p. 535 :

I find it impossible to reconcile the decision of the justices with the facts which they have found. The road was a Class A wide road, carrying a heavy volume of traffic from Lancashire to the Potteries and London. There was a cross-road, and a bend in it, and another road converging to it, and the cross-road and the converging D road had warning signs where they joined the main road. On those facts I do not think that it was open to the justices to find in the circumstances of this case that there was no danger to traffic which might reasonably be expected to be on the road.

That is the passage on which I desire to lay stress. I continued at p. 535.

The justices seem to have confounded the potential with the actual, and to have taken the view that, for the respondent to be guilty, they had to find that there E was in fact danger to actually present members of the public.

The true view is that there was danger to the public, having regard to the amount of traffic which might reasonably be expected to be on the road. . . . The justices, as a reasonable tribunal, could not find that there was not a real, although a potential, danger to the traffic which might reasonably be expected to be on the road.

In dealing with the facts of that case, DU PARCQ, J., said, at p. 536 :

F In my opinion the justices found facts from which the only conclusion which can be drawn by reasonable persons honestly applying their minds to the question before them is that the offence charged was committed. That being so, I am bound to assume that the justices did not correctly apprehend the law.

I repeat here that the justices in this case found facts from which the G only conclusion which could be drawn by reasonable persons honestly applying their minds to the question before them was that the offence charged—namely, that of driving recklessly—had been committed. That being so, I am bound to assume that the justices did not correctly apprehend the law. I have no doubt whatever that the determination H and decision arrived at by the justices were wrong. The appeal will be allowed.

CHARLES, J. : I agree. If the decision arrived at by the justices in this case were allowed to stand, the Road Traffic Act, 1930, and sect. 11 (1) of that Act relating to dangerous driving, would be robbed of a great deal

of their value. The provisions of that Act, and the provisions relating to dangerous driving, are very salutary provisions. As I say, if this decision were allowed to stand, its value would be greatly lessened. I do not desire to repeat in detail the position which faced the justices. They had a lorry, heavily loaded, upon a road with cross-roads and 10 bends, allowed to go at 30 m.p.h. only if it could go at 30 m.p.h. without danger to the public, and yet it travelled at speeds up to 50 m.p.h. and travelled at 46 m.p.h. across cross-roads which have since been the subject of traffic-lighting, which indicates rather what style of cross-roads they were. Yet, faced with that set of circumstances, the justices have found that they did not think that there was in fact danger either to the public on the road or to those members of it who might reasonably have been expected to be on the road. The very use of the words "in fact," combined with the rest of the sentence "might reasonably have been expected on the road," seems to me to show that the justices have completely misapprehended the law. The phrases "in fact" and "reasonable expectation" are confused, and dealt with as one.

In *Kingman v. Seager* (1), which was a case very similar to, but not so strong as, the case now before us, HUMPHREYS, J., said, at p. 536 :

Could anyone, using ordinary common sense and the word "dangerous" in its ordinary meaning, say that such a speed for such a vehicle across a cross-road and round a bend was not a dangerous speed? Such a speed in such circumstances must be dangerous. Whatever was the amount of traffic actually on the road at the material time, there might reasonably be expected to be a considerable volume of traffic on it.

Apply those words to this case, and one inevitably arrives at the same conclusion as DU PARCQ, J., when he says (and I apply these words exactly to this case now before us), at p. 536 :

In my opinion the justices found facts from which the only conclusion which can be drawn by reasonable persons honestly applying their minds to the question before them is that the offence charged was committed. That being so, I am bound to assume that the justices did not correctly apprehend the law.

I would desire to apply those words, as I have said, exactly to this case, and I agree that the appeal should be allowed.

SINGLETON, J. : I agree that this appeal must be allowed, and that the case must be remitted to the justices with a declaration that the case as stated was proved. The only two reasons which lead me to add anything to the judgment delivered are these. I do so out of respect to the argument of Mr. MacKenna, who argued that the justices had found in fact that the speed at which this vehicle was driven was not dangerous within the meaning of the Road Traffic Act, 1930, s. 11 (1). I agree that we ought to be slow to differ from justices on the facts, but, if the facts point one way, and one way only—facts as found—and if it appears, on those facts as found, that the justices were wrong in law, it is our duty to say that they are wrong, and, when this case is examined, it seems to

me that the justices did take a wrong view. In para. 7 of the case stated they say :

A We considered the facts proved or admitted before-mentioned and we decided that although the said van was being driven at a speed in excess of the maximum speed permitted by law for that class of vehicle, in view of the type of the road and the situation of the test the speed was not a speed which was in fact dangerous to the public which was on the road or to the public which might reasonably have been expected on the road and that in fact there was nothing which distinguished this case from any other ordinary case of exceeding the speed-limit.

One imagines that many of the ordinary cases in which a person is accused of exceeding the speed-limit may be on a perfectly straight piece of road.

B The justices say "there was nothing which distinguished this case from any other ordinary case of exceeding the speed-limit." This vehicle was a 50-cwt. furniture-van carrying 30 cwt. Its maximum speed allowed by law is 30 m.p.h. The speed at which it went along this stretch of road of some four miles where the test was made reached 50 m.p.h. Across
C the cross-roads, it reduced to 46 m.p.h., and then increased to 48 m.p.h. Along that stretch of road there are 5 roads converging on to it, 10 bends, and 1 cross-road. The road in fact is the same road on part of which an offence was committed before, and it was dealt with on appeal by this court in *Kingman v. Seager* (1), to which reference has been made. A
D test was made over 4 miles of this road in the present case.

It appears to me that, on the facts as found, there was nothing which the justices could properly do other than register a conviction in respect of driving at a speed dangerous to the public within the meaning of the Road Traffic Act, 1930, s. 11 (1). In my view, the justices have not had
E regard to the decision of this court in *Kingman v. Seager* (1), and, although I agree that we ought to be slow to differ from justices on questions of fact, I venture to say that this is no question of fact, because, on the facts as found by the justices, an offence was committed.

The other reason which causes me to add to the judgments which have
F been delivered is this, and this only. So much has been said in recent years about motor accidents that I think that it is essential that, when an offence is clearly proved, the justices shall hold that it is. When they fail to do so, it is the duty of this court to put them right. It has been said before now that safety on the road cannot be achieved by regulations,
G but it must be clear that, if the driver of a heavy motor vehicle of this character is to leave the court with these facts proved against him, and is to be told he has not committed an offence—the offence of dangerous driving—then indeed the Act becomes of little effect.

I agree that the appeal must be allowed.

H *Appeal allowed, and case remitted to justices with direction to convict.*

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Geoffrey C. Scrimgeour*, Clerk to Chester County Council, Chester (for the appellant); *C. N. Johnson*, Balham (for the respondent).

PUBLIC TRUSTEE *v.* SCARR.

[KING'S BENCH DIVISION (Hawke, J.), January 11, 1939.]

Rentcharges—Recovery—Action of debt—Annuity in commutation of tithe rentcharge—Tithe Act, 1918 (c. 54), s. 4—Law of Property Act, 1925 (c. 20), s. 121.

Certain tithe rentcharge had been commuted by an order of the Minister into an annuity under the Tithe Act, 1918, s. 4. It was contended that such an annuity was only enforceable by the remedies of entry and distress given by the Law of Property Act, 1925, s. 121, and that an action in respect of the same could not be maintained:—

Held: an action lay in respect of the annuity, and the plaintiff was not confined to his remedies under the Law of Property Act, 1925, s. 121.

[EDITORIAL NOTE. The point here is a very short one, and is confined to the question whether, in respect of the particular form of annuity here in question, an action could be brought, or whether the only remedy was by entry and distress under the Law of Property Act, 1925, s. 121.

AS TO ENFORCEMENT OF ANNUITIES BY ACTION OF DEBT, see HALSBURY, Hailsham Fdn., Vol. 28, pp. 242, 243, paras. 439, 440; and FOR CASES, see DIGEST, Vol. 39, pp. 205-207, Nos. 947-969.]

Cases referred to:

- (1) *Searle v. Cooke* (1890), 43 Ch.D. 519; 39 Digest 205, 954; 59 L.J. Ch. 259; 62 L.T. 211.
- (2) *Thomas v. Sylvester* (1873), L.R. 8 Q.B. 368; 39 Digest 205, 948; 42 L.J.Q.B. 237; 29 L.T. 290.
- (3) *Christie v. Barker* (1884), 53 L.J.Q.B. 537; 39 Digest 170, 611.
- (4) *Liverpool Corp'n. v. Hope*, [1938] 1 K.B. 751; [1938] 1 All E.R. 492; Digest Supp.; 107 L.J.K.B. 694; 158 L.T. 215.

ACTION for the recovery of certain annuities replacing tithe rentcharge commuted by an order of the Ministry of Agriculture and Fisheries made Jan. 28, 1927, under the Tithe Act, 1918, s. 4.

C. Erskine Simes for the plaintiff.

Walker K. Carter for the defendant.

HAWKE, J.: In this case, there is no dispute as to the amount sought to be recovered. It is admitted that the plaintiffs are correct if the action lies at all, but counsel for the defendant contends that the plaintiffs have no right to recover the amount admittedly due in respect of the annuity otherwise than by way of the methods mentioned in the order referred to, which is the provision of the Law of Property Act, 1925, s. 121. The suggestion is that that provision in the order of the Minister excludes the right of the landowner to recover by action. It is an interesting and a short point.

The Law of Property Act, 1925, provides remedies in such cases by entry and distress and by entry and taking possession, whether or not legal demand is made, and without impeachment of waste, until the annual sum, and arrears, and costs and expenses, are fully paid, or with or without taking possession, by demising to trustees for the collection of the annual sums or arrears, or by the creation of a mortgage or the

receipt of rents. These are very drastic remedies, and one would think, fairly complete. There may be reasons why the defendant should prefer to force the plaintiffs to take these drastic remedies rather than to sue. That is not the question. The question is whether he is right in saying that that is their only remedy.

- A It is necessary, I think, to remember that the provisions of the Act of 1925 are substantially a re-enactment of the Conveyancing Act, 1881, s. 44. By the Copyhold Act, 1887, s. 16, these provisions applied to rentcharges arising on the enfranchisement of copyholds, and in *Searle v. Cooke* (1) it was held that arrears of rentcharges, notwithstanding the
- B provisions to which I have referred, could be recovered by action, a simple personal action. One might say "action" nowadays, but I say "personal," because the trouble began at the time when some actions were real and others were personal. It began with *Thomas v. Sylvester* (2),
- C which decided that, since the abolition of real actions by the Real Property Limitation Act, 1833, an action for debt would lie for the recovery of a rentcharge in fee. That was against an argument that since the abolition of real actions the only remedy remaining was by distress. *Thomas v. Sylvester* (2) was applied in *Searle v. Cooke* (1) to rentcharges due on the enfranchisement of a copyhold and KAY, J., agreed with the proposition
- D that a personal action would lie in respect of such rentcharges. He did not refer to the provisions of the Conveyancing Act, 1881, s. 44, but in the Court of Appeal the decision of KAY, J., was affirmed, and it was also decided that the fact that the remedies referred to were given by the Conveyancing Act, 1881, did not prevent the owner of the rentcharge
- E from using his other remedies—as, for example, an action for debt. It seems to me to cover the point. The new provisions, whereby the old tithe rentcharge is commuted to an annuity, were enacted with the intention that the payment should come to an end within a certain number of years, and are only describing another method of paying
- F the same sum of money. It seems to me to cover the point.

- Mr. Carter argued, however, that the decision of KAY, J., which was accepted by the Court of Appeal as being right on all the points, came to this, that it was based on an imperfect remedy, and that, therefore, the assistance of equity was necessary to enable people to get a true remedy.
- G He argued that, unless there were an imperfect remedy, there was no need in this case, having regard to the provisions of the Law of Property Act, 1925, for an action for debt, and that therefore *Searle v. Cooke* (1) was distinguishable from this case. It is perfectly true that the Court of Appeal said that KAY, J., was right on all the points, but it is noticeable
- H that no member of the Court of Appeal mentioned this matter about imperfect remedy. They simply followed *Thomas v. Sylvester* (2) and said that it was applicable. But did KAY, J., allege this imperfection of remedy as his reason for saying that an action for debt arises because the assistance of equity is wanted? I can only say that I do not think so, and I think that the report shows that he did not.

I am not going to refer at length to this decision, but will refer only to a passage in the judgment of KAY, J., at p. 528 :

With respect to the arrears of the rentcharges, *Thomas v. Sylvester* (2), and *Christie v. Barker* (3), seem to be distinct authorities that an action of debt may be maintained for these arrears ;

It does not say anything about " imperfect remedy," it is true, but goes **A** on to say, at p. 528 :

. . . but, if not, under the equitable jurisdiction of the court, an order must be made for payment . . .

He seems to me first to say what the Court of Appeal also said—namely, that it was not any question of " imperfect remedy." I think that what KAY, J., **B** really means, and his decision with regard to the claim, is to have ascertained the particular lands upon which the payment might be charged, a matter which apparently might have been of considerable difficulty. The Act of Parliament provided for the ascertainment of the lands. If the limits had been altered or mislaid, the Act of Parliament provided **C** a means by which an inquiry could be held to settle what the lands were, or, if not, to charge the property on other lands of the tenant, and I do not think that the decision of KAY, J., on this point as to whether a personal action would lie had anything to do with the difficulty of that ascertainment, or the imperfection of the remedy, a remedy which no **D** doubt would have caused a good deal of trouble and a good deal of expense. KAY, J., directed that that should be done. Thus, I think that this decision covers this point.

However, Mr. Carter went on to argue—I think that it comes to much the same thing—that the Minister's decision gives the only remedy. **E** Mr. Carter will not misunderstand me if I say that that is begging the question. If it does give the only remedy, of course Mr. Carter is right in this. He argued that the matter was left entirely in the hands of the Minister to give such remedy as he thought right, and that in the case cited the matter sprang from a common law right. The remedy is no **F** doubt given by statute, but in this case the remedy does not spring from a common law right but arises only by statute, because the rentcharge is extinguished, and for that charge is substituted the annuity. I am bound to say that I do not see much substance in the distinction.

Mr. Carter cited as an authority for his proposition *Liverpool Corpn.* **G** *v. Hope* (4), where the Liverpool Corporation sought by action to recover the ordinary rates, and it was held that they could not do so. The Court of Appeal said that the only way of recovering rates is by distress. I think that that is an entirely different thing. Between the **H** rating authority and the ratepayer—I am speaking now of the ordinary poor rate and such local rates—there is no privity in the sense that one is landlord and the other is the *terre tenant* or *pernor* of the profits of the land. I think that the thing is entirely distinct. I think, therefore, that this matter is covered by *Searle v. Cooke* (1), and my decision must be for the plaintiffs.

I ought to add Mr Simes' argument that the Copyhold Act, 1887, s. 16, provides statutory remedies for the recovery of charges ascertained under the Copyhold Act, 1882, s. 7. Thus, one has rentcharges arising out of the statute and controlled by the statute, yet, on the authority of *Searle v. Cooke* (1), recoverable by action.

A *Judgment for the plaintiffs for £173 16s. 10d., with costs.*

Solicitors: *Church, Rendell, Bird & Co.*, agents for *Broomhead & Saul*, Taunton (for the plaintiff); *Mott & Parkes*, agents for *Serjeant & Son*, Ramsey, Hunts (for the defendant).

B *[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]*

LONDON COUNTY COUNCIL v. LEES.
LONDON COUNTY COUNCIL v. IAFRATE.

C [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), January 12, 19, 1939.]

Time—Closing of shops—Sunday trading—Restriction—Sale of chocolate eclairs, cream buns, jam tarts, fruit cake, swiss roll and veal and ham pies—Whether "meal or refreshment"—Shops (Sunday Trading Restriction) Act, 1936 (c. 53), s. 1, Scheds. I, II.

D L., a shopkeeper who also kept a restaurant, was charged with having at 2 p.m. on a Sunday, unlawfully sold chocolate eclairs, cream buns, jam tarts, fruit cake, swiss roll and veal-and-ham pies, contrary to the Shops (Sunday Trading Restriction) Act, 1936, s. 1, Sched. II, prohibiting the sale after 10 a.m. of articles including bread, flour confectionery, groceries and fish. The magistrate held that, although the articles sold came within Sched. II, they were also a "meal or refreshment," which, under Sched. I of the Act, can be sold all day, and he dismissed the charge. Thereupon this appeal was brought:—

E HELD: in view of the ambiguous wording of the Act of 1936, the court was not prepared to say, on the facts of the case, that the magistrate's decision was wrong in point of law.

F [EDITORIAL NOTE. The court here have found very great difficulty in construing the Act of 1936, and particularly in ascribing any proper limits to the phrase "meal or refreshment" in Sched. I thereof, with the result that it was impossible to say that the magistrate's decision could not be supported.

AS TO SUNDAY TRADING, see HALSBURY, Supp., Time, para. 880; and FOR CASES, see DIGEST, Vol. 42, pp. 936-939, Nos. 84-116.]

G APPEALS by way of case stated from two decisions of a metropolitan police magistrate, sitting at Westminster. The facts are fully set out in the judgment of LORD HEWART, L.C.J. In the second appeal, the facts were similar, but the premises did not include a restaurant.

H *Geoffrey C. Hutchinson* for the appellants.

Rt. Hon. Sir William Jowitt, K.C., and *Cyril Salmon* for the respondent.

LORD HEWART, L.C.J.: It may be convenient to deal as shortly as may be with each of these two cases in turn. In the first case, the respondent was one Robert Lees, and the information preferred against

him on behalf of the London County Council charged that on Sunday, Apr. 3, 1938, a shop known as 166, King's Road, London, was not closed for the serving of customers in the sale of flour confectionery, contrary to the provisions of sect. 1 of the Act of 1936. The magistrate, Mr. Kenneth Marshall, having heard the evidence and the arguments, dismissed the information, and the question for us is whether in so doing he came to a correct determination in point of law. A

The relevant facts may be briefly recapitulated. It was proved or admitted that the premises referred to consisted of a restaurant and baker's premises, that they were a shop within the meaning of the Act, and were occupied by the respondent, and that on Sunday, Apr. 3, 1938, between 2 p.m. and 2.26 p.m., certain customers were served at that shop with certain articles—namely, 2 chocolate éclairs, 2 cream buns, 2 jam tarts, 1 fruit cake and 1 swiss roll. It is found as a fact that those articles were, in each case, flour confectionery within the meaning of the Act. More than that, it is proved or admitted that at 2.26 p.m. on that Sunday a customer was served in that shop with 6 veal and ham pies. It was common ground that each of the aforesaid articles—that is, I take it, each of the articles mentioned in this paragraph—was sold for consumption off the premises. B

On that state of facts, various contentions were made on behalf of the appellants. Primarily, it was contended that the flour confectionery did not amount to meals or refreshments within the meaning of Sched. I, para. 1 (b), of the Act, that the sales of flour confectionery were transactions within the meaning of Sched. II of the Act, and that such sales could not at the same time be transactions within the meaning of Sched. I. C It was also contended that the veal-and-ham pies were not meals or refreshments within the meaning of Sched. I, para. 1 (b). D

On the part of the respondents, each one of those contentions was answered in the sense that it was negatived. It was contended that the articles of flour confectionery were meals or refreshments within the meaning of para. 1 (b), that the veal and ham pies were meals or refreshments within the meaning of that paragraph, that the sales of the flour confectionery were transactions to which Sched. I applied, notwithstanding that the sales were also transactions within the meaning of Sched. II, and, finally, that the shop was open only for the serving of customers for the purposes of transactions mentioned in Sched. I. The magistrate came to the conclusion, which I express in his very words, that the final words of Sched. II indicated that the meaning of the expression "meals or refreshments" in Sched. I was not restricted by anything in Sched. II, that therefore the said articles of flour confectionery were meals or refreshments within the meaning of Sched. I, and, thirdly, that the veal and ham pies were meals or refreshments within the meaning of Sched. I. E Holding that view, the magistrate dismissed the first information. F

The second case, except in some minor particulars, was not different from the first. In this case also, where the respondent was a man named G

Iafrate, carrying on business at a shop known as 57, Manor Street, Chelsea, the magistrate, having heard the evidence and the arguments, dismissed the information. I need not read the whole of this case. It is enough, I think, having regard to what has already been said, if I say that, according to the findings of fact, the premises in this case consisted of a general shop, confectioner's and tobacconist's premises, which premises were occupied by the respondent. On Sunday, June 5, 1938, between 2 p.m. and 2.22 p.m., customers were served at the shop with the following articles—namely, 1 swiss roll, 1 round of dundee cake, 2 pastries and 6 currant buns. It was admitted or proved that all those articles were flour confectionery within the meaning of the Act, that each of them was sold for consumption off the premises, that no other article intended to be consumed with the flour confectionery was sold with it, that the shop was not a café or restaurant, that meals and refreshments were not sold at the shop for consumption on the premises, and, finally, that no order in relation to that shop had been made by the local authority under the provisions of sect. 3 of the Act.

In those circumstances, it is contended on behalf of the appellant, the London County Council, that the sales of this flour confectionery, being transactions at a shop where meals and refreshments were not sold, were not transactions within the meaning of Sched. I, para. 1 (b), of the Act, that the articles of flour confectionery were not meals and refreshments within the meaning of Sched. I, para. 1 (b), that the sales of the flour confectionery were transactions within the meaning of Sched. II, and that the shop was open for serving customers on Sunday contrary to the provisions of sect. 1 of the Act. *Per contra*, it was contended on behalf of the respondent that the articles of flour confectionery were meals or refreshments within the meaning of Sched. I, para. 1 (b), that the sales of that flour confectionery were transactions within the meaning of Sched. I, that the shop was open only for the serving of customers for the purpose of transactions mentioned in Sched. I of the Act, and that no offence had been committed under the Act. Here also the magistrate came to a conclusion in favour of the respondents. He was of opinion, as he expresses it, that the sales of the flour confectionery were transactions within the meaning of Sched. I of the Act, notwithstanding that they took place at a shop where meals and refreshments were not sold for consumption on the premises. Holding that opinion, the magistrate dismissed that information also.

These cases turn, and each of them turns, upon the provisions of the Shops (Sunday Trading Restriction) Act, 1936. It would be wrong to be hypercritical in dealing with this statute, or indeed in dealing with any statute, but it may perhaps be regretted, when one considers that part of the subject-matter that is being dealt with is the sale of food, and also that the premises which are being dealt with are, in a great number of cases, the premises of small shopkeepers, that more care was not taken to avoid ambiguity in the scheme and its contents, and in the

vocabulary of this important piece of domestic legislation. The scheme of the Act is sufficiently odd. It is an Act to restrict the opening of shops and trading on Sunday. Sect. 1 provides as follows :

Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers on Sunday :

It is quite obvious, when one reads a little farther, that that universal A provision is really inserted for the purpose of qualifying it by means of exceptions. The universal affirmative having been laid down, there immediately follows a proviso, and a twofold proviso :

Provided that a shop may be open for the serving of customers on Sunday (a) for the purposes of any transaction mentioned in Sched. I to this Act ; and (b) B until after the expiration of 9 months from the commencement of this Act for the purposes of any transaction mentioned in Sched. II to this Act.

That is a sufficiently puzzling beginning. No doubt the hundreds of shopkeepers—small shopkeepers—to whom that applied are persons of at least ability and business capacity, but it is a little odd that this statute should be presented for their bewilderment in this form. Nor does the C puzzle by any means stop there. Sect. 2 goes on to deal with the topic of partial exemption orders, and subsect. (1) provides as follows :

The local authority may by order (in this Act referred to as a "partial exemption order") made in accordance with the provisions of this Act provide that after the expiration of 9 months from the commencement of this Act shops situated in their area or in such part thereof as is specified in the order may for the purposes of such D of the transactions mentioned in Sched. II to this Act as may be so specified be open for the serving of customers on Sunday subject to the limitations hereafter provided.

Then follows subsect. (2), which provides as follows :

Subject to the provisions of this subsection, a partial exemption order shall not authorise a shop to be open for the serving of customers after 10 o'clock on Sunday E morning.

That provision is again subject to another proviso :

Provided that an order may authorise the serving of customers after 10 o'clock on Sunday morning in shops to which the order applies in cases of emergency and in such other cases as may be specified in the order.

Finally, as a topic of the partial exemption order, it is provided by sub- F sect. (3) as follows :

A partial exemption order may contain such incidental, supplemental or consequential provisions as may appear to the local authority necessary or proper.

It might be possible, but I doubt if it would be easy, to compress in the G same number of lines more fertile opportunities for doubt and error. After all, that is only the beginning of the matter, because, when the sections have been perused, and when we have perused other sections to which I think for the present purposes it is not necessary for me to refer, we come to these two remarkable schedules, Schedules I and II. H Sched. I is entitled :

Transactions for the purposes of which a shop may be open for the serving of customers on Sunday.

Sched. II, which is side by side with Sched. I in this statute, is headed :

Transactions in respect of which a partial exemption order may be made under sect. 2 of this Act.

This list of things the sale of which is permitted is given in para. 1, (a) to (l), in Sched. I, and comprises such varieties of things as intoxicating liquors, table water, sweets, chocolates, flowers, fruit, vegetables, milk and cream, medicines, aircraft, motor or cycle supplies or accessories, tobacco and smokers' requisites, newspapers, periodicals and magazines, A books and stationery from a bookstall, guide books, postcards, photographs, requisites for any game or sport, and fodder for horses, mules, ponies, and, indeed, donkeys. Then there follows para. 2, dealing with generally different things—(a) Post Office business, and (b) the business carried on by a funeral undertaker. That is Sched. I, a list, it B is to be observed, not of things prohibited, but of things permitted.

Then one passes to Sched. II. I have deliberately omitted one very important matter in Sched. I because I have a word to say about that in a moment. Sched. II deals with the sale of certain things listed under the heads (a), (b) and (c), all of them varied and generically different, C and then this interesting guide to the trader concludes with the words :
 . . . in so far as such sales are not included amongst the transactions mentioned in Sched. I to this Act.

Thus, at the end of it, the good citizen desiring to observe the law has to consider, not only the nature of the various transactions, but also, D after his perusal of Sched. II, how far, if at all, it is true to say that such sales are not included amongst the transactions mentioned in Sched. I. As I say, I deliberately refrained for a moment from referring to one particular matter in Sched. I. The first transaction referred to in Sched. I is the sale of intoxicating liquors, but the second is :

E (b) meals or refreshments whether or not for consumption at the shop at which they are sold, but not including the sale of fried fish and chips at a fried fish and chip shop. That is Sched. I. One turns to Sched. II, dealing only with the cases of partial exemption—where, that is to say, in the ordinary way, shops are not permitted to be open for the serving of customers after 10 o'clock on Sunday morning—and one finds in the forefront of it : F

The sale of (a) bread and flour confectionery, including rolls and fancy bread. . . . Thus at one and the same time the intelligent shopkeeper is faced with a statutory provision that he may sell meals or refreshments, whether or not for consumption at the shop at which they are sold, and a provision G that the sale of bread and flour confectionery, including rolls and fancy bread, is the subject of a partial exemption order. Nevertheless, although it is the subject of a partial exemption order, and although it is contained in Sched. II, the transactions to which it relates are dealt with in Sched. II only in so far as such sales are not included amongst H the transactions mentioned in Sched. I. What, then, is the provision of this statute with reference to—to leave out all other matters—meals or refreshments, whether or not for consumption at the shop at which they are sold, especially if the meals or refreshments consist of, or include, flour confectionery, in its turn including rolls and fancy bread ? One must suppose that the object of this statute—the scheme and system

which it exhibits or conceals—was to give guidance to the law-abiding shopkeeper. Not often in the course of half a century of experience of the law have I had the opportunity of endeavouring to come to close quarters with such a piece of legislation. Sir William Jowitt, appearing on one side in this case, frankly admitted that the provisions of these two schedules, taken together, and compared and contrasted with each other, were, to his mind, unintelligible. I do not think it necessary to express an opinion upon that point. I will only say that, having considered this statute, and having considered the findings of fact here found, and the contentions of the one side and the other therein contained, I am not prepared to say that this magistrate, in my view, came to a wrong conclusion in point of law. A

I will only add that among the many doubts which this case and this legislation present to my mind is the doubt whether we are really dealing here with a question of law at all, or whether, upon the true construction—if there is a true construction—of this statute, that with which the magistrate was coming to terms was a pure question of fact. I express no opinion upon that point. All I say is that, *rebus sic stantibus*—if “*stantibus*” is the right word—I am not prepared to differ from the magistrate. I think that these appeals, and each of them, must be dismissed. B

CHARLES, J. : I agree. LORD HEWART, L.C.J., has dealt so fully with all the matters which we had to consider in this case that I do not think it necessary or appropriate to add anything. C

SINGLETON, J. : I agree. D

Appeals dismissed.

Solicitors : J. R. Howard Roberts (for the appellants) ; Samuel Tonkin, Booth & Co. (for the respondent). E

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.] F

Re HODSON'S SETTLEMENT, BROOKES v. ATTORNEY-GENERAL.

Applied. Re BRASSEY'S DEED TRUSTS. [1951] 2 All E.R. 353.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), November 7, 9, 10, 16, 17, 18, 19, 1938, January 20, 1939.] G

Estate Duty—Property deemed to pass—Accumulations—Life tenant's income during settlor's life if below stated amount to be made up to that amount out of accumulations—Income of accumulations to go to life tenant upon death of settlor—Liability to duty on death of settlor—Aggregation—Finance Act, 1894 (c. 30), ss. 1, 2 (1) (d), 4. H

A settlor vested a trust fund in trustees upon trust that they should, if the income were sufficient, pay the clear yearly sum of £1,200 to S. during her life. During the joint lives of the settlor and S., the residue of the income was to be accumulated and form an accumulations fund. If the income of the principal trust fund was at any time insufficient to pay S. £1,000 per annum, the deficiency was to be made up out of

the capital or income of the accumulations fund. After the death of the settlor, if S. survived him, the annual income of the accumulations fund was to be paid to S., and after the death of S. the trust fund and the accumulations fund were subject to a special power of appointment given to S., and in default of appointment for the children of S. By a second settlement, the residue of the income during the life of S. was given to the trustee. The settlor died on Mar. 3, 1933, in the lifetime of S., and the question was as to the estate duty payable on his death :—

HELD : (i) estate duty in respect of the accumulations fund was payable under the Finance Act, 1894, s. 1, on the principal value of the fund.

(ii) the accumulations fund ought to be aggregated with the other property passing on the settlor's death.

Decision of FARWELL, J. ([1938] 3 All E. R. 341) reversed.

[EDITORIAL NOTE.] As to the incidence of estate duty in this case, the Court of Appeal have decided that attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the relevant death, and upon the question whether the death effected an alteration in rights, as distinguished from merely removing the possibility of an alteration. Upon the question of aggregation, the court has adopted as a criterion of whether the deceased had an interest in the property the test of assuming that all the beneficiaries under the settlement disclaimed the interests given them and then asking in whose favour there would be a resulting trust. As to future income of a settled fund, and future investments resulting from the re-investment of the fund, it is said : "The person who planted the tree cannot be said never to have had an interest in its future fruit, though the fruit may not mature until long after he has, in virtue of his ownership of the tree and all its future fruit, alienated the future fruit."

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 13, 14, Nos. 61-67.]

E Cases referred to :

- (1) *A.-G. v. Milne*, [1914] A.C. 765; 21 Digest 46, 296; 83 L.J.K.B. 1083; 111 L.T. 343.
- (2) *Burrell & Kinnaird v. A.-G.*, [1937] A.C. 286; [1936] 3 All E.R. 758; Digest Supp.; 106 L.J.K.B. 134; 156 L.T. 36.
- (3) *Adamson v. A.-G.*, [1933] A.C. 257; Digest Supp.; 102 L.J.K.B. 129; 148 L.T. 365.
- (4) *A.-G. v. Lloyds Bank, Ltd.*, [1935] A.C. 382; Digest Supp.; 104 L.J.K.B. 523; 152 L.T. 577; *affg.* (1934), 151 L.T. 268.
- (5) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 21 Digest 7, 27; 68 L.J.Q.B. 435; 80 L.T. 361; *varying S.C. sub nom. Re Cowley's (Earl) Estate*, [1898] 1 Q.B. 355.
- (6) *Scott & Coultts & Co. v. Inland Revenue Comrs.*, [1937] A.C. 174; [1936] 3 All E.R. 752; Digest Supp.; 106 L.J.Ch. 36; 156 L.T. 33; *affg.*, [1935] Ch. 246.
- (7) *De Trafford v. A.-G.*, [1935] A.C. 280; Digest Supp.; 104 L.J.K.B. 396; 153 L.T. 17.
- (8) *A.-G. v. Dickinson & Baron*, [1937] 2 K.B. 574; [1937] 2 All E.R. 485; Digest Supp.; 106 L.J.K.B. 615; 157 L.T. 550.
- (9) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, 790; 15 L.T.O.S. 557.
- (10) *Re Thorley, Thorley v. Massam, Re Thorley, Thorley v. Mussam*, [1891] 2 Ch. 613; 21 Digest 52, 345; 60 L.J.Ch. 537; 64 L.T. 515.
- (11) *Re Tong, Hilton v. Bradbury*, [1931] 1 Ch. 202; Digest Supp.; 100 L.J.Ch. 132; 144 L.T. 260.

- (12) *A.-G. v. Quizley* (1929), 98 L.J.K.B. 652; Digest Supp.; 141 L.T. 288.
- (13) *A.-G. v. Pearson*, [1924] 2 K.B. 375; 21 Digest 15, 75.
- (14) *Glegg v. Bromley*, [1912] 3 K.B. 474; 8 Digest 432, 94; 81 L.J.K.B. 1081; 106 L.T. 825.
- (15) *Holroyd v. Marshall* (1862), 10 H.L. Cas. 191; 39 Digest 678, 2642; 33 L.J.Ch. 193; 7 L.T. 172.

A

APPEAL by the Attorney-General from an order of FARWELL, J., dated May 25, 1938, and reported [1938] 3 All E.R. 341. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

J. H. Stamp for the Crown.

Cyril J. Radcliffe, K.C., and *B. F. Mendel* for the respondent, Brookes. B

Stamp: Until the settlor died, every item of income that accrued went into corpus, and it was a fund in the reversionary interest of which the two daughters of Mrs. Stuart were to benefit. When the settlor died, Mrs. Stuart's interest came into being, and from that moment the interest went to her. Until Mrs. Stuart's interest began, the children C had an interest in the accruing income. It was an interest in the accumulation fund, in that all the income accruing was to be capitalised for them. The property passed under sect. 1. The fact that there may be a defeasance is a matter which may be disregarded. The meaning of the word "passing," in the case of a settlement, is shown by *Cowley (Earl)* D *v. Inland Revenue Comrs.* (5) and *A.-G. v. Milne* (1). It is necessary to consider whether or not there has been a change in the title to the property as a whole at the time of the settlor's death. *Burrell & Kinnaird v. A.-G.* (2) shows that interests which are remote and inconsiderable can be disregarded. One applies the *de minimis* rule to the interests of the E parties. Unless the court is bound by what took place in *A.-G. v. Lloyds Bank, Ltd.* (4), the property passed to the life tenant when the settlor died. The vital element in *Adamson v. A.-G.* (3) was that the settlor's children already had an absolute interest in the property devisable. That fact was entirely absent in *A.-G. v. Lloyds Bank, Ltd.* (4), so that the person F who came into possession on the death of the settlor had already, before the death of the settlor, an absolute, though defeasible, interest in the fund. Neither the judgment nor the *ratio* in *Adamson v. A.-G.* (3) has been disapproved by the House of Lords, and the *ratio* substituted is inapplicable to the present case. G

As to aggregation, the view taken by the Crown is that, where a settlement is made by any person, all the beneficial interests arising out of the settlement must be interests in which the deceased had an interest. It is his property which he settled, and he had an interest in the whole. The ownership of a fund gives a right to all future income H from it, and a right to that future income is an interest within the meaning of the section. The test is to see whether or not the income of a fund belongs to the owner of the fund. There is the test of a resulting trust. A settlor, let us say, settles property to accumulate for a period and the accumulations are disclaimed by the beneficiary. There is a re-

- sulting trust for the settlor. The reason for that is that it is a part of his property of which he has not fully disposed. If it is property in which he never had an interest, why should there be a resulting trust for him? The income is an interest of which the settlor never completely disposed. My whole case is based on the proposition that the deceased was dealing
- A with property in which he had an interest when he made the settlement. A man has an interest in the future income of his own property. Until the settlement was made, the whole beneficial interest was in the settlor. From the moment the settlement operated, the beneficial interest was transferred to some one else. That beneficial interest is a right to future
- B income. The right of the original owner is diminished. Can it be said that the man out of whose interest it was provided never had an interest in it? If he had not executed the settlement, it would have been his property, and it would be his if the person interested under the settlement disclaimed it. Property is a bundle of rights, and the most important
- C of them is the right to receive the income, and, if a man has a right to receive the future income, it cannot be said that he has no interest in the future income. [Counsel referred to *Re Thorley*, *Thorley v. Massam* (10), *Re Tong*, *Hilton v. Bradbury* (11), *A.-G. v. Dickinson & Baron* (8), *A.-G. v. Quixley* (12), *A.-G. v. Pearson* (13) and *Adamson v. A.-G.* (3).]
- D *Radcliffe, K.C.* : The settlor was not the owner of the property, because he had parted with all interest in it. The words of LORD TOMLIN in *A.-G. v. Lloyds Bank, Ltd.* (4) mean that he is not to be taken as deciding the case except upon the rule in *Lassence v. Tierney* (9). The interests in *A.-G. v. Lloyds Bank, Ltd.* (4) were beneficially settled interests,
- E although there was no life tenant in existence until the settlor died. In *A.-G. v. Lloyds Bank, Ltd.* (4), the children had a life interest and also a *Lassence v. Tierney* (9) interest. The property which the Crown says passes under sect. 1 is a fund represented by certain investments at the date of the settlor's death. They were formed out of the accumu-
- F lations of the income which arose after the date of the settlement. They are property which did not exist at all at the date of the settlement. They are simply investments of what was then non-existing property—namely, income of the trust fund. The settlor settled no beneficial interest at all. If one took this block of investments the
- G day before the settlor's death, and asked who were the owners of that fund, and for what interest, the answer would be: "Mrs. Stuart has a life interest dependent upon her surviving the settlor, and her children have an interest in remainder." If one took the fund the day after the settlor's death, and asked who had an interest in the property, the
- H answer would be that Mrs. Stuart's life interest is turned from a contingent interest into an interest in possession, and her children's interests are, as before, interests in remainder, defeasible in the event of her making an appointment. No one had a right to receive the income before the settlor's death. There was a valid direction to accumulate, and everybody interested in the fund could compel the enforcement

of the trust. This case is different from *Scott & Coutts & Co. v. Inland Revenue Comrs.* (6), in which case, up to the relevant death, the trust was to pay the income at discretion for the benefit of a composite class, and, after the relevant death, to pay the whole income to a named person. [Counsel referred to *Burrell & Kinnaird v. A.-G.* (2).]

At no time did the settlor possess any interest in that property whatsoever because one cannot have an interest in a non-existing property. There was what has been called a fund. Actually it was a block of shares in a company. At a certain date the settlor parted with his interest in those shares. A certain distribution of profits, if any, taking the form of dividends, would ultimately be made. If profits were not made, no dividends would ever come into existence. If profits were made, and dividends, by the regulations of the company, came into existence, they would be payable to the existing owner of the shares. Such future profits, not being in existence at the date of the settlement, are not capable of being the subject of an interest at law. Future property cannot be assigned at law, and it can be assigned at equity only if one makes a contract for consideration: *Glegg v. Bromley* (14). Until that time, there is nothing in which an interest can inhere. The settlor parts with his property and all accretions to it in the future. When the accretions take place, it is not the settlor, but the beneficiary, who has the interest in them for the first time. [Counsel referred to *Holroyd v. Marshall* (15).]

Stamp, in reply: In *Scott & Coutts & Co. v. Inland Revenue Comrs.* (6), there was a discretionary trust for a class, and any income not applied under that discretionary trust for members of the class was to be accumulated for a life tenancy, and was then to fall into capital and go to a tenant in tail in possession. It was thought by the Crown that, in those circumstances, it would be governed by *Adamson v. A.-G.* (3). That has no bearing upon the present case. It was part of the *ratio decidendi* in *A.-G. v. Lloyds Bank, Ltd.* (4) that, by virtue of the rule in *Lassence v. Tierney* (9), the property passed to the three children under the settlement, and would not be taken away from them except if an interest arose under the super-added trust. The case of *A.-G. v. Lloyds Bank, Ltd.* (4) cannot govern this case. That is apparent from the judgment itself. The reason is that it depends upon the application of the rule in *Lassence v. Tierney* (9). When a life interest comes into possession, something more happens than the mere falling off of a contingency. A property cannot pass from some one and not pass to some one else. That was the second point in *Adamson v. A.-G.* (3). The fallacy lies in failing to see what is essential in the judgment in *Adamson v. A.-G.* (3)—namely, that the interest of the children is the same both before and after. In the present case, it is admitted that the Finance Act, 1894, s. 2 (1) (d), applies if nothing else applies, but in that event the matter is almost negligible. If sect. 1 does not apply, sect. 2 (1) (b) does apply. Before one can say that there is an interest known to the law, it is necessary to know what an interest is. No attempt has been made on behalf

of the respondents to show what an interest is. It is any right which entitles the owner to receive a benefit out of the property. That right may exist as well in respect of future, as in respect of present, property. Every man has an interest, within the meaning of this Act, in the future income of his own property, and that covers the largest part of all
A accumulated funds. The test of a resulting trust is a good test.

CLAUSON, L.J. [delivering the judgment of the court]: The relevant facts in this case are as follow. By a settlement of May 20, 1925, Mr. Hodson settled a fund of 20,000 shares in the names of trustees, upon
B trust to pay to a lady out of the income £1,200 per annum during the joint lives of the lady and himself, and invest and accumulate the surplus income of the fund during the same joint lives. The accumulations fund was to be held in trust to supplement any deficiency in the income of the settled fund to supply the £1,200 per annum, and from and after Mr.
C Hodson's death the income of the accumulations fund was, during the rest of the lady's life, to be paid to her. By virtue of this settlement and a supplementary settlement, the surplus income of the settled fund during the period of the lady's survivorship of the settlor was to be dealt with as is mentioned in the supplementary settlement, and, on the lady's
D death, the originally settled fund and the accumulations fund were, by virtue of the settlement, to be held in trust for her children. Mr. Hodson died in the lifetime of the lady on Mar. 3, 1933.

There is no doubt that, upon the coming into operation of the settlement, Mr. Hodson lost all possibility of benefit from the future accumulations, and thenceforward the beneficiaries of the accumulations fund as
E it accumulated (disregarding, for the sake of simplicity, the function of that fund as an additional security for the £1,200 annuity) were the lady (as regards a life interest to commence on Mr. Hodson's death) and her children (as regards various contingent interests which could not
F become interests in possession while their mother's life interest continued). On the death of Mr. Hodson, no change took place in the beneficial interests in the capital of the accumulations fund, so far as the lady's children were concerned, but their interest in the income of the accumulations fund was materially altered, in that they lost the right
G to require that income to be accumulated for their ultimate benefit. So far as the lady was concerned, her interest, which had previously been contingent on her surviving Mr. Hodson, became an immediate interest in possession to continue for her life. For simplicity, we omit any reference to certain forfeiture provisions, which have never come
H into operation and do not affect the questions in dispute.

No question arises in regard to the estate duty payable in respect of the settled fund. The first question raised by the summons is as to the duty, if any, payable, on the occasion of Mr. Hodson's death, in respect of the accumulations fund. It will be observed that, on Mr. Hodson's death, the income of the accumulations fund, which up to that point the

trustees were bound, on receipt, to accumulate, would cease to be subject to accumulation, and would become payable to the lady. It was argued for the Crown that, within the meaning of the Finance Act, 1894, s. 1, this change in the destination of the income resulted in the accumulations fund "passing" on Mr. Hodson's death, and that duty was accordingly payable under that section on the occasion of Mr. Hodson's death. On behalf of the subject, it was denied that on Mr. Hodson's death there was any "passing" under that section, whatever might be the position under sect. 2. A

It appears from the opinion of LORD PARKER in *A.-G. v. Milne* (1), at p. 779, that the expression "passing" on the death is used in the Finance Act, 1894, s. 1, to denote some actual change in the title or possession of the property as a whole which takes place at the death. In the present case, the property as a whole is the accumulations fund, and it would appear *prima facie* that, applying the words of LORD PARKER, it is not open to this court to hold otherwise than that on Mr. Hodson's death the accumulations fund passed. Up to the death, the income was subject to a trust for accumulation for the ultimate benefit of the lady and her children. Upon the death, this trust ceased, and the lady became thenceforward for the rest of her life the sole beneficiary in the income of the fund. It is true that before the death the lady had an interest of a contingent character in the income of the fund, since she had a right to have it accumulated so as to provide a fund the fruit of which would, if she survived Mr. Hodson, come to her, but this circumstance would not prevent the change in the beneficial possession of the property as a whole which took place on Mr. Hodson's death from operating as a "passing" of the property on his death. It is settled by the decision of the House of Lords in *Burrell & Kinnaird v. A.-G.* (2), at p. 301 ([1936] 3 All E.R. at p. 765), that the mere fact that a person who becomes entitled to the beneficial enjoyment of property on a death has already before the death had some beneficial interest in the property does not prevent the property from passing under sect. 1. The judge nevertheless felt himself bound to decide that the accumulations fund did not pass under sect. 1. He pointed out that, had there been no life interest given to the lady, and had the only beneficiaries been her children, the fact that, on Mr. Hodson's death, the accumulation ceased would not have resulted in a passing of the fund on his death, in view of the decision in *Adamson v. A.-G.* (3), and so far we find ourselves in agreement with him. He, however, felt himself bound by the decision of this court in 1934 in *A.-G. v. Lloyds Bank, Ltd.* (4) to decide that the *Adamson* case (3) laid down certain principles which prevented him from holding that the change in the beneficial title to, and the possession of, the income of the fund occurring on Mr. Hodson's death resulted in a passing of the property on his death. The principles which, it is suggested, are so laid down may, we think, be thus formulated. If, on the settlor's death, the accumulations cease, that circumstance alone, it is suggested, does not constitute B C D E F G H

a passing. If, on the settlor's death, an interest which was previously defeasible becomes indefeasible, that again, it is suggested, does not constitute a passing. If, on the death, an interest which had previously been deferred in point of possession becomes an interest in possession, that again, it is suggested, does not constitute a passing. If that be a

A correct statement of the principles recognised by this court in *A.-G. v. Lloyds Bank, Ltd.* (4), and if those principles have not been corrected in the House of Lords in subsequent cases, it would seem to follow that, as FARWELL, J., held, a court of first instance ought to apply those principles in the present case. So, applying the principles, FARWELL, J.,

B held that, in the present case, the cesser of the accumulations could be disregarded. There was no question of a defeasible interest becoming indefeasible. There was no doubt that an interest—namely, the life interest of the lady—which had previously been deferred in point of possession, became, on the death, an interest in possession, but that

C *ex hypothesi* did not constitute a passing. We agree that, given the premises, the conclusion follows, and that it may well be that FARWELL, J., sitting as a judge of first instance, had no course open to him other than to decide, as he did, that, on the death of Mr. Hodson, the accumulations fund did not pass for the purposes for the Finance Act, 1894,

D s. 1. Now that the matter is before this court, however, the situation is altered in two respects. The first is this. The decision of this court in *A.-G. v. Lloyds Bank, Ltd.* (4) has been held by the House of Lords to have proceeded upon a wrong construction of the material deed, and that means that the principles enunciated in the judgments in this

E court, though no doubt entitled to the most serious consideration, have been formulated in regard, not to the correct, but to a hypothetical, and in fact erroneous, view of the meaning and effect of the material deed. In our judgment, this circumstance leaves it open to this court to refuse to accept the stated principles as necessarily correct. Another,

F and perhaps a more important, alteration has taken place, however, in the situation. The principles to be deduced from the decision of the House of Lords in the *Adamson* case (3) have been considered by their Lordships and authoritatively expounded by LORD TOMLIN, with the assent of LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN

G and LORD WRIGHT, upon the occasion of the appeal from the very decision in *A.-G. v. Lloyds Bank, Ltd.* (4) already mentioned. Moreover, there are some other recent decisions in the House of Lords which may throw light on the matter. It is necessary to review all these authorities in some detail before coming to a conclusion as to how far,

H in light of them, the principles formulated in this court in *A.-G. v. Lloyds Bank, Ltd.* (4) can be applied without modification to the present case.

In *Adamson v. A.-G.* (3), by a settlement dated Mar. 24, 1924, a settlor had settled a fund in the hands of trustees upon trust for accumulation during his life. On his death, the fund was to be held in trust

for his children. The testator reserved to himself powers of disposition over the capital and income of the fund in favour of the children, but these powers were not exercised. It was held by a majority of the House that the property had passed to the children, subject to various possibilities of defeasance, on the making of the settlement, that, on the death, although those possibilities of defeasance ceased, nothing more happened, and that, in particular, the property did not pass within the meaning of the Finance Act, 1894, s. 1. A

In May, 1934, *A.-G. v. Lloyds Bank, Ltd.* (4) came before this court. The effective trust was to accumulate the income until a mother's death, and thenceforward to hold the fund and the accumulations in trust (as this court construed the trust) for her daughters for life, and, subject to their life interests, for their children and issue. This court held, in effect, that the property had passed on the settlement to the daughters and their children, and that, before as well as after the death, the daughters and their children were the *cestui que trustent*, and that there was no "change" on the mother's death which amounted to a "passing." C
It is to be observed that, before the death of the mother, as each item of income, whether of the original fund or of the accumulations fund, accrued, that item of income had to be capitalised. That is to say (on the construction of the settlement adopted by the court), the three daughters had no interest in it except the right to have it capitalised, and, th's, to have the fruits of it accruing after the mother's death, while the children of the daughters would be entitled (subject, of course, to their parents' life interests) to the items of income in question as capital, with a like title to its fruit accruing before the mother's death. D
Upon the mother's death, an alteration of rights occurred (we pass by, for the moment, the question whether or not the alteration could be said to be such a change as to effect a passing within sect. 1 of the Act), in that, as from the mother's death, the children of the daughters ceased to have any interest, so long as their respective parents lived, in the items of income accruing, whether in respect of the settled fund or in respect of the accumulations. Those items of income, and all like items accruing during their respective lives, became the absolute property of the daughters. E
It will be observed that the mother's death had the direct effect (to be contrasted with the mere abolition of a possibility of defeasance) of placing in the hands and ownership of the daughters the income accruing as from that date, whereas the income accruing previously to that date had, as it accrued, become subject to trusts primarily for the children of the daughters as capital, though no doubt the future fruits (after the mother's death) of the capitalised sums would enure for the daughters' benefit. F
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Whether or not the attention of this court was drawn to the characteristics of the settlement in this form there are no means, so far as the printed reports go, of saying. However, on a study of the judgments of this court, it must, we think, be taken that this court was of the

opinion that it was precluded by the decision in *Adamson's* case (3) from holding that the alteration of rights spoken of above as accruing on the mother's death amounted to such a "change" as to effect a "passing" within sect. 1 of the Act on the mother's death. The case went to the House of Lords, where it would appear from the printed
 A case for the Crown, a copy of which was furnished to us, that the Crown's contention was that the alteration in rights to which we have drawn attention was such a "change" as to effect a "passing" within sect. 1 of the Act. The point is put in detail in the following "reasons," numbered 1, 2, 3 and 4 respectively :

- B 1. Because the decision of the House of Lords in *Cowley v. Inland Revenue Commrs.* (5) established the principle that settled property passes under the Finance Act, 1894, s. 1, to a tenant for life thereof when his life interest falls into possession and the opinions of the majority of the House of Lords in *Adamson v. A.-G.* (3) contain nothing inconsistent with this principle.
- C 2. Because the opinions of the majority of the House of Lords in *Adamson v. A.-G.* (3) are not—as was assumed in the judgments appealed from—founded upon the simple proposition that by the settlement the deceased had in his lifetime wholly divested himself of the property alleged to have passed upon his death, but upon that proposition coupled with the further proposition that the interests of the children of the deceased under the settlement were immediate interests though defeasible during the lifetime of the deceased, and the second of these propositions was and is essential to the decision of the majority of the House of Lords in that case and is inapplicable to the present case.
- D 3. Because the judgments appealed from disregard the essential fact that in the present case the life interests of the children of the deceased under the settlement were reversionary life interests taking effect upon the death of the deceased, and not immediate life interests taking effect upon the execution of the settlement.
- E 4. Because the judgments appealed from involve affirming the proposition (which it is submitted is wholly inadmissible) that settled property can for the purposes of the Finance Act, 1894, pass to a tenant for life thereof as tenant for life before the happening of the event upon which his tenancy for life is limited to begin.

The contention of the subjects is set out in their printed case in the following reasons, lettered C, D and E, respectively :

- C. Upon the death of Mrs. Butler the beneficial interests of the three children and their issue who between them were absolutely entitled to the trust fund and the accumulations of income remained unaltered with this qualification that they
 F were no longer defeasible.
- D. In *Adamson's* case (3) it was held that inasmuch as the settlor in that case had completely divested himself of all beneficial interest in the settled property (the legal title to which was vested in the trustees of the trust instrument) and made a gift of it to the *cestuis que trust* under the settlement in question in that case the change in the character of the interests of the beneficiaries from defeasible to indefeasible interests did not constitute a "passing" of the settled property
 G within the meaning of the Finance Act, 1894, s. 1.
- E. The only difference between *Adamson's* case (3) and the present case is that the interests of the beneficiaries in that case were absolute while in the present case the absolute interest is divided up between tenants for life and remaindermen, and this difference is immaterial to the application of the principle of *Adamson's* case (3) to the present case.

H It would appear from the report of the hearing in the House of Lords that the Crown's case, as argued, consisted in putting to the House the reasons set out above. Counsel for the subjects, so far as the report shows, based their argument on the proposition that the daughters were not persons with reversionary life interests taking effect on the death of the deceased, but took absolute interests, defeasible in the event of the birth of issue or of death without issue, and, if that pro-

position was, on the construction of the settlement, true, the inevitable conclusion, as their Lordships held, was that the interests of the children were absolute, though liable to defeasance *pro tanto* in the relevant events. The death of the mother did not even, on this view of the construction of the settlement, operate to change any interest from a defeasible to an indefeasible interest. It merely operated to stop an accumulation of a fund which, subject to the possibility of defeasance, was, as well after the death as before, the absolute property of the daughters, subject to an accumulation which, as LORD TOMLIN points out, might, as well after the death as before, but for the possibility of defeasance, have been stopped by the daughters. A

The opinion of LORD TOMLIN indicates clearly that, in his view, the question propounded by the Crown in reasons 1, 2 and 3, which I have cited above, did not arise. In those circumstances, the last paragraph but one, in his opinion, becomes most significant. He said, at p. 397 : B

Further, having regard to some of the observations in the courts below, I may perhaps also venture to observe that the *ratio decidendi* in *Adamson v. A.-G.* (3) is not that on the execution of the settlement the beneficial interest in the whole fund passed out of the settlor but that it passed out of the settlor to the children whose interest was the same both before and after the death of the settlor subject only to this, that a possibility of defeasance came to an end with the death and that the cesser of that possibility of defeasance did not constitute a passing. C

It is to be noted that these observations are, at the least, not in conflict with the view that the propositions put forward in reasons 1, 2 and 3 of the printed case for the Crown are sound, but not applicable to the will as the House construed it. The four other learned Lords present expressed themselves as in accord with the opinion of LORD TOMLIN. The decision of the House appears to be quite consistent with the view that, if the true construction of the will had been adopted in the Court of Appeal, the decision would have been in favour of the Crown, and not, as it in fact was, in favour of the subject. D E

In Nov., 1934, after the decision of this court in *A.-G. v. Lloyds Bank, Ltd.* (4), but before the determination of that case in the House of Lords, *Scott & Coutts & Co. v. Inland Revenue Comrs.* (6) came before this court. The matter in question was as to the duty payable on the death of one whom we will, for convenience, call C. Immediately before C.'s death, rents and profits of the estate were receivable by certain trustees, whose duty it was, after keeping down incumbrances, to apply the same at their discretion for the benefit of such members of a defined class of beneficiaries as they might think fit, a class which included C. and C.'s eldest son. On C.'s death, this trust ceased, and the estates became vested in possession in C.'s eldest son as tenant in tail. BENNETT, J., had held that the estates "passed" on C.'s death, and thereupon attracted duty under sect. 1 of the Act. In this Court, his decision was affirmed, and MAUGHAM, L.J., had occasion to express his view of the grounds of the decision in *Adamson's* case (3). He said, at p. 265 : F G H

I think what they held was that upon the death of the settlor in that case the beneficial interests in the property did not pass, because the only effect of the death

was to render impossible the happening of any of the events which would have deprived the successors—if I may so describe them—of their interests. On that view, the property did not change hands. That, I think, in its simplest form is the result of the decision in *Adamson's case* (3).

- Moreover, MAUGHAM, L.J., found no difficulty in accepting the proposition (which, for convenience, we have restated in the terms used above in stating the material limitations in the *Scott case* (6)) that, if the estate is settled upon discretionary trusts for a number of persons during the life of C., and on C.'s death for C.'s eldest son in tail, then, on the death of C., the property passes, and that whether or not C. was an object of the discretionary trusts. The material point on which, in his Lordship's view, attention is to be fixed is the fact that the discretionary trusts came to a complete end on the death of C. The property then, in his Lordship's opinion, changes hands as a whole, and C.'s eldest son, who obviously before the death had no beneficial interest in possession, becomes the tenant in tail in possession of the whole property.
- We may venture to add that there is a further proposition which follows from those thus stated, and which his Lordship would, we think, have affirmed, had it been material to the matter then in hand—namely, that the property changed hands as a whole notwithstanding that the interest of C.'s eldest son, before, as after, the death, was unchanged save only that, from being a future interest, it became on C.'s death an immediate interest in possession. In other words, there will be a passing when the only change is that one interest in possession ceases and another interest in possession (previously a mere interest *in futuro*) takes its place. We mention this merely in order to make clear a proposition upon which some doubt might conceivably have been cast in view of a possible (though, we think, erroneous) construction of certain language used by LORD WRIGHT in *Adamson v. A.-G.* (3), at p. 287.

- In the House of Lords, the judgments of BENNETT, J., and of the Court of Appeal in *Scott & Coutts & Co. v. Inland Revenue Comrs.* (6) were affirmed. It is important to note that in the judgment of the House, delivered by LORD RUSSELL OF KILLOWEN, it is clearly laid down, at p. 182, that, when the estate in tail male of C.'s eldest son became, on the death of C., an estate in tail male in possession, instead of an estate tail in remainder—when, that is to say, C.'s eldest son became entitled to receive the income which, immediately before C.'s death, was primarily applicable for the benefit of the objects of the discretionary trusts—there was a change of hands in the beneficial title or possession of the property as a whole which constituted, as was said by LORD PARKER in *A.-G. v. Milne* (1), at p. 779, a passing of the property on C.'s death.
- LORD RUSSELL OF KILLOWEN then adverted to *Adamson's case* (3) and referred (as we read it) with approval, not only to the pronouncement of LORD TOMLIN in the *Lloyds Bank case* (4), at p. 397, but also to the observations, which we have ventured to abstract above, of MAUGHAM, L.J., in the case under consideration. His Lordship then proceeded to state once more the foundation of the decision in *Adamson's case* (3),

and pointed out, as we read his observations, that that case covers, and covers only, a case where it can be predicted that the beneficiaries both before and after the death were the same, and that their interests both before and after the death were the same, save only that their interests which before the death were subject to alteration or defeat ceased, on the death, to be so subject. No "changing hands" resulted from the possibility of alteration or defeat having been eliminated, and therefore there was no "passing" on the death. A

We do not find it necessary to deal in detail with any other reported cases on this topic. It is sufficient to note that in *De Trafford v. A.-G.* (7) the House of Lords, a few days before the decision in *A.-G. v. Lloyds Bank, Ltd.* (4), found no difficulty in holding that, whereas before the relevant death the rents and profits of certain equities of redemption were subject to trusts, first for payment thereof of £8,000 per annum to the date of the relevant death, and next for the application thereof on various discretionary and other trusts, there was a "passing" of the whole of the equities of redemption (including the "slice" required to provide the £8,000 per annum) when, on the relevant death, the £8,000 per annum ceased to be payable and the remaining trusts of the rents and profits came to an end, and the beneficiary of the £8,000 annuity became tenant for life in possession of the whole of the rents and profits of the equities of redemption. The decision is, of course, completely in line with the later decision of the House of Lords in *Scott & Coutts & Co. v. Inland Revenue Comrs.* (6), and merely emphasises the position that, if the death is the occasion of a future life interest becoming a life interest in possession, the death is the occasion of such a "change of hands" as results in a passing within sect. 1 of the Act. This position is again emphasised by the decision of the House of Lords in *Burrell & Kinnaird v. A.-G.* (2), where, however, the case was not one in which, on the relevant death, a simple life interest came into possession. The matter was complicated by the fact that the life interest which came into possession was an interest *pour autre vie* in trustees charged with the duty of applying the income during the continuance of their interests for the benefit of certain beneficiaries, some of whom had, during the period immediately before the relevant death, been similarly interested under a like trust, which came to an end on the relevant death. D E F G

This lengthy survey of the authorities leads us to the conclusion that, omitting for the moment the judgments of this court in *A.-G. v. Lloyds Bank, Ltd.* (4), the decided cases not only contain nothing inconsistent with the view which we have expressed above—namely, that in the present case the accumulations fund "passed," within the meaning of the Finance Act, 1894, s. 1, on Mr. Hodson's death—but also make it necessary for this court so to decide. In our judgment, this court is bound, in view of the later authorities, to hold that the view taken by this court in *A.-G. v. Lloyds Bank, Ltd.* (4) of the principles to be applied in such cases as the present must now be recognised to have been H

- deficient, in that it failed to bring out the crucial point that, in order to arrive at a correct decision, attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death effected an alteration in rights, as distinguished from merely removing the possibility of an alteration. Accordingly, if the persons beneficially interested are the same both before and after the death, and if the death merely removes the possibility of an alteration of their rights, as was, in the view of the House of Lords, the case in *A.-G. v. Lloyds Bank, Ltd.* (4), there is no passing; whereas in the present case, while the beneficiaries are, no doubt, the same before and after the death, but the death brings to an end one set of trusts of income and shifts the beneficial interest in the income to the possession of one who (though no doubt previously a contingent beneficiary) had no beneficial interest in possession before the death, there is a "passing" within sect. 1 of the Act. For these reasons, we are of opinion that the first declaration in the order of FARWELL, J., dated May 25, 1938, should be discharged, and that a declaration should be substituted that estate duty is payable upon the death of Mr. Hodson in respect of the accumulations fund under the Finance Act, 1894, s. 1, on the principal value of that fund. ✓

- The second question raised by the summons turns on the application to the facts of the case of the Finance Act, 1894, s. 4. The material provisions of that section, as amended by subsequent Acts, are (a) that, for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof, but (b) that any property so passing in which the deceased never had an interest shall not be aggregated with any other property, but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof. The necessity for some such provision in order to obviate the grossest injustice seems obvious. It has not been uncommon to find provision in wills and settlements for the continuance of a certain set of trusts during the life of the survivor of a class—for example, descendants of King Edward VII living at the date of the settlement—followed by different trusts to arise on that survivor's death. Such a disposition might well result in a passing on that survivor's death. Were it not for some such provision as that made in sect. 4, the beneficiaries under the will of the survivor of the class might find themselves saddled with duty at a very high rate through the action of strangers in indicating—as the event happens—their testator as the person on whose death the property of an entire stranger was to pass.

It is, we venture to think, permissible, in construing the section, to bear its obvious legislative genesis in mind. This does not, however,

dispense the court from the necessity of ascertaining the fair meaning of the expressions used in the section, in its application to the facts of the particular case under consideration. It was argued that the words must be read with the utmost strictness, and that the court was bound to examine the items comprising the property which passes in order to ascertain whether or not the testator ever had an interest in each such item of property. It was suggested that, if a settlor settles £10,000 consols, and in due course, in accordance with the trusts, the consols are sold and the proceeds invested in local loans, and thereafter the event of passing occurs, the court is bound to treat the local loans as "property in which the deceased never had an interest." It was said that, if the deceased left estate which comprised, among other items, a policy of insurance on his own life, the proceeds of an action by his executors against the insurance company on the policy must be treated by this court as "property in which the deceased never had an interest." It was accordingly argued, applying this construction to the present case, that it was impossible to say that Mr. Hodson ever had an interest in the accumulations fund, since the accumulations fund necessarily arose after he had, by the execution of the settlement, parted with all ownership in the fund from which the accumulations arose. We cannot bring ourselves to believe that this court is bound to construe the phrase with such paradoxical narrowness. In different circumstances, different tests may well be applicable. However, there was one test suggested by counsel for the Crown as being properly applicable to the facts of the present case which, in our judgment, may fairly be adopted, without prejudice, of course, to the adoption of other (and perhaps wider) tests in the appropriate circumstances. That test is to ask in whose favour there would be a resulting trust of the accumulations fund in case all the beneficiaries under the disposition under which the property passes were to disclaim the benefits conferred on them by the disposition. It was suggested that, if the answer is (as, of course, it must be) that the resulting trust would be in favour of the deceased, or in favour of his representatives as such representatives, the court would be bound to hold that the property is property of which it would be untrue to say the deceased never had an interest in it. In our judgment, that test is a sound one in this particular case, and is in consonance with the intentions of the legislature, as properly gathered from the language of the section. To apply that test is to treat the legislature as fixing attention, not on the items which make up the corpus which passes on the death, but on the corpus which is the subject-matter of the disposition under which the "property passed" on the death, the identity of the individual items, varying, no doubt, from time to time as changes of investment take place, being of no consequence as compared with the identity of the corpus as that which was originally the subject of the disposition, and is the object which passes. If it be right to treat the "property which passes" as the identifiable corpus, and thus to hold

that the person who owned this corpus in its original form must be treated as "having had an interest" in this corpus, it having been his property before the creation of the trust, it surely must be right to treat the future produce of this corpus as something in which the original owner of the corpus cannot truly be said never to have had an interest.

- A The test thus applied disposes of the dialectical difficulty raised by the suggestion that a settlor can be said never to have had an interest in the fund of local loans into which the original trust fund consisting of consols has by reinvestment been converted, and also disposes of the like difficulty raised by the suggestion that the owner of a policy of insurance on his own life cannot be said ever to have had an interest in the money recovered after his death from the insurance company. The truth is that the application of the test of what would occur on disclaimer brings out the fact that the beneficial interests in the accumulations fund, the local loans and the policy moneys in the various examples taken, flow from the ownership of the settlor in the original settled funds and the policy respectively, and have come into being by reason of his action in creating the settlement. The person who planted the tree cannot be said never to have had an interest in its future fruit, though the fruit may not mature until long after he has, in virtue of his ownership of the tree and of all its future fruit, alienated the future fruit.

- The point has been the subject of decision in *A.-G. v. Dickinson & Baron* (8), where LAWRENCE, J., was dealing with a case where the property in question passed under the Finance Act, 1894, s. 1, and came to the same conclusion as that which we feel bound to reach. FARWELL, J., having held that sect. 1 does not apply to the present case, considered that the decision in *A.-G. v. Dickinson & Baron* (8), relating, as it did, to a case to which sect. 1 was applicable, was not binding on him, and proceeded to consider sect. 4 in its application to a case under sect. 2. We agree with FARWELL, J., that the fact that in *A.-G. v. Lloyds Bank, Ltd.* (4) the point was not pressed—indeed, it seems to have been abandoned by the then advisers of the Crown—cannot be regarded as in any way conclusive. Treating the present case as one in which the property did not pass under sect. 1 of the Act, but as one in which an "interest provided by the settlor" passed under sect. 2 (1) (d), FARWELL, J., held that the settlor never had an interest in that which passed. In the view that we take—namely, that the property passed under sect. 1—it is not necessary to deal with the hypothetical case of sect. 2 being applicable. We agree with FARWELL, J., that the conclusion which LAWRENCE, J., reached, and which we have reached, as to the proper construction of sect. 4 in its application to the case now before this court of property which passes under sect. 1 does not necessarily cover the question as to the application of that section to property which is deemed to pass under sect. 2 (1) (d). We must not, however, be understood to agree with the view of FARWELL, J., on the latter question. As the point does not arise in this case, we express no opinion upon it.

In our judgment, the second declaration in the order of FARWELL, J., of May 25, 1938, should be discharged, and there should be substituted a declaration that the accumulations fund ought to be aggregated so as to form one estate with the other property which passed on Mr. Hodson's death. It will follow that the costs of the Attorney-General in respect of the summons and of this appeal must be paid by the plaintiff, Mr. Brookes. A

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Cannon Brookes & Odgers* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.] B

R. v. WESTON-SUPER-MARE LICENSING JUSTICES, *Ex parte* POWELL.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), **January C**
12, 13, 20, 1939.]

Intoxicating Liquors—Licensed premises—Alterations—Alterations involving extension of licensed premises—Jurisdiction of justices—Licensing Act, 1902 (c. 28) s. 11—Licensing (Consolidation) Act, 1910 (c. 24), s. 71.

A licensee of licensed premises made an application to the local justices for approval of certain alterations to the premises, involving the inclusion of certain adjoining premises, which had hitherto been entirely separate from the licensed premises, and an enlargement of the existing saloon bar. Plans of the proposed alterations were duly deposited with the clerk to the justices. The justices came to the conclusion that they had no power to grant the application, as the bulk of the alterations was to premises not already licensed, but they were ready to approve the alterations in so far as they related to the premises already licensed :— D

HELD : (i) the words "in the premises" in sect. 71 of the Act should be construed so as to extend, not only to alterations inside the physical premises before the time of the proposed alterations, but also to the premises as they will be when altered. E

(ii) the justices may, in the exercise of their jurisdiction under the Licensing (Consolidation) Act, 1910 (c. 24), s. 71, consent to any alteration, provided that the premises, when altered, will still be within the ambit of the licence. They had, therefore, jurisdiction to hear the application in the present case. F

(iii) (*per* DU PARCQ, L.J.) the justices, having misinterpreted the statute, and declined jurisdiction, could not be said to have "heard and determined" the case. G

Decision of the Divisional Court (LORD HEWART, L.C.J., CHARLES and MACNAGHTEN, JJ.) ([1938] 4 All E.R. 133) *reversed*.

[EDITORIAL NOTE.] The Divisional Court were of opinion that the power to alter licensed premises with the consent of the licensing justices was confined to alteration "in" the licensed premises, and did not extend to additions to existing licensed premises. The Court of Appeal have found that this is too narrow a view. Before 1902, the licensee altered or extended premises at his peril, and, if the justices later found that the premises were not substantially the same as those previously licensed, they refused to renew the licence. The Act of 1902 enacted, for the first time, that the licensee must obtain the consent of the justices to any proposed alteration, and the court has held that the criterion of what is an alteration must be fixed by H

the principle adopted in the cases prior to 1902—that is to say, that an addition or extension of premises is allowable provided the licensed premises are substantially the same as those existing before the alteration.

AS TO ALTERATIONS IN LICENSED PREMISES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 38, 39, paras. 102-104; and FOR CASES, see DIGEST, Vol. 30, pp. 44, 45, Nos. 339-344.]

A Cases referred to :

(1) *R. v. Southampton JJ., Ex p. Customs and Excise Comrs.* (1931), [1939] 1 K.B. 192, n.; Digest Supp.; *sub nom. R. v. Isle of Wight JJ.* (1931), Br. Tr. Rev. 474.

(2) *R. v. Raffles* (1876), 1 Q.B.D. 207; 30 Digest 43, 330; 45 L.J.M.C. 61; 34 L.T. 180.

B

(3) *R. v. Taylor, R. v. Amendt*, [1915] 2 K.B. 593; 30 Digest 35, 272; 84 L.J.K.B. 1489; 113 L.T. 167.

(4) *Jones v. Brown* (1848), 2 Exch. 329; 42 Digest 641, 451; 17 L.J. Ex. 163; 11 L.T.O.S. 129.

(5) *R. v. Smith* (1866), 15 L.T. 178; 30 Digest 42, 329.

C

(6) *Ballam v. Wiltshire, R. v. Hampshire JJ.* (1879), 44 J.P. 72; 30 Digest 43, 332.

(7) *Marshall v. Spicer* (1911), 103 L.T. 902; 30 Digest 44, 341.

(8) *R. v. Bradford JJ.* (1896), 74 L.T. 287; 30 Digest 43, 334.

(9) *Bushell v. Hammond*, [1904] 2 K.B. 563; 30 Digest 44, 342; 73 L.J.K.B. 1005; 91 L.T. 1.

D

(10) *Smith v. Portsmouth JJ.*, [1906] 2 K.B. 229; 30 Digest 45, 343; 75 L.J.K.B. 851; *sub nom. Smith v. Couzens, etc., Portsmouth Licensing JJ.*, 95 L.T. 5.

(11) *R. v. Watford Licensing JJ., Ex p. Trust Houses, Ltd.*, [1929] 1 K.B. 313; Digest Supp.; 98 L.J.K.B. 198; 140 L.T. 350.

(12) *Kingsland v. Haben* (1904), 90 L.T. 449.

APPEAL from a decision of a Divisional Court (LORD HEWART, L.C.J., CHARLES and MACNAGHTEN, JJ.), dated Oct. 27, 1938, and reported [1938] 4 All E.R. 133, refusing to make absolute a rule *nisi* granted at the instance of William Herbert Powell, the licensee of the Three Queens Hotel, Weston-super-Mare, calling on the licensing justices for the Weston-super-Mare petty sessional division to show cause why a writ of *mandamus* should not issue commanding them to hold a transfer sessions meeting to hear and determine an application by the said licensee under the Licensing (Consolidation) Act, 1910, s. 71, for the approval of the justices to certain alterations at the hotel.

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Hon. Sir R. Stafford Cripps, K.C., R. F. Lyne and Anthony Cripps for the appellant.

G

The Attorney-General (Sir Donald Somervell, K.C.) and Valentine Holmes for the respondents the Customs and Excise Commissioners.

P. Colin Duncan for the respondents the licensing justices.

Sir Stafford Cripps, K.C. : It is important to realise what is meant by licensed premises. The premises extend to all the curtilage as well as to the buildings. In *Marshall v. Spicer* (7), they were held to extend to 11 acres. [Counsel referred to *R. v. Raffles* (2), *R. v. Smith* (5), *Ballam v. Wiltshire, R. v. Hampshire JJ.* (6) and *R. v. Bradford JJ.* (8).] The Licensing (Consolidation) Act, 1910, s. 71, must be read in a practical way—that is to say, so as to allow improvements to be made

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in licensed premises, and not so, as to prevent their being made. The word "in" must not be construed too narrowly. It means "to," or "of," or "in." *R. v. Isle of Wight JJ.* (1) was dealing with a different problem. [Counsel also referred to *Bushell v. Hammond* (9), *Smith v. Portsmouth JJ.* (10) and *R. v. Watford Licensing JJ., Ex p. Trust Houses, Ltd.* (11).] A

The Attorney-General: In *Bushell v. Hammond* (9), the court was construing the Licensing Act, 1902, s. 11 (4), and the construction there of the word "in" is of no assistance here. There is a distinction between an alteration and an addition in respect of licensed premises. There is nothing to prevent a licensee from getting a licence for a geographical addition to licensed premises. There is then no need to pay a monopoly value on the whole premises. B

Holmes: The licensed premises can always be defined. Here the justices have made it clear that the proposed alterations are not entirely to the licensed premises because a part is an addition to them. C

Duncan: A part of the proposed alterations provided increased drinking facilities, and required the justices' consent. It also involved an addition to licensed premises. It is necessary to examine closely the meaning of the word "in." Even if "alterations in" can mean "alterations of," that cannot extend to these additions. It may be necessary for the court to consider, not only the meaning of "in," but also the meaning of "in premises," "in licensed premises," and "in premises in respect of which a justices' licence is in force." Some meaning must be attached to the words "in respect of which a justices' licence is in force," because the phrase "licensed premises" is defined in the definition section of the Act. An application could have been made under sect. 71 to approve the alterations which were within the licensed premises, but the justices were right to refuse to hear the present application. [Counsel referred to *Kingsland v. Haben* (12) and *R. v. Raffles* (2).] D

Cripps, K.C., in reply: The 1910 Act was a consolidating Act, and was not intended to introduce a fundamental change of law. It was intended to continue the practice which had been in existence for many years. The doctrine of *R. v. Raffles* (2) still survives. A licensee cannot surrender his licence and then obtain another one on better terms. [Counsel referred to *R. v. Taylor*, *R. v. Amendt* (3).] E F

SLESSER, L.J.: This is an appeal from a judgment of the Divisional Court refusing a writ of *mandamus* to the licensing justices for Weston-super-Mare, commanding them to hold a transfer sessions meeting and hear and determine an application under the Licensing (Consolidation) Act, 1910, s. 71, for the approval of the justices for certain alterations sought to be made at the Three Queens Hotel, Weston-super-Mare. The proposed alterations, as shown on a plan annexed to the application, would require the enlargement of an existing saloon bar within the present premises and also the inclusion of certain premises adjacent, G H

which are entirely separate from the existing licensed premises. It was stated and held that the proposed alterations would increase the facilities for drinking.

A The justices, while prepared to agree to the alterations in so far as they were alterations in the existing licensed premises, nevertheless came to the conclusion that they had no jurisdiction to give their consent to the alterations in general, basing their decision on *R. v. Southampton JJ., Ex p. Customs and Excise Comrs.* (1). In a memorandum of their decision taken from their minute book, they are reported to have announced their decision in the following terms :

B (i) that the contemplated alterations in this case would not destroy the identity of the premises as already existing ; and (ii) that the alterations to the licensed premises are necessary and desirable. They have, however, come to the conclusion that in view of the decision in *R. v. Isle of Wight JJ.* (1), they have no power to grant the application as the bulk of the alterations are to premises not already licensed. The justices would be prepared to consent to the alterations so far as they relate to the premises already licensed.

C The jurisdiction of the justices to sanction alterations is to be found in the Licensing (Consolidation) Act, 1910, s. 71 (1), which provides as follows :

D An alteration in any licensed premises in respect of which a justices' on-licence is in force, which gives increased facilities for drinking . . . shall not be made without the consent of the licensing justices. . . .

E This section is a repetition of the Licensing Act, 1902, s. 11 (2). Before the passing of that Act, there was no necessity to obtain the consent of the justices at all, though, if the alterations had the effect of destroying the identity of the premises, the sale of intoxicating liquors in the enlarged house might amount to the offence of selling intoxicating liquors at a place not authorised by licence.

F It was decided in *R. v. Raffles* (2) that whether the premises for which the licence is granted and the enlarged premises subsequently used are the same is a question of fact (*per* COCKBURN, C.J., at p. 208), and that an addition to the premises in the nature of an improvement, which would yet be within the description covered by the licence, might not destroy the identity of the premises as a whole, and so be protected by the original licence. In the present case, the justices have, I think, proceeded logically in considering, first, whether or not the contemplated alterations in the present case would destroy the identity of the premises covered by the licence within the meaning laid down in *R. v. Raffles* (2). Had they come to the conclusion that the premises so altered would not be covered by the licence, it would follow that any alteration sought would be beyond their powers to sanction, as it could not, on any view, be said to be an alteration in the premises within the meaning of sect. 71 of the 1910 Act. However, as I have said, they were of the contrary opinion, holding that the licence would cover the premises as proposed to be extended. Therefore, in this case the sole question for consideration is whether, in those circumstances, the words " alteration in the premises " are to be construed so narrowly as to limit the justices' consideration

to internal alterations in the existing physical premises, or whether they are to be given the more liberal construction that there may be sanctioned an alteration which, if it were made, would yet bring the premises so altered within the area covered by the licence. In my view, the latter construction is correct. That is, the word "in" in the words "in the premises" should be construed to extend, not only to alterations inside the physical premises before the time of the proposed alteration, but also to the premises as they will be when altered. A

If this consent cannot in law be given, the result, at any rate before the passing of the 1910 Act, would have been very serious, for the definition of a new licence in the Licensing Act, 1874, s. 32, would apparently have prevented the applicants from obtaining a new licence in respect of the additions, if such additions, when made, would in fact be covered, as here proposed, by the existing licence, because a new licence is there defined as one "in respect of premises in respect of which a similar licence has not theretofore been granted," so that the licensee would have been precluded for want of capacity to obtain consent to add to the area of his existing premises, and also would have been unable to obtain a new licence solely in respect of the additions. C
Moreover, if *R. v. Taylor* (3) be rightly decided, he could not obtain a new licence for the premises as altered, as that would be to ask for a new licence for premises already covered by the existing one, with the result that all improvement by external addition, where increased facilities for drinking were to be given, would be well-nigh impossible. D
It is true that, by the Licensing (Consolidation) Act, 1910, Sched. VII, this definition of new licence in the 1874 Act is repealed, and the expression "justices' licence" in sect. 110 of that Act has no such limitation. E
However, inasmuch as the Licensing Act, 1910, is expressed to be a consolidation Act, the fact that from 1902 to 1910 the construction which has found favour with the Divisional Court would have made it nearly impossible for the licensee, in such a case as this, to obtain consent for his proposed additions either under sect. 11 (2) of the 1902 Act or by way of a new licence raised a strong presumption that the consent to alterations which was made necessary for the first time in 1902 was never intended to be limited in the way contended for by the Attorney-General, and that the 1910 Act has merely repeated in sect. 71 (1) the legal effect of sect. 11 (2) of the 1902 Act. F G

Finally, it was contended by the Attorney-General that the principle enshrined in *R. v. Raffles* (2) and other subsequent cases (to the effect that the licence may, on the facts of a particular case, be held to extend to additions or improvements of the original physical premises) is no longer law, by reason of the fact that by that Act it is required that, on application for a new licence, it is necessary that, before the application is made, there shall be deposited with the clerk of the licensing justices a plan of the premises in respect of which the licence is to be made (sect. 15 (1) (d)). Such a provision is to be found in the Licensing H

Act, 1902, s. 11 (1), and it is said that no case following the decision in *R. v. Raffles* (2) has been decided since that date. In my view, this argument is fallacious. Where a licence does not contain specific metes and bounds, it is still granted in respect of named licensed premises without any reference to boundaries defined by a plan, and such justices'

A licences, by sect. 42 (1) of the 1920 Act, are to be in such form as may be prescribed by the Secretary of State. Such forms still speak of "an excise licence to sell beer at the established premises situated at . . .," to which may be added "known by the sign of . . ." (see Form 1 and Appendices A and B). It is true that, under sect. 15 (1) (d) of that Act, a plan in respect of which the application is made is to be deposited, but this in no way affects the question whether, the licence being granted therefor, sanctioned additions or improvements to such physical premises so shown by plan may not thereafter be made which will be covered by the original licence.

C The case of *R. v. Southampton JJ., Ex p. Customs and Excise Comrs.* (1), which the justices, and, I think, the Divisional Court, here purported to follow, was one where the additions sought to be made extended to connect with the main structure a separate villa, which immediately adjoined the hotel and which it was proposed to attach thereto. It was argued for the applicant that there was there proposed no such addition to the premises as would destroy their identity, and that the Totland Bay Hotel would still be the Totland Bay Hotel, with the addition to it. The then Attorney-General contended that what was sought was not alteration to licensed premises but the taking in of a building hitherto entirely unlicensed. He said that this question was one of degree and fact, and he seems to have conceded that, if the additions were within an area covered by the licence, the justices might have given their consent. AVORY, J., pointed out that sect. 11 of the Act of 1902 was in its very terms distinguishing between alterations in existing premises which are already licensed and new licences which may be granted for other premises, and HUMPHREYS, J., said that, in his view, the plans which were deposited with the justices showed that it was not proposed to make any alteration which would not come within sect. 71 (1) of the Act of 1910. In the present case, the Divisional Court seem to follow the decision in the *Southampton* case (1), but, for myself, I am by no means sure that that case assumed, as does the present one, that the alterations, when made, would bring the whole physical premises within the licence, and that doubt is sufficient to distinguish that case. If it did have the wider intention, I think that it was wrongly decided.

H On the construction of sect. 71 of the 1910 Act which I adopt, I have come to the conclusion that it is competent for the justices to give their consent to an alteration in the physical premises once they have come to the conclusion that the proposed alteration, on being made, would bring the altered premises within the ambit of the licence, and that, accordingly, the rule must go to the justices to hear and determine.

As regards the costs, we are of opinion that the appellant is entitled to his costs from the respondents both here and below, and that in the court below the costs of the justices should be paid by the respondents, but that in this court there should be no order as to the costs of the justices.

CLAUSON, L.J. : At the conclusion of the arguments in this case, counsel for the appellant had failed to satisfy me that the decision of the Divisional Court was wrong. I could see no answer to the simple and attractive view, pithily expressed by CHARLES, J., that, in the Licensing (Consolidation) Act, 1910, s. 71, the word "in" does not con-
 note "out" or "outside", and that that section does not cover alterations
 outside the licensed premises as existing at the date of the application
 made to the justices under sect. 71. On a fuller consideration of the case
 law as it stood at the time when the Licensing Act, 1902, s. 11 (now
 represented by the Licensing (Consolidation) Act, 1910, s. 71) received
 the Royal assent, I am satisfied that the attractive simplicity of this
 view of the section is fallacious, and that to attribute to the word "in"
 the narrow sense adopted by the Divisional Court is to misinterpret
 the intention of the legislature as expressed in the section. In inter-
 preting that intention, regard must be had to the law as Parliament
 must be taken to have known that it stood when it adopted the language
 which appears in the section : see *Jones v. Brown* (4), at p. 332.

At first sight, one might be tempted to think that, where a justices' licence authorises the licensee to hold an excise licence for the sale of intoxicating liquors on premises described as Blackacre, it must be
 construed as authorising such sale on the premises which, at the date
 of the issue of the justices' licence, are known as Blackacre. A different
 view of the construction of the licence is, however, possible. It may
 be that the authority given in relation to the sale of intoxicating liquors
 on premises described as Blackacre may be—or, indeed, ought to be—
 construed as a licence in relation to the sale of intoxicating liquors on
 premises which at the date of the sale of the liquor are known as Blackacre.

The question came up in 1866 in *R. v. Smith* (5), and again in 1876 in *R. v. Raffles* (2), and it was determined by the High Court that, if, at the moment of sale, the premises then known as Blackacre are as
 a matter of fact substantially the same as the premises known as Black-
 acre at the date of the issue of the licence, the licence must be construed
 as relating to sale on the premises known as Blackacre at the moment of
 sale. If, as a matter of fact, in the opinion of the tribunal of fact (which
 will usually be the justices), the premises are substantially the same at
 the time of the sale as they are at the time of the licence, it matters
 not that an area of considerable size, in a purely geographical sense,
 has been added to the premises : see *Ballam v. Wiltshire, R. v. Hampshire JJ.* (6). My attention has not been called to any case in the Court of
 Appeal in which the point was expressly considered, and it is unnecessary

- to go at length through the many cases in the High Court in which this construction of the usual form of justices' licence was adopted. The original section, which is now represented by the section which falls to be construed in the present case, was enacted in 1902. At that date, it must, I think, be taken to have been settled law for at least a quarter
- A of a century that the true construction of a justices' licence is as I have stated it. From this, it follows that at that date the settled law was that any holder of a justices' licence could make any alteration he pleased to his licensed premises, whether internally or by way of external addition, including an increase of area, and, provided that the altered
- B or extended premises were as a matter of fact substantially the same as the premises existing when the licence was granted or renewed, the altered or extended premises had to be treated as the area in which intoxicating liquor could, by virtue of the justices' licence, and the appropriate excise licence, be lawfully supplied.
- C In this state of the law, the legislature, being fully aware, as must be presumed, of the fact that a licence-holder could alter or extend his premises so long as the alteration or extension left them substantially the same, and that the altered premises, or the premises as extended, would be as fully covered by the licence as if there had been no alteration
- D or extension, enacted the relevant section, which, in the case of certain specified classes of alterations—for example, alterations which would give increased facilities for drinking—forbids alteration without the consent of the justices. The alterations are spoken of as alterations “in” licensed premises. There is no doubt that a possible construction
- E of the section is that adopted by the justices and the Divisional Court—namely, that the prohibition is merely a prohibition against alterations of this particular type within the perimeter of the licensed premises, and that, while the legislature wished to prevent the licensee from increasing drinking facilities within that perimeter without the justices' consent, it intends that he should be free, without any such consent,
- F to increase drinking facilities by extending his premises within the limits as to substantial identity recognised as permissible by law, provided only that the increased drinking facilities are given in the added area. It seems hardly possible to attribute such an intention to the
- G legislature. If there is any alternative interpretation which can reasonably be given to the words, and which will avoid the attribution of such an intention to the legislature, there is a very strong case for preferring it. In my judgment, it is quite possible, and it is right, to read the words as the precise equivalent of the phrase: “Licensed premises shall not,
- H without the justices' consent, be altered so as to give increased facilities for drinking.” It may be that it would have been better to use the preposition “to” than to use the preposition “in,” but, pedantry apart, it appears to me that I can as truly say that I am making an alteration in my house when I am throwing out a bow window as I can so say when I am knocking down an internal partition. I accordingly

read the words "alteration in" as equivalent to "alterations (including extensions) of," and then I am able to read them as carrying out what I am convinced must have been the intention of the legislature.

It remains to apply the law as I understand it to the present case. The applicant to the justices is the licensee of the Three Queens. He proposes to extend the Three Queens by adding to the house as it now stands an excrescence the addition of which, as the justices appear to have intended to find, will leave the extended premises substantially the same as the unextended premises. The justices appear to be satisfied that, although the extension will increase the drinking facilities, it is in fact an unobjectionable extension, and they appear to be prepared to consent to the extension and its lay-out as indicated on the plans placed before them. However, they considered themselves constrained by the decision of the Divisional Court in *R. v. Southampton JJ., Ex p. Customs and Excise Comrs.* (1) to hold that they must construe the words "an alteration in any licensed premises" as meaning "an alteration within the perimeter of the licensed premises as existing at the time of the application," and on that ground they felt bound to abstain from consenting to the proposed alterations, extending, as they do, to an extension outside that perimeter. I admit that, having regard to the decision cited, it is not easy to see how the justices could have taken any other course, and I do not propose to lengthen this judgment by a consideration of that decision, which proceeded in substance on the same grounds as those of the decision under appeal. On an application for a *mandamus*, the Divisional Court has held, on the ground which I have mentioned above in the terms so pithily and attractively stated by CHARLES, J., that the justices took a correct view of the law. I have explained the grounds which seem to me to make it necessary for this court to hold that view of the law to be incorrect. In my judgment, the appeal should be allowed, and the *mandamus* should be issued.

DU PARCQ, L.J. : The question for our decision may be stated as follows : Do the words contained in the Licensing (Consolidation) Act, 1910, s. 71 (1)—"an alteration in any licensed premises in respect of which a justices' on-licence is in force"—include an alteration of such premises by their extension beyond their existing bounds, or is their application limited to internal changes within the four walls of the existing structure ? Inasmuch as the Act of 1910 is a consolidating Act, the question may be considered with reference to the Licensing Act, 1902, s. 11 (2), and it becomes necessary to take into account the state of the law when the Act of 1902 was passed. Before its enactment, no application to licensing justices to sanction alterations was necessary, and such an application was possible only in the sense that a practice had grown up by which justices, though without any statutory authority so to do, sometimes indicated their approval of plans submitted to them. If a licensee chose to make changes in the licensed premises, he ran two

risks. First, he might be convicted of selling liquor on unlicensed premises, on the ground that the premises, as altered, were no longer substantially the same as those licensed. Secondly, the licensing justices might refuse to renew the licence when application was made for a renewal. It is obvious that this state of things was inconvenient and unsatisfactory, whether considered from the point of view of public, or from that of private, interest.

The Act of 1902 first made it obligatory upon the licensee, before he made "any alteration in" the licensed premises which came within the categories now set out in sect. 71 of the 1910 Act, to obtain the consent of the licensing justices. He might still without their consent make any alteration in the licensed premises which did not fall within those categories. If the judgment of the Divisional Court is right, no jurisdiction was conferred on the licensing justices to deal with an application to alter the premises when one effect of the alteration would be to enlarge their boundaries. The appellant contends that, under the Act of 1902 and the Act of 1910, the justices have jurisdiction to entertain such an application, provided that the proposed extension is not such as will, in the words of FIELD, J., in *R. v. Raffles* (2), "destroy the identity" of the licensed premises. I have come to the conclusion that the appellant's contention is right, and that the judgment of the Divisional Court is based upon an erroneous construction of the section. In my opinion, there is no difficulty about giving to the words "alteration in premises" the same meaning which the words "alteration of premises" or "alteration to premises" would bear. I believe it to be in accordance with common and correct usage to speak of changes or alterations "in" a house, though the reference is not to a diminution, or internal remodelling, but to an enlargement of the premises, and to an enlargement, it may be, which has necessitated the acquisition of some part of the adjoining land. I think that, except for controversial purposes, few people would say that the addition of a bay window or a porch, if it entailed an extension beyond the original boundary of the premises, was not an alteration "in" premises. The strictest of purists would hardly maintain that it should rather be described as an alteration "outside" the premises.

It was argued, however, that the words which follow in the section, amplified, as they must be, by the addition of words from the definition in sect. 110, are fatal to the appellant's contention. If it is granted that the words "alteration in" may include an alteration which amounts to an extension, provided that the identity of the premises is not destroyed. I confess that I cannot see the difficulty which the later words are supposed to create. On any view of the section, it is of the essence of the licensee's application that the premises as they existed when the licence was granted are to undergo a change. After the alteration has been made (whether it be wholly or only partly internal), they will in one sense no longer be the same premises. In another, and no less practical,

sense, they remain the same, provided that their identity is not destroyed. Nobody doubts that the justices may sanction a remodelling of the interior of the premises, the result of which will be a building different from that in respect of which a licence was granted and (in the case of a licence granted after 1910) possibly unrecognisable from the plans deposited under sect. 15 (1) (d). I hope that I am not doing an injustice A to the respondents' argument when I say that it provided no clear answer to the question whether or not the addition of an upper storey or a cellar would be within the section. In my opinion, the object of the section was that the justices should be empowered to decide the question whether the proposed changes were such that the licence might B properly remain in force in respect of the altered premises, and it is immaterial whether the result of the alteration will be to enlarge the building or only to change it internally.

It is interesting to notice that in 1931 the then Attorney-General, in his argument for the Crown in *R. v. Southampton JJ., Ex p. Customs and Excise Comrs.* (1), appears to have assumed that such a change as has been made in the present case might properly be approved by the justices. Referring to the case of the Totland Bay Hotel in the Isle of Wight, which was then being considered, the Attorney-General said : C

It is not a case at all of merely knocking a door through adjoining premises. I can conceive that there might be a very large region which properly is a question of fact, because it is a question of degree. If you take in an adjoining room, as one of the judges says: Does that destroy the identity of the old premises? No. Where do you draw the line? If you take in an adjoining house, does that destroy it? No, some of the cases say. Till at last you get to a point when, like all points of degree, difficult though it is to draw the line, it becomes perfectly obvious to any reasonable person that a given case must fall definitely on one side of the line. D E

This cannot, of course, be relied on as an authoritative statement of the law. I quote it because it puts plainly the view of the law which I hold to be correct, and also because it usefully emphasises the distinction between the facts of this case and those of the *Isle of Wight* case (1).

If there can be said to be any ambiguity in the words of the section, and if it is asked which meaning is the more probable, having regard to what may be supposed to have been the intentions of the legislature, it seems to me that the answer cannot be in doubt. The inconvenient, not to say absurd, results which would follow if the respondents' contention were right have already been sufficiently stated. It was suggested G by the Attorney-General that a licensee might safeguard himself by obtaining a new licence merely in respect of the addition to the existing premises. This is really not a practical proposal. Sect. 37 of the Act of 1910 would be fatal to such an application in most cases, and, apart from the difficulties created by that section, justices might well hesitate H to grant a new licence in respect of, say, half a bar parlour, a cloak-room, and a lavatory.

On the other hand, the contention which this court is adopting gives rise to no practical difficulty. The public interest will be fully protected. Whenever alterations in the wider sense fall within the specified categories,

the licensing justices keep control over them. The licensee, for his part, obtains the advantage which, in my view, the Act of 1902 was intended to give him, and will not be prevented or discouraged from making beneficial improvements which necessitate some extension of his premises.

I have deliberately refrained from mentioning the question of monopoly value, and from considering whether one or other interpretation of the section will be beneficial to the Revenue. Monopoly value is the creature of the Act of 1904, and, as was pointed out by SLESSER, L.J., in the course of the argument, and, as I understood, conceded by the Attorney-General, no such consideration can affect the interpretation of a section in the Act of 1902 which is reproduced in the consolidating Act of 1910.

One ground for discharging the rule was stated by LORD HEWART, L.C.J., as being that the justices, whether they were right or wrong, had "heard and determined" the matter, so that *mandamus* was not an appropriate remedy. No argument in support of this view was advanced at the bar, and I think, with respect, that it is erroneous. The justices have not merely misinterpreted an Act of Parliament, but have in effect declined jurisdiction for reasons which are bad in law. They came to the conclusion, in their own words, that they had "no power" to grant the application. It is, therefore, impossible to say that they heard and determined according to law, and I feel no doubt that it is in accordance with sound principle that the writ should be issued. I agree that the appeal should be allowed.

Appeal allowed, with costs in both courts. No order as to the costs of the justices in the Court of Appeal. Leave to appeal to the House of Lords.

Solicitors: *Godden, Holme & Ward*, agents for *Smiths, Ford & McFadyean*, Weston-super-Mare (for the appellant); *Solicitor of Customs and Excise* (for the respondents the Customs and Excise Commissioners); *Cameron, Kemm & Co.*, agents for *John Hodge & Co.*, Weston-super-Mare (for the respondents the licensing justices).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

PRENDERGAST v. CAMERON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.J.J.), December 9, 12, 13, 1938, January 23, 1939.]

Income Tax—Remuneration—Company director—Payment for retaining office—Whether payment in discharge of a contingent liability of the company—Income a capital sum—Income Tax Act, 1918 (c. 40), Sched. E.

C., who had for many years been a director of a company, towards the end of 1934 notified his fellow-directors of his intention to resign, as he was entitled to do under the articles. The other directors thereupon wrote asking him not to serve notice of resignation, and saying that, in consideration of his not doing so, the company would pay him a sum of £45,000, and would enter into a formal deed to that effect. Shortly afterwards the company entered into a deed, which recited that the company, in the circumstances set out in the letter, and for the con-

sideration therein specified, agreed to pay C. £45,000 in two amounts of £35,000 and £10,000 respectively. The remuneration of directors was at all material times by resolution of the company in general meeting, C., who, previous to the execution of the deed, had received a salary of £1,500 per annum, agreed to remain a director at £400 per annum, on the understanding that he would devote less time in the future to the company's business. It was contended that the possibility of C.'s resigning was a contingent liability on the company, that this liability had in the meantime been discharged by a payment of £45,000, and that the case was therefore analogous to *Dewhurst's case* (1), and the sum of £45,000 was not liable to income tax:—

HELD (SIR WILFRID GREENE, M.R., dissenting): (i) this case was distinguishable from *Dewhurst's case* (1), in that the sum here paid was referable to C.'s directorship, or to its continuance, and was not a lump sum paid by way of compensation for loss of office.

(ii) the sum of £45,000 was not a capital payment, but constituted a profit from the office of director.

Decision of LAWRENCE, J. ([1938] 2 All E.R. 617) *affirmed*.

[EDITORIAL NOTE.] The Court of Appeal have, by a majority, upheld the decision of LAWRENCE, J., in this matter. SIR WILFRID GREENE, M.R., in a dissenting judgment examines the consideration for the payment of the sum of £45,000, which was out of all proportion to the annual remuneration of the director. He finds that the consideration was the act of the director in acceding to a request not to serve a notice of resignation. The contract was a contract not to serve a notice and not one to continue as a director, though the continuance of the directorship naturally followed from the undertaking not to serve the notice.

AS TO VOLUNTARY PAYMENTS TO DIRECTORS AND SERVANTS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 213, 214, para. 435; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to :

- (1) *Henry v. Foster (A.)*, *Henry v. Foster (J.)*, *Hunter v. Dewhurst* (1932), 16 Tax Cas. 605; Digest Supp.; *sub nom. Dewhurst v. Hunter*, 146 L.T. 510.
- (2) *Stott v. Hoddinott* (1916), 7 Tax Cas. 85; 28 Digest 47, 241.
- (3) *Radeliffe v. Holt* (1927), 11 Tax Cas. 621; Digest Supp.
- (4) *Allen v. Trehearne*, [1938] 2 K.B. 464; [1938] 2 All E.R. 698; Digest Supp.; 107 L.J.K.B. 597; 159 L.T. 270.
- (5) *Secretary of State in Council of India v. Scoble*, [1903] A.C. 299; 28 Digest 65, 337; 72 L.J.K.B. 617; 89 L.T. 1; *sub nom. Scoble v. Secretary of State for India*, 4 Tax Cas. 618.

APPEAL by the taxpayer from an order made by LAWRENCE, J., dated Apr. 10, 1938, and reported [1938] 2 All E.R. 617, where the facts are fully set out.

Raymond Needham, K.C., and *R. A. Willes* for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

Needham, K.C. : *Hunter v. Dewhurst* (1) is a close parallel to this case, and it decides the principle. In order that the revenue authorities can succeed, they must show that the sum paid was remuneration. A lump sum is not remuneration. It is not uncommon for a man to be offered a lump sum to enter upon some employment. There may be a case where a man contemplates leaving and he is given a sum to induce him to remain in office. There is no difference in principle between the two

cases. These payments are not the profits of the office within the meaning of the section. Where there is a deed which has been held to be a perfectly *bona fide* deed, it must be looked at to see what is the legal relationship of the parties to it. The payment, in the present case, was made by virtue of the deed. It was not a payment made for services or under a contract of employment. Adequacy of consideration is not a relevant matter. If one does admit that the payment is a profit of the office—thus wrongly answering LORD THANKERTON'S first question (whether the sums arose from the office of director within the meaning of Sched. E) in *Hunter v. Dewhurst* (1), at p. 648, in the affirmative—it is still contended that the sum was a capital sum.

Willes : A payment to a man in consideration of his accepting an office is not income, and it is not a profit of the office. Under the articles of most companies, a director forfeits his position if he becomes bankrupt. It is not inconceivable that a man whose name was of great value to a company might find himself insolvent. It might be of the greatest importance to keep his name on the list of directors. A company might, for business reasons, pay a director a large sum of money to avoid his becoming bankrupt. That would not be a profit of his office. That kind of problem is involved in this instance. A payment to secure an office would be a capital expenditure. *Stott v. Hoddinott* (2) is a valuable test of the principle.

The Attorney-General : The important point to bear in mind is that Mr. Cameron has been continuously a director. It follows, from that, that all the sums which he has received from the company he has received as a director only. The payment in question was made in order that he might remain a director. In the case stated, it is said that the company did not wish to lose his valuable services. The company had no right to give him anything except for his services. The court has to decide whether or not this sum falls within Sched. E. Anything that comes to a man from his office is part of the income derived from that office: *Radcliffe v. Holt* (3). A man may be a director of a company and the company may agree to pay him a certain sum if he will agree not to cease being a director. How can it be said that that sum does not come to him by virtue of his office? In *Henry v. Foster* (1), the sum was paid in respect of past services. It was paid for loss of office, and that was the *ratio decidendi* of that case. In *Allen v. Trehearne* (4), a managing director was entitled to be paid a sum of £10,000 on the final termination of his services with the company. The managing director died during the subsistence of the agreement of service, and the sum stated was paid to his executors. It was held that the executors were rightly assessed to income tax in respect of the £10,000 paid.

Hills : In the present case, the payment was a profit arising from the office. The appellant received the £45,000 only because he was a director. A profit which arises from an office cannot be a capital payment. If

something is the profit of an office, within the meaning of the Income Tax Acts, it is subject to taxation. [Counsel referred to *Henry v. Foster* (1), *Hunter v. Dewhurst* (1) and *Secretary of State in Council of India v. Scoble* (5).]

Needham, K.C., in reply : It is a fallacy to say that, because there is an office, and something is received by the employee, that is necessarily a profit of that office. The view that everything a man gets from an office is the reward of services is directly negatived by the decision of the House of Lords in *Hunter v. Dewhurst* (1). That case shows that there may be a payment to a person during the continuance of his office and yet the sum paid may not be a profit of the office. There is a similarity between *Hunter v. Dewhurst* (1) and the present case, in that the payment was made by the company to the director to induce him to stay in office. There is a great similarity between these two cases on a point which is fundamental. In *Hunter v. Dewhurst* (1), LORD THANKERTON negatived the general proposition that, because a payment comes from the occupation of an office, it is subject to tax. One must inquire whether or not it is a capital payment.

SIR WILFRID GREENE, M.R. [read by FINLAY, L.J.] : I regret to find myself in disagreement, not only with the views of LAWRENCE, J., but also with those expressed in the written judgments of FINLAY and LUXMOORE, L.JJ., which I have read. In my opinion, the Special Commissioners came to a correct decision.

The facts are stated in the case, and are summarised in the judgment of LAWRENCE, J., and there is no necessity for me to repeat them at length, but there are certain matters which require to be set out in order to explain the reasons on which this judgment is based. At some time previous to Dec. 17, 1934, the appellant had intimated to his co-directors on the board of Higgs & Hill, Ltd., that he intended to retire from the board at the end of the year. In order to carry out this intention, all that was necessary for him to do was to serve a written notice of resignation under art. 107 (D) of the company's articles of association. The service of such a notice would automatically have determined his directorship, without the necessity of any acceptance by the company. Thereafter the appellant could have been replaced upon the board only by the company in general meeting, as the articles of association contained no power in the directors to fill a casual vacancy. In these circumstances, the board of directors of the company were anxious that the appellant should not serve his notice of resignation.

Pursuant to a resolution of the board passed on Dec. 17, 1934, a letter was written to the appellant on that date in the following terms :

The board have considered your recent intimation that, in the exercise of your right so to do under art. 107 of the company's articles, you intend forthwith to determine your directorship, and I am authorised to ask you, in the interests of the company, not to serve such notice and to say that, in consideration of your acceding to this request, the company will, within 21 days or by such instalments

as you will accept, pay you the sum of £45,000 and will embody their undertaking so to do in a formal deed reciting this letter.

The appellant did not send in his resignation, and, on Dec. 31, 1934, a deed was executed to which the company and the appellant were parties. The material parts of this deed were as follow :

A Whereas Mr. Cameron is a director of the company and whereas the company in the circumstances set out in the letter hereunto annexed has for the consideration therein specified agreed to make to Mr. Cameron the payments hereinafter set out it is hereby agreed between the parties that the company shall pay to Mr. Cameron the following sums on the following dates : On Dec. 31, 1934, the sum of £35,000 and on Mar. 31, 1935, the sum of £10,000.

B In his evidence, which the Special Commissioners accepted, the appellant stated that he

. . . agreed to remain on as director at the salary of £400 per annum on the understanding that he would devote less time in the future to the company's business.

C This agreement is evidenced by a resolution of the board dated Dec. 31, 1934, a copy of which is before us, although it forms no part of the case. The salary of £400 per annum was substantially less than that which the appellant had previously been receiving.

The crucial finding of the commissioners is as follows :

D We hold that the respondent received the sum of £45,000 for the consideration expressed in the said letter dated Dec. 17, 1934, and embodied in the said deed made Dec. 31, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out.

This finding we are not entitled to question, nor are we entitled to say that in substance it means something different from what it says. It is a finding which determines clearly and precisely the legal relationship between the parties in the circumstances to which it refers, the true nature of the contract under which the £45,000 was paid and the consideration moving from the appellant in regard to that payment. The consideration expressed in the letter was the act of the appellant in acceding to a request by the company not to serve the notice of resignation which he was intending forthwith to serve. It was that and nothing more. The contract did not impose upon the appellant any obligation to act as a director. It is true that, so long as he refrained from serving a notice, he remained as a director, but this was a by-product of his undertaking not to serve the notice, and not the performance of that undertaking. The £45,000 was paid to him, not for the by-product, but for the undertaking, and, in view of the finding of the commissioners, we are not, in my judgment, entitled to hold to the contrary.

The matter may be tested by considering what the legal position would have been if the appellant, immediately after the making of the contract, had, in breach of it, served a notice of resignation. The notice would have been effective under the articles of association to determine his directorship, and the company's cause of action would have been, not for damages for breach of a contract to serve as a director (for this was not the contract), but for damages for breach of a contract not to serve

a notice of resignation, for which the measure of damages would have been different.

This leads me to another matter. The appellant did agree to continue as a director at a reduced salary of £400 per annum, but this was a separate agreement, and formed no part of the agreement under which the £45,000 was paid. To hold otherwise would be to contradict the finding of the Special Commissioners as to the true consideration for that payment. There were thus two contracts, quite distinct in law, and neither of them formed any part of the consideration for the other. Each of them imposed separate obligations on the appellant, the acts by which they could be broken by the appellant would not be the same, and the causes of action which would arise by reason of any such breach would be different. The agreement to serve as a director was an agreement to serve upon the terms governing the office laid down in the articles, one of which is that a director may resign by notice in writing. If, on Dec. 31, 1934, immediately after the deed was executed and the agreement made whereby the appellant undertook to serve as a director for £400 per annum, the appellant had served a notice of resignation, he would not have broken his agreement to serve as a director, because his right to resign was inherent in the office, but he would have broken his agreement not to serve the notice of resignation. Similarly, if he had committed a breach of duty as a director, the company could only have sued him for breach of his agreement to serve as a director, which implies faithful service. It could not have sued him for breach of his undertaking not to serve the notice of resignation. Moreover, as from the making of the two agreements, he was being remunerated for his services as a director under his agreement to serve as a director. It was not by serving as a director that he was earning the £45,000, since he had already earned it by agreeing not to send in his resignation.

These distinctions may appear fine, but they are, in my opinion, real distinctions in law, which must not be disregarded. The application of the Income Tax Acts involves, in many cases, fine distinctions which operate sometimes in favour of the Crown and sometimes in favour of the subject. It is of the utmost importance that, if there is to be any principle in these matters, these distinctions be not blurred. The precise nature of a contract, and of the consideration in law moving from the parties, is often the determining factor in the question on which side of the line a particular case is to fall, and, once the true nature of the contract and the true consideration are ascertained, it is not, in my opinion, legitimate to treat them as though they were different. If the commissioners had found as a fact that the agreement contained in, or ratified by, the deed of Dec. 31, 1934, was part of one transaction under which the appellant agreed to serve the company as a director for an immediate payment of £45,000 and an annual remuneration of £400, the position would have been different. However, this is exactly what they do not find, and I am unable to treat the case as though they had so found.

It may be suggested that, upon the view which the Special Commissioners took, the consideration which the company received for the £45,000 was inadequate. However, this does not, in my opinion, justify me in treating what, in law, was unquestionably a real consideration as being something different from that which the special commissioners have found

A that it was. As a matter of business, the company may well have been satisfied by the expectation that the appellant would feel in honour bound not to resign for some time, but no such expectation forms any term of the contract, and we are precluded by the finding of the Special Commissioners from inferring that it did.

B With all respect to LAWRENCE, J., he appears to me to have overridden the finding of the Special Commissioners. He says at p. 620 :

His acceding to the request made in the letter of Dec. 17, 1934, involved that he would remain as director for some period ; and that undertaking to remain as director of the company for some period was the consideration for the payment of £45,000.

C Again he says at p. 620 :

Therefore, I think that the true consideration for the payment of the £45,000 must have been the desire of the company that he should continue as a director. If that were the consideration for the payment, then the payment arises from his office as director.

D My reasons for disagreeing with the first of these two passages already sufficiently appear. The second passage I construe as meaning that the company paid the appellant the £45,000, because they desired that he should continue as a director. Such desire could not be, and was not, the consideration for the payment. It may have been the motive, but

E that is not, in my opinion, a relevant matter.

The question then arises whether the assessment under Sched. E was properly raised against the appellant in respect of the £45,000. Was it a profit from his office of director ? It is quite true that, if he had never been a director, he would not have received this payment, but that is

F not enough. The profit to be assessable under the schedule must arise from the office. In my opinion, it did not so arise. It was not " an emolument received as a reward for services rendered in the course of the employment," to use the words of LORD ATKIN in *Hunter v. Dewhurst* (1), at p. 645, nor was it a reward for services to be rendered. By refusing

G to perform the duties of a director, the appellant would have committed no breach of the contract under which the £45,000 was paid. The payment was made in consideration of the appellant refraining from serving the notice which he was intending to serve, and which, under the terms of his employment, he was entitled to serve, not as a reward for services

H past or future.

A variant of the present case would be one where the holder of a salaried office was bound to serve for a term of, say, 6 years, subject to a right to resign at the end of, say, the second year. If, after the execution of the agreement, and before the end of the second year, the employer chose to make a contract with the holder of the office under which, in

consideration of a money payment, he agreed to give up his right to resign, I cannot see how it could be said that the sum paid was a profit arising from the office. In the converse case, if the right to determine the tenure of the office lay with the employer, and not with the holder, and the holder made a subsequent contract under which he paid the employer a sum of money in consideration of the employer giving up his right to determine the tenure of the office, the sum so paid could not properly be described as an expense of the office. It would be a sum paid in order to enable the holder of the office to retain his office and receive its emoluments, a very different thing. A

Reliance was placed by counsel for the appellant on *Dewhurst's* case (1), and, although I do not think that the decision in that case covers the present, it does illustrate what I conceive to be the imperative necessity of ascertaining the exact nature of the contract under which the alleged remuneration is received, and of not imputing to it a different character for the purpose of bringing the case to the other side of the line. C
Commander Dewhurst had for some years been a director of a company and chairman of the board at a substantial remuneration. Under art. 109 of the company's articles of association, on resigning office as a director, he would have become entitled "by way of compensation for the loss of office" to a sum calculated by reference to the director's fees received by him during the preceding 5 years. It was held by this court, on appeals by two other directors who had resigned, that the sums payable to them under this article were remuneration for services rendered, and, therefore, profits derived from the office which they held. D
In July, 1923, Commander Dewhurst wrote to the company (i) informing them of his intention to resign the chairmanship, (ii) offering to waive any future claim under art. 109, (iii) asking for payment of £10,000 in cash, and (iv) offering to remain on the board at a remuneration of £250 per annum, a sum substantially less than that which he had previously been receiving. E
The board accepted these terms, the sum of £10,000 being referred to in the resolution as "compensation for loss of office in lieu of the provision under" art. 109. The £10,000 was duly paid. F
The Special Commissioners found that the payment to Commander Dewhurst was made

. . . by way of compromise of existing and future rights, Commander Dewhurst remaining on as a director but upon a reduced scale. G

It is to be observed (i) that, if Commander Dewhurst had retired, he would have been entitled, under art. 109, to a payment which, it must be taken, would have been remuneration for past services and taxable accordingly, (ii) that, if he had merely continued to serve as a director at a reduced salary, the sum payable to him under art. 109 when later on he retired would have been substantially less than that which he would have received if he had retired at the time, and (iii) that the sum which he received was "by way of compromise of existing and future rights" under art. 109. H
The Court of Appeal held that the fact that the payment

was made as a compromise in respect of what he would have received if he had retired forthwith was sufficient to stamp it with the same character as that which it would have borne if it had been a payment made upon actual retirement. In the House of Lords, LORD DUNEDIN, who dissented, thought that in its true nature the payment was "just deferred remuneration." LORD MACMILLAN, who also dissented, thought that

A Commander Dewhurst (p. 652)

. . . received these payments in consideration of his agreeing to vary the existing terms on which he held his office of director and consenting to continue to hold that office on those altered terms.

B This analysis of the position resembles very closely that put forward by the Crown in the present case. All these opinions, if regarded as statements of what the contract might have been without producing any financial result different from that in fact produced, are unchallengeable. However, the defect in them, if I may respectfully so call it, is that they

C all involve departing from the true terms of the contract and the true nature of the consideration moving from Commander Dewhurst. LORD WARRINGTON OF CLYFFE was of opinion, at pp. 643, 644, that the £10,000

. . . was paid not by way of remuneration for past services or of services thereafter to be performed, but in performance of an arrangement under which Harry Dewhurst was enabled to give only occasional attendance at the board . . . while at the same time the company did not lose altogether the benefit of his help.

D As part of that arrangement (p. 643) :

. . . he disclaimed all rights for himself and his executors under art. 109, the directors, on the other hand, agreeing to pay the sum in question.

E As was said by LORD ATKIN, at p. 645 :

To induce him not to retire, the company agreed to give him a lump sum of £10,000 in consideration of which he agreed to release them from the obligations under art. 109, both in the past and in the future. He entered into no bargain to serve the company for any particular time. . . . The £10,000 was not paid for past remuneration for the condition of its becoming payable, for instance, loss of office, never was performed. It was not paid for future remuneration, for that

F was expressed to be £250 per annum, which was to be the sole remuneration.

As was said by LORD THANKERTON, at p. 649, the payment

. . . formed the consideration for the company's release from their contingent obligations under art. 109.

He pointed out that the payment

G . . . was in no way conditional on such service [as a director] and the remuneration for such service was otherwise provided for by the new arrangement.

It is clear from these extracts that the majority of the House of Lords was deciding the case by reference to the exact bargain and the true consideration for the payment, and was declining to substitute a different bargain and a different consideration, a principle which, in this judgment,

H I have endeavoured faithfully to follow. I would allow the appeal, but, as my brethren take a different view, the appeal will be dismissed with costs.

FINLAY, L.J. : The question in this case is whether the sum of £45,000 is chargeable under Sched. E as coming within the words

"salaries, fees, wages, perquisites or profits" within Sched. E, r. 1. The facts are set forth in the various paragraphs of the case, and the gist of the matter is really obtained from the deed of Dec. 31, 1934, with the letter attached. The letter is as follows :

The board have considered your recent intimation that, in the exercise of your right so to do under art. 107 of the company's articles, you intend forthwith to determine your directorship, and I am authorised to ask you, in the interests of the company, not to serve such notice and to say that, in consideration of your acceding to this request, the company will, within 21 days or by such instalments as you will accept, pay you the sum of £45,000 and will embody their undertaking so to do in a formal deed reciting this letter.

The finding of the commissioners, by which we are, of course, bound, was, as to the vital matter, in the following terms :

We hold that the respondent received the sum of £45,000 for the consideration expressed in the said letter dated Dec. 17, 1934, and embodied in the said deed made Dec. 31, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out.

The position on this finding appears to me to be that the appellant was a director of the company and that, according to his evidence, which was accepted by the commissioners, at the end of 1934 he wished to resign, in view of his long service and because he desired a rest. The sum was offered to him by the other two directors. He agreed to remain on as director at a salary of £400 per annum. It may be said, and I feel the force of this, that the £45,000 was not a remuneration of his office, but was a sum paid to him as consideration for forbearing to send in his resignation. It seems to me that this is too narrow a construction. The appellant was a director of the company. His fellow-directors highly valued his services, and were willing to pay him a large sum to retain them. There is a passage in the judgment of ROMER, L.J., in *Henry v. Foster* (1), at p. 633, which I think is relevant here :

Now, supposing that a director is employed upon the terms that he is to be paid in each year of his service a sum of £1,000, and in the last year of his service a sum of £5,000 in addition to the £1,000, no one I think could doubt in such a case that the £5,000 was a profit of his office, paid to him in respect of his office, that it was liable to income tax, and was to be treated for the purposes of tax as forming part of his salary for the last year of his office.

In my opinion, this sum of £45,000 was paid to the appellant by way of special remuneration for performing the duties of a director. He was a director when the payment was arranged for, he was a director when the payment was received, and he continued, in accordance with the bargain, to perform his duties. I cannot resist the view that, in these circumstances, the sum paid to him was paid to him in respect of his continued services as a director.

Some difficulty arises in reference to the case of *Hunter v. Dewhurst* (1). That case disclosed an unusual difference of judicial opinion. Upon one side were ROWLATT, J., and three members of the House of Lords. On the other side were the three members of the Court of Appeal and two members of the House of Lords. It is by no means easy to get at the *ratio decidendi* of the majority of the House of Lords. It is clear that LORD WARRINGTON decided upon a very narrow and special ground, at

p. 644. The gist of the decision of LORD ATKIN, and, I think, of LORD THANKERTON also, was that the true view there was that it was a sum of money paid to obtain a release from a contingent liability under the contract of employment (p. 645). If this is correct, it seems to me that *Dewhurst's* case (1) does not govern the present case.

- A It was also argued that this was a payment, not of income, but of capital. No doubt plausibility is given to this argument by the very large sum involved, but, if indeed the sum was paid as remuneration for services performed as director, then I cannot think that the argument that this sum is a capital sum can prevail. If, in the illustration referred
- B to above in the judgment of ROMER, L.J., in *Foster's* case (1), £40,000 was substituted for £5,000, I cannot think that this would affect the matter. For these reasons, I arrive at the conclusion that the judgment of LAWRENCE, J., was correct, and I do not think that my reasons differ substantially from those which influenced him.

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LUXMOORE, L.J.: The question to be determined on this appeal is whether Mr. John Cameron is liable to be assessed to income tax under the provisions of Sched. E of the Income Tax Acts in respect of a total sum of £45,000 paid to him during the year ending Apr. 5, 1936. The

- D answer to the question depends upon whether the sum falls within the scope of Sched. E, r. 1, of the Income Tax Act, which, so far as material, provides as follows :

Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever, therefrom for the year

E

The directorship of a limited company is one of the offices mentioned in the schedule.

Mr. Cameron was assessed to income tax in respect of the sum of £45,000 for the year ending Apr. 5, 1936. He appealed to the Special

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Commissioners in respect of this assessment, and obtained its discharge. A case was stated for the opinion of the King's Bench Division of the High Court, and this case came before LAWRENCE, J. He held that Mr. Cameron was liable to income tax on the £45,000, and Mr. Cameron appealed from that decision.

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The material facts are as follow. In 1934, and for some years before that date, Mr. Cameron was a director of a private company carrying on business as builders and contractors under the name of Higgs & Hill, Ltd. At the end of 1934, Mr. Cameron intimated to his co-directors that he desired to resign his directorship by giving the appropriate notice

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required by art. 107 (D) of the company's articles of association. As stated in the case (para. 3), the company carried on a prosperous business, for which the respondent was largely responsible. His co-directors did not wish to lose his services, and, with that object in view, caused to be written to Mr. Cameron a letter dated Dec. 17, 1934, in these terms :

The board have considered your recent intimation that, in exercise of your right

so to do under art. 107 of the company's articles, you intend forthwith to determine your directorship, and I am authorised to ask you, in the interests of the company, not to serve such notice and to say that, in consideration of your acceding to this request, the company will, within 21 days or by such instalments as you will accept, pay you the sum of £45,000 and will embody their undertaking so to do in a formal deed reciting this letter.

On Dec. 31, 1934, Mr. Cameron and the company duly executed a deed to give effect to the terms of the letter of Dec. 17, 1934. Omitting formal parts, the deed is in the following words : A

Whereas Mr. Cameron is a director of the company, and whereas the company in the circumstances set out in the letter hereunto annexed [the letter of Dec. 17, 1934] has for the consideration therein specified agreed to make to Mr. Cameron the payments hereinafter set out it is hereby agreed between the parties that the company shall pay to Mr. Cameron the following sums on the following dates : B
On Dec. 31, 1934, the sum of £35,000 and on Mar. 31, 1935, the sum of £10,000.

The commissioners accepted Mr. Cameron's evidence that he did not know how the sum of £45,000 was arrived at, that he was not present at any of the discussions concerning the matter, and that that sum was offered to him by the two other directors. The commissioners also C
found that Mr. Cameron agreed to remain on as director at the salary of £400 per annum, on the understanding that he would devote less time in the future to the company's business. They further found that the sum of £45,000 had no reference to any sum or sums in the accounts of the company, and that, at the time when it was offered to him, Mr. D
Cameron was not aware of the amount of the company's balances or reserves. The commissioners discharged the assessment, stating their decision in these terms :

We hold that the respondent [Mr. Cameron] received the sum of £45,000 for the consideration expressed in the said letter dated Dec. 17, 1934, and embodied in the said deed made Dec. 31, 1934. We accept the deed as genuine and find that the conditions contained therein have been carried out. We also accept the evidence given by the respondent [Mr. Cameron] and are satisfied that the sum of £45,000 had no relation to any sum or sums contained in the company's profit, loss and reserve accounts or to any possible claim he might have in respect thereof. E

It is said that this is a finding of fact by the commissioners that the only consideration moving from Mr. Cameron in respect of the £45,000 was F
the withholding of the notice of resignation, and that consequently the payment to him of that sum was not a payment arising from his office of director. If this is the correct view with regard to the decision of the commissioners, I am of opinion that, the question being one of construction of the deed and letter, they were not entitled in law so to hold. G
An agreement not to give a notice of resignation of necessity includes an agreement to continue to act as director for so long as the notice is withheld, and, although the result of the payment, looked at from Mr. Cameron's side of the bargain, is to prevent his resignation, yet, when it is looked at from the company's point of view, the object is to ensure H
the continuation of his directorship. Indeed, so far as the company is concerned, the only legitimate ground for making the payment is to induce Mr. Cameron not to resign, and so to continue his services as a director. The fact that the letter and the deed are silent as to any period during which notice of resignation is to be withheld does not,

I think, affect the position, although it is not immaterial to remember that, at the time the arrangement was entered into, there was a contemporaneous agreement on the part of Mr. Cameron to remain as a director at the salary of £400 per annum.

A As a matter of construction of the deed and the letter of Dec. 17, 1934, it appears to me that the £45,000 must necessarily be held to have been paid by the company to Mr. Cameron in respect of his directorship. The offer in the letter is made in express terms to induce Mr. Cameron not to serve a notice to determine his directorship. The deed, after reciting that "Mr. Cameron is a director of the company," refers to the letter as disclosing the consideration for the payments—that is, the withholding of a notice "to determine your directorship."

C Mr. Cameron's counsel placed great reliance upon the decision in *Dewhurst's* case (1). In my judgment, this case is distinguishable from the present. There the payment was made as consideration for the release of Commander Dewhurst's right to receive, under special provisions in the articles of association, a lump sum by way of compensation for loss of office if and when his directorship should cease, and so was not referable to his directorship or to its continuation. The distinction is no doubt a fine one, and the difficulty of decision is illustrated by the marked divergence of judicial opinion in the *Dewhurst* case (1), where, in the result, 5 judges held the view that the payment in question was assessable under Sched. E, while 4 judges, including the majority in the House of Lords, held that it was not assessable thereunder.

E I do not think that the answer to the question whether or not the payment arose from Mr. Cameron's office as director can differ according to the manner in which the consideration for that payment is described, so that the answer will be in the negative if the consideration is stated to be the withholding of his resignation and in the affirmative if it is stated to be the continuation of his directorship. In my opinion, in whichever form the statement is made, the other form is, of necessity, included in it by implication. I appreciate, of course, that there is a distinction between the two forms, but, in my judgment, there is no difference between them in substance. I am satisfied that the £45,000 constituted a perquisite or profit coming to Mr. Cameron from his office as director within the precise terms of Sched. E, para. 1, and was, therefore, assessable to income tax thereunder. In my opinion, the judgment of LAWRENCE, J., was right, and the appeal should be dismissed with costs. I need hardly say that, although I have formed a definite opinion as to the answer to be given to the question to be determined, I express that opinion with diffidence in view of the fact that SIR WILFRID GREENE, M.R., has arrived at a different conclusion.

Appeal dismissed with costs.

Solicitors: *Edell & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL v. GLYN MILLS & CO.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), December 13, 14, 1938, January 23, 1939.]

Estate and Other Death Duties—Succession duty—Succession—Private Act of Parliament avoiding restraint upon alienation—Whether succession destroyed—Succession Duty Act, 1853 (c. 51), ss. 2, 12, 15.

Under a settlement of 1888, out of property brought into settlement by cousins of the deceased, the deceased was given a life interest subject to forfeiture in the event of alienation, and, subject thereto, the settled property was entailed in tail male in the usual form. In 1918, the entail was barred and the settled property made subject to the joint appointment of the deceased and his eldest son. At the same time, the settled property was resettled, the material clause of the resettlement being that the eldest son was given a power to charge the settled property with the payment after the death of the deceased of any sum not exceeding £50,000 free of death duties, such charge not to take effect unless the eldest son survived the deceased. By a private Act, passed in 1921, it was provided that the above power to charge might be exercised during the lifetime of the deceased, and that, notwithstanding the provision for forfeiture in the event of alienation, the deceased might release his life interest in any sum so charged. The Act also contained a general saving to His Majesty of all estate, right, title, interest, claims or demands. In 1923 and 1925, by three charges the sum of £50,000 was raised. The eldest son died on July 30, 1930. The deceased died on Oct. 3, 1932, and, this date being more than three years after the £50,000 had been raised, there was no claim to estate duty in respect thereof. The Crown claimed succession duty in respect of the £50,000 under the Succession Duty Act, 1853, ss. 2, 12, 15, upon a succession by the eldest son to the settlers in the 1888 settlement:—

HELD: there was no succession in respect of the £50,000, since it was not the mere exercise of the power of charging contained in the resettlement that conferred on the eldest son an indefeasible title to the £50,000, but the combined operation of (i) the power itself, (ii) the cancellation by the private Act of 1921 of the proviso in the resettlement that the eldest son must survive the deceased, and (iii) the two instruments of charge.

Decision of LAWRENCE, J. ([1938] 3 All E.R. 605) *reversed*.

[EDITORIAL NOTE. The Crown in this case strongly relied upon the argument that, once there is a succession, it cannot be destroyed, and that, therefore, the £50,000 must be subject to succession duty, since it was part of the subject-matter of the settlement of 1888. The Court of Appeal have, however, held that the eldest son did not derive his title to the £50,000 through the settlement, and that here there never was any succession in respect of the £50,000.

AS TO WHAT CONSTITUTES A SUCCESSION, see HALSBURY, Hailsham Edn., Vol. 13, pp. 349, 350, para. 383; and FOR CASES, see DIGEST, Vol. 21, pp. 84-89, Nos. 601-651. FOR THE SUCCESSION DUTY ACT, 1853, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 8, p. 53.]

Cases referred to:

- (1) *Braybrooke (Lord) v. A.-G.* (1861), 9 H.L.Cas. 150; 21 Digest 94, 694; 31 L.J.Ex. 177; 4 L.T. 218; *varying* (1860), 5 H. & N. 488.
- (2) *A.-G. v. Floyer* (1862), 9 H.L.Cas. 477; 21 Digest 86, 622; 31 L.J.Ex. 404; 7 L.T. 47; *reversing* (1861), 7 H. & N. 238.
- (3) *A.-G. v. Selborne (Earl)*, [1902] 1 K.B. 388; 21 Digest 102, 753; 71 L.J.K.B. 289; 85 L.T. 714.
- (4) *Lilford (Lord) v. A.-G.* (1867), L.R. 2 H.L. 63; 21 Digest 106, 780; 36 L.J.Ex. 116; 16 L.T. 184; *affirmed* (1864), 3 H. & C. 239.

- (5) *Northumberland (Duke) v. A.-G.*, [1905] A.C. 406; 21 Digest 84, 602; 74 L.J.K.B. 734; 93 L.T. 88; *affg.*, [1904] 1 K.B. 762.
- (6) *Lord Advocate v. Jamieson* (1886), 13 R. (Ct. of Sess.) 737; 21 Digest 85, case f.
- (7) *Wolverton v. A.-G.*, [1898] A.C. 535; 21 Digest 90, 660; 67 L.J.Q.B. 829; 79 L.T. 58; *revsg.*, [1897] 1 Q.B. 231.
- A (8) *Re Drake's Settlement Trusts, Wilson v. Drake*, [1937] 4 All E.R. 171; Digest Supp; 157 L.T. 559.
- (9) *Re Bolton Estates Act, 1863*, [1904] 2 Ch. 289; 21 Digest 24, 133; 73 L.J.Ch. 688; 91 L.T. 259.

APPEAL by the defendants from an order made by LAWRENCE, J.,
 B dated July 8, 1938, and reported [1938] 3 All E.R. 605. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J. A. M. Latter, K.C., and J. H. Bowe for the appellants.

The Attorney-General (Sir Donald Somervell, K.C.) and J. H. Stamp for the respondent.

- C *Latter, K.C.*: It is important to identify the succession and thus ascertain the suggested acceleration of succession. Apart from the private Act, and looking at the deeds alone, all the son's rights were dependent upon his surviving his father, which he did not do. First, he was tenant for life of the settled estates. Secondly, he had power to charge a sum
 D of £50,000 in his own favour, such charge to be effectual only in the event of his surviving his father. The Act gave him the right to take this £50,000 out of the settlement and enjoy it. The Act does not create a disposition under which he became entitled under the Succession Duty Act, 1853, s. 2. The section of that Act which refers to acceleration
 E has no application, because it applies only to the acceleration of the title by the cessation of a prior interest. Mr. Glyn's title was not accelerated at all, because he received a new interest. The £50,000 was taken out of the settlement. Under the deed of 1888, the fourth Baron Wolverton had an estate which was inalienable, so that nothing could be done for
 F George Glyn in his lifetime without the permission of an Act. If George Glyn had died without the Wolverton Estate Act, 1921, having been passed, no succession duty would have been payable by him. The onus is upon the Crown to identify the succession to which the claim relates. The Crown must show that George Glyn had a succes-
 G sion, and that it came into his possession, or that it was accelerated in some way, by the Act, and so was liable to duty. It is not enough to say that all this property was subject to the life interest of Baron Wolverton, and that, therefore, on his death, there must be succession duty payable, because he had an interest which ceased on his death. The Crown must
 H go further, and must say that there is a particular succession on which duty is claimed and that that particular succession is liable to pay duty. [Counsel referred to the Succession Duty Act, 1853, ss. 2, 10, 15, and to *Lilford (Lord) v. A.-G.* (4), *Northumberland (Duke) v. A.-G.* (5), *Braybrooke (Lord) v. A.-G.* (1), *A.-G. v. Selborne (Earl)* (3), *Lord Advocate v. Jamieson* (6) and *Wolverton v. A.-G.* (7).]

Bowe : If the private Act of 1891 had not been passed, the Crown would have had no duty on succession at all, merely by reason of the fact that George Glyn predeceased his father. George Glyn did not survive to take any interest in possession. The Crown relies upon the doctrine of acceleration, and falls back upon sect. 15 of the Act of 1853. Nevertheless, the actual disposition is a contingent disposition. However A
cl. 9 of the resettlement may be regarded, the only benefit conferred upon George Glyn by the resettlement was a contingent interest. A contingent interest can never be accelerated. A vested interest alone is capable of acceleration. Under the joint power, a vested interest could be appointed to George Glyn to arise on Baron Wolverton's death. B
The joint power, however, is a different power. [Counsel referred to *Lord Advocate v. Jamieson* (6).]

The Attorney-General : This case merely falls to be determined upon the construction of the private Act. Prior to the passing of that Act, there is a great deal of common ground. The present case is covered C
by *Lilford (Lord) v. A.-G.* (4), where it was decided that the succession is not destroyed when a tenant in tail bars the entail by a disentailing assurance. In *Braybrooke (Lord) v. A.-G.* (1), the estate tail had not been barred. In *A.-G. v. Floyer* (2), there is an exposition of *Braybrooke's* D
case (1) by LORD CRANWORTH, at p. 486. The ground of that decision was that there was a joint disposition. In *Northumberland (Duke) v. A.-G.* (5), the EARL OF HALSBURY, L.C., said, at p. 409, that, when a succession within the Act of 1853 had once been established, no manipulation by the parties afterwards could get rid of it. In *Northumberland (Duke) v. A.-G.* (5), the liability could be transferred. The liability cannot be E
got rid of, however, although it may fall elsewhere. In *A.-G. v. Selborne (Earl)* (3), the interest was subject to the joint powers. In the present case, it is the other way round. The reason why the *dictum* of the EARL OF HALSBURY, L.C., did not apply in *A.-G. v. Selborne (Earl)* (3) was that a succession within the Act was not established. It had only been F
established subject to a defeasance which related back *ab initio*. This case really turns upon the construction of sect. 4 of the private Act of 1921, and it is conclusive in favour of the Crown by reason of the form of cl. 9. The effect has been to operate upon cl. 9 of the resettlement. G
If the general power in the settlement had been used to annul the proviso to cl. 9, duty would have been payable whether George Glyn survived his father or not. On what principle is it suggested that the removal of a condition such as that by Act of parliament prevents succession duty from being payable? The Act of parliament in this case is not a disposition. The disposition is in the resettlement. All that the Act of H
parliament did was to operate upon a clause in the disposition by enabling it to be exercised and to be effective. The second part of sect. 4 of the private Act gets rid of the liability to forfeiture which is contained in the settlement of 1888. It says that, notwithstanding the restrictions in the 1888 settlement, it shall be lawful for Baron Wolverton to transfer

his life interest to George Glyn. This enabled the acceleration contemplated by the Succession Duty Act, 1853, s. 15, to take place. All that is necessary to bring that section into operation is the power of acceleration and the acceleration. The private Act leaves standing all the essential parts of the succession for the purposes of the Succession
 A Duty Act, 1853. There is a great distinction between such a case as the present one, where an Act of parliament enlarges the effect of the deed, and *Lord Advocate v. Jamieson* (6), where the Act of parliament had nothing to do with the deed.

Stamp : It has never been contested that a private Act of parliament
 B containing a saving clause may have the effect of taking a reversion out of the settlement. It is a pure question of construction of the private Act as to whether or not it has that effect. In *Re Drake's Settlement Trusts*, *Wilson v. Drake* (8), two persons between them owned the fee simple of an estate, and the title of each of them was contingent upon
 C a future event. In the circumstances, they made a settlement, and the question arose as to who was the predecessor. The court decided that there were two predecessors, and that the settlement was partly derived from each of them. That would have been the result in the present case if there had been an exercise of the overriding power. The distinction
 D between the two cases is vital. Mr. George Glyn had a power of charging, by virtue of cl. 9 of the settlement. By the private Act, cl. 9 was revised so as to have an effect different from that which it would have had if the Act had not been passed. The vital point is the true construction of sect. 4 of the private Act. An Act of parliament can revise the effect
 E or the wording of a settlement so as to create a statutory effect, or it can alter *ex post facto* the constitution of the settlement. In the present case, it has not superimposed upon the settlement a power to take part of the property out of the settlement. [Counsel referred to *Re Bolton Estates Act, 1863* (9).]

F *Latter, K.C.*, in reply : In *Northumberland (Duke) v. A.-G.* (5), the EARL OF HALSBURY, L.C. was not dealing with succession duty at large, and that case turned upon its particular facts. The case of *A.-G. v. Selborne (Earl)* (3) turns upon an overriding power of appointment. [Counsel referred to *A.-G. v. Floyer* (2) and *Lord Advocate v. Jamieson* (6).]
 G

LUXMOORE, L.J. : The judgment I am about to read is the judgment of the court which has been prepared by SIR WILFRID GREENE, M.R.

The appellants, Glyn Mills & Co., are the present trustees of a settle
 H ment dated Dec. 31, 1888 (which we will call the 1888 settlement), and they appeal against an order made by LAWRENCE, J., charging them with liability to pay succession duty at the rate of $11\frac{1}{2}$ per cent. upon the death of the fourth Baron Wolverton (whom we will call the deceased) in respect of a certain sum of £50,000. By the 1888 settlement, five ladies, cousins of the deceased, settled personal property upon trust for investment in the purchase of freehold hereditaments to be settled to the

use of the deceased for life (but subject to a provision for forfeiture in the event of alienation), with remainder to the use of his first and every other son successively in tail male.

By a disentailing deed, dated Dec. 30, 1918 (which we will call the disentailing deed), George Glyn, the eldest son of the deceased (with the consent of the deceased as protector of the 1888 settlement), disentailed the settled property, and conveyed it (subject to the life estate of the deceased) to such uses and upon such trusts as the deceased and George Glyn should by deed jointly appoint, and, subject thereto, to the use of, or in trust for, George Glyn absolutely. A

By a resettlement, dated Dec. 31, 1918 (which we will call the resettlement), the deceased and George Glyn, in exercise of the joint power conferred upon them by the disentailing deed, appointed that, subject to the life estate of the deceased, the freehold settled property should go to such uses as they should by deed jointly appoint, and, subject thereto, to the use of George Glyn for life, with remainders over. The resettlement also dealt with the settled investments by providing that, subject to the prior interests therein during the life of the deceased and otherwise, they should be held, as to part, upon trust for George Glyn absolutely, if he should survive the deceased, and, subject thereto, upon the same trusts as capital money arising from the settled freeholds under the Settled Land Act, 1882. B
C
D

Clause 9 of the resettlement dealt with the sum of £50,000 which is in question in this appeal. It empowered George Glyn to charge the settled property with payment, after the death of the deceased, of sums not exceeding £50,000 free from death duties for the benefit of himself or any other persons, with the proviso : E

... that any such charge shall not take effect unless he the said George Glyn survives Lord Wolverton [the deceased].

George Glyn died on July 30, 1930, in the lifetime of the deceased, who died on Oct. 3, 1932. If the matter had stood there, assuming that George Glyn had exercised his power of charging, no succession duty would have been payable on the death of the deceased in respect of the charge (which would not have taken effect), since George Glyn would not have "become entitled to his succession," to use the words of the Succession Duty Act, 1853, s. 20. However, the present claim of the Crown is based upon the allegation that the title to the succession was accelerated, in the circumstances next to be mentioned, within the meaning of the provisions of sect. 15 of the same Act with regard to acceleration of title. F
G

In 1921, a private Act of Parliament, known as the Wolverton Estate Act, was passed. It recited (among other things) the 1888 settlement, the disentailing deed and the resettlement, the restraint on alienation affecting the life interest of the deceased under the 1888 settlement which made it impossible for George Glyn to obtain any part of the income or capital of the settled property during the life of the deceased, and the H

inability of George Glyn, in the event of his dying in the lifetime of the deceased, to make any provision out of the settled property during the remainder of the life of the deceased for any widow or children who might survive George Glyn. It then recited that it was

A . . . expedient that the power conferred on George Glyn if he should survive Lord Wolverton of charging the property subject to the 1888 settlement and the resettlement with the payment after the death of Lord Wolverton to himself of any sum not exceeding £50,000 . . . should be varied in manner hereinafter mentioned [and that] the purposes aforesaid cannot be affected without the authority of Parliament.

B The former of these two recitals is inaccurate, since the power to charge conferred by cl. 9 of the resettlement was not contingent upon George Glyn surviving the deceased. He could have validly exercised the power in the lifetime of the deceased, but, if he predeceased the deceased, the appointment was not to take effect.

C Sect. 4 of the Act provided, first, that, notwithstanding anything contained in cl. 9 of the resettlement, or in the proviso thereto, George Glyn, with the consent in writing of the deceased, might

. . . exercise the power of charging conferred upon him by the said clause so that any charge made under that power shall take effect after the death of Lord Wolverton [the deceased] whether George Glyn shall survive Lord Wolverton or not.

D Secondly, it provided that, notwithstanding the restriction on the deceased's life interest under the 1888 settlement, the deceased might

. . . release or assign and transfer to George Glyn . . . his life interest in the whole or any part of any sum so charged as aforesaid so as to enable the said sum to be raised and paid during the lifetime of Lord Wolverton.

E Sect. 12 provides that no exercise of the powers conferred by the Act should work a forfeiture of the life estate of the deceased. Sect. 14 is a general saving clause, which (among other things) saves to His Majesty any claims upon the settled property which he had

F . . . before the passing of this Act or would could or might have had or enjoyed if this Act had not been passed.

G Armed with the power conferred upon him by the Wolverton Estate Act, 1921, s. 4, George Glyn, by indentures dated respectively Nov. 29, 1923, and Nov. 4, 1925, charged the settled property in his own favour with sums amounting in the aggregate to £50,000 free of death duties, irrespective of whether or not he survived the deceased. These indentures were followed by indentures dated respectively Nov. 30, 1923, and Nov. 5, 1925, whereby the deceased released his life interest in the sums charged by the indentures of charge respectively. In each case, the trustees of the 1888 settlement raised the amounts charged and paid H them to or by the direction of George Glyn.

It is contended, on behalf of the Crown, that the £50,000 so received by George Glyn was a succession taken by him, that the 1888 settlement and the resettlement contain the "dispositions" by reason whereof George Glyn became entitled to the succession, such dispositions being made effectual by the two indentures of charge, and that George Glyn's

title to this succession was, within the meaning of the Succession Duty Act, 1853, s. 15, "accelerated" by the release by the deceased of his prior interest. It was not contended on behalf of the Crown that the Wolverton Estate Act, 1921, was a "disposition" within the Succession Duty Act, 1853, s. 2. Indeed, this was expressly disclaimed.

It will be convenient, in the first place, to examine the position as it existed immediately before the Wolverton Estate Act, 1921, was passed. At that date, George Glyn had a power of charging the settled property with the sum of £50,000 payable after the death of the deceased, but in the event only of George Glyn surviving him. This power was in its origin derived from the estate tail conferred upon George Glyn by the 1888 settlement, since it was by means of the enlargement of that estate by the disentailing deed, and the joint general power of appointment thereby conferred upon the deceased and George Glyn, that the power to charge came into existence. If George Glyn had exercised his power of charging, a succession consisting of the sum charged would have come into existence, and it would have arisen under a "disposition" made by himself (consisting of the disentailing deed and the resettlement which was executed under the joint power created by the disentailing deed) out of what had originally been his estate tail: *Braybrooke (Lord) v. A.-G.* (1) and *A.-G. v. Floyer* (2). If, then, George Glyn had survived the deceased, so that this succession came into possession, the rate of duty would have been fixed upon the footing that his succession had been derived from the five original settlers under the 1888 settlement by which his estate tail was created (see the Succession Duty Act, 1853, s. 12, and *Braybrooke (Lord) v. A.-G.* (1))—namely, 11½ per cent. The same result would have followed if George Glyn were regarded as the donor of the power of charging under sect. 4 of the Act.

Returning, therefore, to the position as it in fact was immediately before the passing of the Act of 1921, there were at that date in existence certain successions in the settled property created by the resettlement in respect of which George Glyn was the predecessor. Those successions, however, were liable to be diminished by any exercise of George Glyn's power of charging which, in the event, might turn out to be effective. If it did not become effective, they would stand undiminished. The power of charging was a power to create a succession within the limits of the power—namely, a succession to which George Glyn would only become entitled in possession if he survived the deceased. However, this potential succession, if we may so call it, never materialised, and, in the event which happened of George Glyn dying before the deceased, it never could have become a taxable succession. It was not the mere exercise of the power of charging contained in the resettlement that conferred upon George Glyn an indefeasible title to the £50,000. In the event which happened, it never could have done so. What did confer that title upon him was the combined operation of (i) the power itself, (ii) the cancellation, by the Wolverton Estate Act, 1921, s. 4, of the proviso at the end of cl. 9

of the resettlement, the effect of which was to confer upon George Glyn a power, which he did not previously possess, to charge £50,000 in his own favour, which would be payable whether or not he survived the deceased, and (iii) the two instruments of charge. It is, in our judgment, impossible to treat the £50,000, the indefeasible title to which George Glyn thus conferred upon himself, as, to quote the language of para. 11 of the information :

... succession taken by him under the dispositions contained in the 1888 settlement and the resettlement as effectuated by the said respective charges.

- B It is said on behalf of the Crown (but not with complete accuracy—see *A.-G. v. Selborne (Earl)* (3), referred to below) that a succession, once created, cannot be destroyed by the act of the successor, and that a decision in favour of the appellant would violate this rule, since the effect would be to remove the £50,000 from the area of taxation. The Succession
- C Duty Act does not impose a tax on property at large. It imposes it on successions, and, in applying the Act, it is essential clearly to ascertain both the “succession” and the “disposition” under which it arises. It is the succession, so ascertained, that is taxed as such, and nothing else. In the present case, no “succession” arising under the power to
- D charge conferred by the resettlement was destroyed by the act of George Glyn in executing the deeds of charge and the act of the deceased in releasing his life interest. Such a succession never came into existence, and, even if it had, it would have disappeared, not by reason of any act of George Glyn, but because George Glyn died before the deceased.
- E It is true that a sum of £50,000 was removed from the area of taxation in one sense, since, if the Wolverton Estate Act had never been passed, the £50,000 would never have been raised, and the settled property would have been, to the extent of £50,000, more valuable, with the result that the duty payable on the death of the deceased in respect of successions
- F then falling into possession would have been larger. Nevertheless, this £50,000 would not have been the same thing as the £50,000 succession which would have been taxable if George Glyn had exercised the power of charging contained in the resettlement and survived the deceased, and it would have borne duty at a different rate. A “succession” is an
- G artificial thing. It is not a sum of money or other piece of property as such. An illustration of this is to be found in *A.-G. v. Selborne (Earl)* (3), where, by a settlement, an estate was conveyed, subject to a joint general power of appointment thereby conferred on father and son, to the use of the father for life, with remainder to the son if he should survive the
- H father (which event happened) in fee. Subsequently, the father and son appointed the estate to the son in fee. It was held by this court that no succession duty became payable on the death of the father, since the effect of the execution of the power was not to accelerate the son's succession under the settlement but to defeat it. It was pointed out that the estate which the son took by the execution of the power came to him under a different title—namely, under the power, and not under

the settlement in default of appointment—and was, moreover, for a different interest, being absolute, and not subject to defeasance on his predeceasing his father. However, the main argument presented on behalf of the Crown was based simply on the construction of the Wolverton Estate Act, 1921, s. 4. It was said that the effect of the section was to make the power exercised by George Glyn in law the same power as that conferred upon him by cl. 9 of the resettlement. In other words, the section ought to be construed as though it had in terms declared that any appointment depending for its ultimate effectiveness on the provisions of the section was for all purposes to be deemed to have been made in exercise of the power conferred by cl. 9 of the resettlement, and in exercise of that power alone. We cannot extract this meaning from the language of the section. A

One further argument advanced on behalf of the Crown must be mentioned. It was based on the saving clause, the Wolverton Estate Act, 1921, s. 15. It was said that no taxable succession can disappear without being replaced by another taxable succession—a proposition in itself of doubtful accuracy—that, if the Act had never been passed, what we have called the potential succession could never have become effective, that in that event it would have been “replaced,” in the sense that the other successions under the resettlement would have stood undiminished by any charge, and that, accordingly, the saving clause must be construed so as to make the £50,000 actually charged and raised a “succession.” We are quite unable to follow this argument. The effect of it, if accepted, would be to make the saving clause itself create a succession, a meaning which cannot possibly be extracted from it. Assuming that the saving clause applies to succession duty, it means, in our opinion, no more than it says—namely, that the Crown’s rights are to be the same as though the Act had not been passed. If that had been the case, no succession duty would have been payable in respect of the £50,000 which George Glyn was empowered by the resettlement to charge. The appeal is accordingly allowed, with costs here and below. The order of LAWRENCE, J., will be discharged, and the information will be dismissed. The order will be prefaced by the words: “The court being of opinion that upon the death of Frederic 4th Baron Wolverton no succession duty became payable in respect of the sum of £50,000. . . .” B C D E F G

Appeal allowed, with costs in both courts. Conditional leave to appeal to the House of Lords.

Solicitors: *Bircham & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] H

Re KAY'S SETTLEMENT, BROADBENT v. MacNAB.

[CHANCERY DIVISION (Simonds, J.), December 8, 9, 13, 1938.]

Settlement—After-acquired property—Enforcement of covenant by beneficiaries—Voluntary settlement—Assignment of defeasible interest—Enforcement of covenant for further assurance.

A By a voluntary settlement made in 1907 the settlor as settlor assigned to trustees, *inter alia*, all that share to which she was, or might become, entitled in a sum of £20,000 under the trusts of a deed of 1875. The settlement also contained a covenant to settle after-acquired property. The share in the sum of £20,000 was subject to a power of appointment vested in the settlor's mother, which the latter subsequently exercised, appointing a share in that sum to the settlor. The assignment in the settlement, therefore, operated as a covenant by way of further assurance to assign the share appointed to her. The settlor also became entitled to property which became subject to the after-acquired property clause. In the meantime, the settlor had married, and there were 3 children of the marriage, who were beneficiaries under the settlement. The trustees took out this summons to determine whether they should take proceedings to compel the performance of the above covenants or for damages for the settlor's failure to perform them :—

C HELD : since the infants, being volunteers, could not themselves successfully take proceedings for specific performance of the above covenants, or for damages for the breach of them, the court ought not to direct the trustees to take any proceedings of either nature.

D **[EDITORIAL NOTE.]** Circumstances very similar to those which arise here were considered by EVE, J., in *Re Pryce, Nevill v. Pryce* (1), and, after a full consideration of the law, EVE, J., refused to make an order for proceedings either for specific performance or for damages to be commenced by the trustees. In the present case, the judge has followed that judgment as to the after-acquired property, and has applied the same principles to the assignment of an interest liable to be defeated by the exercise of a power of appointment. As an assignment of such property operates as a covenant by way of further assurance to assign it, if and when it falls into possession, it is in the same position as that of property caught by the after-acquired property clause.

E AS TO ENFORCEMENT OF COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 590, 591, para. 860 ; and FOR CASES, see DIGEST, Vol. 40, pp. 525-529, Nos. 699-731.]

F Cases referred to :

- (1) *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234 ; 40 Digest 527, 719 ; 86 L.J. Ch. 383 ; 116 L.T. 149.
- G (2) *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch.D. 228 ; 40 Digest 527, 717 ; 49 L.J.Ch. 756 ; 43 L.T. 135.
- (3) *Pullan v. Koe*, [1913] 1 Ch. 9 ; 40 Digest 523, 685 ; 82 L.J.Ch. 37 ; 107 L.T. 811.

H ADJOURNED SUMMONS to determine whether or not trustees under a voluntary settlement should take proceedings to compel specific performance or recover damages for non-performance of a covenant to settle after-acquired property. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiffs.

F. R. Evershed, K.C., and *T. A. C. Burgess* for the first defendant.

E. M. Winterbotham for the remaining defendants.

SIMONDS, J. : In this case, the trustees of a voluntary settlement made on Dec. 24, 1907, by a lady, then Mary Winifred Kay, spinster, ask whether they shall take any, and, if so, what, proceedings to compel the performance by her of a covenant contained in that settlement or to recover damages for her failure to implement the covenant. A further question is raised dealing with substantially the same question in regard to a covenant of further assurance in regard to certain property which I shall have to mention more specifically. A

The circumstances of the case are these. On Dec. 24, 1907, the lady in question made her settlement, the trustees to it being Mr. Emmott, Mr. Lees and Mr. Hayhurst. The settlement recited that under the will of Elkanah Moss the settlor was entitled, subject to the life interest of her mother, Mary Lees Kay, to an equal share, with other children of Mary Lees Kay, in a sum of £20,000 or the investments for the time being representing the same. It recited that, under an indenture of Jan. 25, 1875, made between Christopher Kay, her father, of the first part, her mother, Mary Lees Kay, of the second part, and the trustees of the third part, and under a further indenture therein referred to, the settlor was, or might become, entitled, subject to the life interest of her mother, to a share of and in a further sum of £20,000 therein specifically mentioned. It recited, too, that the settlor was possessed of, or entitled to, the sum of £16,500, which she had arranged to advance temporarily to her brother in circumstances therein stated. It recited that the settlor was desirous of settling the reversionary share or shares of and in the two several sums of £20,000 to which she was, or might become, entitled, and also her undivided moiety of a certain mortgage for £33,000. It recited that it had been agreed that such provision should be made for the settlement of other or future acquired property of the settlor, except as was thereafter mentioned, and it contained the usual recital as to the making of a voluntary settlement and a reservation of the power to revoke. The operative part of the settlement is as follows : B C D E F

The said Mary Winifred Kay as settlor hereby assigns unto the trustees all that one equal fourth part or share or other the part or share to which the said Mary Winifred Kay is entitled in the said sum of £20,000 or the investments for the time being representing the same under or by virtue of the said in part recited will of the said Elkanah Moss deceased and also all that the part or share to which the said Mary Winifred Kay is or may become entitled in the said further sum of £20,000 under or by virtue of the said indentures of Jan. 25, 1875, and Jan. 26, 1875, or either of them or under any appointment which may be made thereunder in her favour by the said Mary Lees Kay and all other (if any) the part or share parts or shares to which she may hereafter become entitled by accruer survivorship or otherwise of and in the said two several sums of £20,000. G

Let me pause there to observe this. The assignment purports to be an assignment of, *inter alia*, the share to which she was, or might become, entitled in the second-mentioned sum of £20,000. In the events that happened, though, at the time of the settlement, she was entitled to a share, that share was liable to be defeated by the exercise by her mother of the power of appointment. In fact, her mother did exercise the power, and, under the exercise of the power, appointed to her a certain share. H

Thus, so far as that appointed share was concerned, this part of the settlement operated as a covenant by way of further assurance to assign the share which was in fact appointed to her. Then by cl. 12 of the settlement the settlor entered into the usual after-acquired property clause. It was thereby agreed and declared that, if the settlor should

A . . . at any time during her life become seised possessed or entitled of or to any real or personal property from or through any relative in blood on the father or mother's side but not otherwise (other than the property hereby specifically settled) for any estate or interest whatsoever in possession reversion remainder contingency or expectancy . . . then and so often as the same shall happen all such real and personal property (except as aforesaid), shall forthwith at the expense of the trust estate be assured or transferred by [the settlor, her heirs, executors or administrators to the trustees, to be held on the trusts of the settlement].

B That settlement having been made, as I say, on Dec. 24, 1907, the settlor subsequently married one MacNab, and by him she has had issue of the marriage three children, and no more. Her mother died on June 11, 1937, and, as I have said, whether under that will or otherwise, she
C exercised her power of appointment in favour of the settlor in respect of part of the £20,000 fund first mentioned. Under her will also the settlor became entitled to a substantial pecuniary legacy and to a share of residue, and it appears that the settlor is also entitled, contingent upon her surviving a certain person, to a share in the residuary estate of an
D uncle, one Edward Howard Moss.

It is in those circumstances that the trustees have issued this summons, making as parties to it, first of all, the settlor herself, and, secondly, her infant children, who are beneficiaries under the settlement, but, be it observed, though beneficiaries, and though her children, they are for the
E purpose of this settlement to be regarded as volunteers. They are not within the marriage consideration so as to entitle them to sue, though they are parties to this application. What the trustees ask is whether, in the event which has happened, of the settlor having become entitled to certain property, they should take proceedings against her to compel
F performance of the covenant or to recover damages upon her failure to implement it. I am bound to say that that does not seem to me to be a very happy form of proceeding, though perhaps it is difficult to see how else the trustees should act. Be it observed, however, that one of the persons made a party is the very person as to whom the trustees ask the
G question whether she should be sued. She, the settlor, has appeared by Mr. Evershed, and has contended, as she was entitled to contend, that the only question before the court was whether the trustees ought to be directed to take such proceedings. That is to say, she contended that the only question before the court was precisely that question which the
H court had to deal with in *Re Pryce, Nevill v. Pryce* (1), decided by EVE, J. That is to say, she has said that the question before me is not primarily whether, if she were sued, such an action would succeed (as to which she might have a defence, I know not what), but whether, in the circumstances as they are stated to the court, the trustees ought to be directed to take proceedings against her.

As to that, the argument before me on behalf of the children of the marriage, beneficiaries under the settlement, has been that, although it is conceded that the trustees could not successfully take proceedings for specific performance of the agreements contained in the settlement, yet they could successfully, and ought to be directed to, take proceedings at law to recover damages for the non-observance of the agreements contained in the settlement, first of all the agreement for further assurance of the appointed share of the first-mentioned £20,000, and, secondly, damages for the failure to comply with the covenant in regard to after-acquired property. In the circumstances, I must say that I felt considerable sympathy for the argument which was put before me by Mr. Winterbotham, on behalf of the children—namely, that at law there was, at any rate, on the evidence before the court to-day, no reason why the trustees should not be directed to take proceedings in order to recover what damages might be recoverable at law for breach of the agreements entered into by the settlor in her settlement. However, upon a consideration of *Re Pryce, Nevill v. Pryce* (1), before EVE, J., to which I have already referred, it seemed to me that, so far as this court was concerned, the matter was concluded, and that I ought not to give any such directions to the trustees to take the suggested proceedings. A B C

In *Re Pryce, Nevill v. Pryce* (1), the circumstances appear to me to have been in no wise different from those which obtain in the case which I have to consider. In that case, there was a marriage settlement made in 1887. It contained a covenant to settle the wife's after-acquired property. In 1904, there was a deed of gift, under which certain interests in reversions belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in certain sums appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement. The headnote states : D E

... The share of the £9,000 fell into possession in 1891 on the death of his father, and was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the £4,700 came into possession in 1916 on the death of the husband's mother, and were now outstanding in the trustees of his parents' settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will. F G

In that case, the trustees of the marriage settlement, according to the headnote, took out a summons :

... to have it determined whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should take proceedings to enforce them. H

To those proceedings, apparently, the parties were the trustees of the marriage settlement and a single defendant, the widow of the settlor. That is to say, there were no other parties to the proceedings to whose

beneficial interest it was to argue in favour of the enforceability and enforcement of the covenant, but the trustees no doubt argued in favour of their interests, as it was their duty to do.

A In a considered judgment, EVE, J., held that, although the interests to which I have referred were caught by the covenant of the wife and the agreement by the husband, respectively, yet the trustees ought not to take any steps to recover any of them. In the case of the wife's fund, he said that her next-of-kin were volunteers, who could neither maintain an action to enforce the covenant nor maintain an action for damages for breach of it, and the court would not give them by indirect means B what they could not obtain by direct procedure. That is to say, he declined to direct the trustees to take proceedings either to have the covenant specifically enforced or to recover damages at law—or now, I suppose, in this court, for breach of such covenant. EVE, J., as I say, took time to consider his judgment. Many of the cases that have been cited C to me—though not all of them, apparently—were cited to him, and, after deciding that no steps should be taken to enforce specific performance of the covenant, he said, at p. 241 :

D The position of the wife's fund is somewhat different, in that her next of kin would be entitled to it on her death; but they are volunteers, and although the court would probably compel fulfilment of the contract to settle at the instance of any persons within the marriage consideration (see *per* COTTON, L.J., in *Re D'Angibau, Andrews v. Andrews* (2)), and in their favour will treat the outstanding property as subjected to an enforceable trust (*Pullan v. Koe* (3)), "volunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed" : see *per* JAMES, L.J., in *Re D'Angibau, Andrews v. Andrews* (2). Nor could damages be awarded either in this court, or, I apprehend, at law, where, since the Judicature Act, the same defences would be available to the defendant as would be raised in an action brought in this court for E specific performance or damages.

That is the exact point which has been urged upon me with great insistence by Mr. Winterbotham. Whatever sympathy I may feel for his argument, I am not justified in departing in any way from this decision, F which is now 21 years old. EVE, J., goes on, at pp. 241, 242 :

G In these circumstances, seeing that the next of kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and *cestui que trust* between the defendant and the next of kin, in which case effect could be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the court now for the sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant's covenant? I think it ought not; to do so would be to give the next of kin by indirect means relief they cannot obtain by any direct procedure, and would in effect be enforcing the settlement as against the defendant's legal right to payment and transfer from the trustees of the parents' marriage settlement.

H It is quite true that in those last words EVE, J., does not specifically refer to an action for damages, but it is quite clear that he has in his mind directions in regard to both an action for specific performance and an action to recover damages at law—or, now, in this court.

In those circumstances, it appears to me that I must follow the decision of EVE, J., and direct the trustees not to take any steps either to compel performance of the covenant or to recover damages through the settlor's

failure to implement it. So far, I have been dealing expressly with the covenant for the settlement of after-acquired property. Exactly the same considerations arise in regard to the appointed power under the parents' marriage settlement, for there it is conceded that the settlement, if it operated at all, operated by virtue of the covenant for further assurance implied by the settlor, and, since it rests in agreement—or in covenant, rather—it stands on exactly the same footing as does the property which would be caught by the covenant for settlement of after-acquired property. Accordingly, the summons being amended, I will answer that question specifically in that way. A

Direction to trustees not to take any steps or proceedings. All costs as between solicitor and client to be paid out of capital of settled fund. B

Solicitors: *Skelton & Co., Manchester* (for all parties).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

R. v. SALISBURY.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 16, 1939.**] D

Gaming and Wagering—Unlawful gaming—Premises used for unlawful gaming—Whether legality of game a question for the judge or for the jury.

The appellant was convicted of having permitted premises to be used for unlawful gaming and for purposes in connection with a lottery. At the conclusion of the evidence for the prosecution, which clearly showed that the games were games of chance, the chairman invited evidence on behalf of the accused, but, as none was forthcoming, he then decided, on the clear and uncontradicted evidence of the prosecution, that the games were unlawful, and convicted the accused:— E

HELD: it is the duty of the judge, and not of the jury, to decide whether or not a game is unlawful.

[EDITORIAL NOTE.] At common law all games except cock-fighting are apparently lawful. Statutory enactments have made games of chance unlawful, and, in some cases, all games which are not games of mere skill. The nature of the game being established by evidence, it is for the judge to say whether it is unlawful. F

AS TO UNLAWFUL GAMING, see HALSBURY, *Hailsham Edn.*, Vol. 15, p. 502, para. 905; and FOR CASES, see DIGEST, Vol. 25, pp. 422, 423, Nos. 254, 255.] G

Cases referred to:

- (1) *R. v. Hendrick* (1921), 37 T.L.R. 447; 25 Digest 423, 255; 15 Cr. App. Rep. 149.
- (2) *R. v. Kirby, Parker & Patrick* (1927), 20 Cr. App. Rep. 12; Digest Supp.
- (3) *R. v. Davies*, [1897] 2 Q.B. 199; 25 Digest 422, 254; 66 L.J.Q.B. 513; 76 L.T. 786. H
- (4) *R. v. O.K. Social & Whist Club, Ltd.* (1929), 45 T.L.R. 570; Digest Supp.; 21 Cr. App. Rep. 119.
- (5) *R. v. Brennand* (1930), 47 T.L.R. 22; Digest Supp.; 22 Cr. App. Rep. 95.

APPEAL by leave against a conviction at the London Sessions for

permitting premises to be used for unlawful gaming and for purposes connected with a lottery. The facts are fully set out in the judgment.

H. Montgomery Hyde for the appellant.

Vernon Gattie for the Crown.

- A CHARLES, J. [delivering the judgment of the court]: In this case, the appellant, George Curtis Salisbury, was convicted at the London Sessions before the chairman of permitting premises to be used for unlawful gaming and for purposes connected with a lottery. He was fined £25 on each count, and was ordered to pay £25 costs. The circumstances in which the case arose, as discovered by the evidence which was adduced before the chairman, were as follow. Upon these premises there were two games being played. They were premises in the Haymarket, managed by the appellant, to which the public were admitted, and certain games were played there, among them being Film Stars and Fascination, the first being charged as a lottery and the second as an unlawful game. Abundant evidence was given upon which the chairman could come to the conclusion that these were games of chance, and, therefore, unlawful games. Evidence was given by two police officers, and I do not propose to go into the various moves made by the players of the games in order to receive a packet of 20 cigarettes. Suffice it to say that, in order to get a packet of 20 cigarettes in each game, 18 names were illuminated in rotation by a revolving light, and the object of each player was to stop the revolution of the light at a point opposite his own stall by the use of a press button. The evidence was that the use of the press button had no effect. That was Film Stars. When one comes to the game of Fascination, which is played by 24 persons, if one succeeds, after having paid 2*d.* for each entry, one receives a packet of 15 cigarettes. Each player sat on a stool behind a barrier, and had in front of him a glass box with an aperture in the side. In the bottom, was a square space divided into five rows of five square recesses, like an egg-box, and it was the object of the player to be the first to throw five soft rubber balls through the aperture so as to fill five of those square recesses in any row opposite him. The balls were very slightly smaller than the recesses, and evidence was given by the police officer that the players had no control over the balls, and that it was mere chance as to whether the ball went into a square. At the conclusion of the evidence for the prosecution—that is, the evidence of the police constable who drew attention to the chance involved in these two games—the chairman said :
- H I am not going to determine the question until I have heard any evidence which may assist me to come to a conclusion. Who do you call ?
- That was said to Mr. Hyde, who appeared for the appellant, and Mr. Hyde said : “ Mr. Aldersham.” On further consideration, however, Mr. Aldersham was not called, and the result was that the chairman was faced with this state of affairs. He had before him evidence, which

was uncontradicted, which showed as clearly as anything could show that these games were games of chance, and that certainly Film Stars came under the category of a lottery. He took into his consideration one authority particularly, *R. v. Hendrick* (1), which was brought to his notice by the appellant's counsel, but which can be disposed of, as we think that it has been rightly decided in more modern times by A two members of this court, or, at any rate, by two judges who were members of the court, in *R. v. Kirby, Parker & Patrick* (2), that it is the duty of the judge, and not of the jury, to decide whether or not a game is unlawful. In deciding that case, words used by LORD RUSSELL OF KILLOWEN, L.C.J., in *R. v. Davies* (3) were quoted by LORD HEWART, B L.C.J., in support of the judgment at which the court had then arrived, and the words, at p. 202, are these :

But, further, it appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of "German Bank", as played there, was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge. . . . C

That judgment has been constantly supported, notably in *R. v. O.K. Social & Whist Club, Ltd.* (4), where the same quotation from the judgment of LORD RUSSELL OF KILLOWEN, L.C.J., as that in *R. v. Davies* (3) is used in support of the judgment then given. Then, later still, in 1930, D in *R. v. Brennand* (5), *R. v. Davies* (3) is again relied upon, and in that case *R. v. O.K. Social & Whist Club, Ltd.* (4) is quoted by AVORY, J., in his judgment, and the law is, therefore, left beyond all question of doubt and possibility of argument that it is the duty of the judge, and not of the jury, to decide whether or not a game is unlawful. E

In this case, on ample evidence, and after an invitation for further evidence, which he did not get, the chairman came to the conclusion that these games were unlawful games—that Film Stars was a lottery, and that Fascination was an unlawful game—and it is difficult to find that he could come to any other conclusion, supported, as that conclusion is, F by a long unbroken chain of authorities. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors : *Macarthur & Macarthur* (for the appellant) ; *Legal Department, Metropolitan Police* (for the Crown). G

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Re AN ARBITRATION BETWEEN BEBB AND FRANK.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **January 23, 1939**]

Agriculture—Agricultural holding—Compensation—Disturbance—Amount of compensation—Tenant of two holdings—Agricultural Holdings Act, 1923 (c. 9), s. 12 (6), (8).

The appellant was tenant of two agricultural holdings in close proximity. He received notice to quit one of them, the rent of which was £100 per annum, and claimed compensation for disturbance. The arbitrator found that the only loss was the cost of the preparation of his claim, which was £10 10s., and awarded £10 10s. compensation, stating that, in accordance with the Agricultural Holdings Act, 1923, s. 12 (8), he reduced the compensation from £100 to £10 10s. :—

HELD : the provision in sect. 12 (6) of the Act that the compensation shall be an amount equal to one year's rent of the holding is an overriding provision, and the compensation in this case cannot, therefore, be reduced to less than £100.

EDITORIAL NOTE. This case considers the construction of the Agricultural Holdings Act, 1923, s. 12 (8). It had been thought that one year's rent was not the minimum amount of compensation in cases coming within that subsection, and this view was based on the judgments in *Westlake v. Page* (1). The Court of Appeal in this case have, however, favoured another construction, and, as the matter was not the actual subject of the decision in the earlier case, they have found no difficulty in departing from the view there expressed.

AS TO AMOUNT OF COMPENSATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 363, 364, para. 598 ; and FOR CASES, see DIGEST, Supp., Agriculture, Nos. 266j-266m.]

Case referred to :

(1) *Westlake v. Page*, [1926] 1 K.B. 299 ; Digest Supp. ; 95 L.J.K.B. 456 ; 134 L.T. 612.

APPEAL from an order dated May 17, 1938, of His Honour JUDGE SAMUEL, K.C., at the Oswestry County Court, upon a special case stated in an arbitration under the Agricultural Holdings Act, 1923, where a claim was made by a tenant, R. L. Bebb, against his landlord, C. E. Frank, under the terms of sect. 12 (1), (6), of that Act.

The tenant became the tenant of a holding of about 38 acres on Mar. 25, 1925, at a rent subsequently reduced to £100 per annum. He remained as yearly tenant of that holding until Mar. 25, 1937, his tenancy then being determined by notice to quit. He was also tenant of about 132 acres situate at about half-a-mile from the first holding, and was owner in fee simple of about 35 acres adjoining the second holding. He had not on or before Mar. 25, 1937, received notice to quit the second holding. He duly gave notice of his intention to claim compensation for disturbance in respect of the first holding. He subsequently became tenant of a further holding of about 40 acres. On the termination of his tenancy of the first holding on Mar. 25, 1937, he removed about 60 ewes with their lambs to the second holding—that is, for a distance of about half-a-mile. The arbitrator found as a fact that the loss due

to disturbance was a sum of £10 10s., the amount of the fee for the preparation of the tenant's claim for compensation. The arbitrator awarded, apart from sums not material to the case stated, a sum of £10 10s. only in respect of the claim for unreasonable disturbance. Upon this point, the award stated :

In fixing this sum I was of opinion that this sum represented the actual loss or expense incurred by [the tenant] attributable to the notice to quit in respect of [the first holding], in view of the fact that he continued in his tenancy of the second holding. Therefore, in accordance with the Agricultural Holdings Act, 1923, s. 12 (8), I reduced by £89 10s. the amount of the compensation for unreasonable disturbance provided for by sect. 12 (6) of the Act.

Harold L. Murphy, K.C., and *W. Hanbury Aggs* for the appellant. *J. B. Richardson* for the respondent.

SCOTT, L.J. : The Agricultural Holdings Act, 1923, s. 12 (1), (6), provides as follows :

(1) Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section.

(6) The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of the compensation), but for the avoidance of disputes, such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding.

The sum referred to in the second half of subsect. (6), about avoidance of disputes, is the sum payable under the section for compensation on the various heads named. It has been decided that that right to a minimum compensation of one year's rent does not attach unless some actual loss or expense is proved. In this case, that was so established, being a figure of £10 10s. *Prima facie*, therefore, under sect. 12 (1), (6), Mr. Bebb was entitled to one year's rent. That was in fact £100.

The landlord says, however, that that is not an end of the matter. Sect. 12 (8) provides as follows :

In any case where a tenant holds two or more holdings, whether from the same landlord or different landlords, and receives notice to quit one or more but not all of the holdings, the compensation for disturbance in respect of the holding or holdings shall be reduced by such amount as is shown to the satisfaction of the arbitrator to represent the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings.

The landlord submits that the effect of that subsection reacting upon subsect. (6) is that, where the loss or expense proved under subsect. (6) is greater than the year's rent, the reduction is to be applied so as to reduce the claim, but, further, that, where the actual loss or expense is

less than the year's rent, and, therefore, under subsect. (6), the tenant would get his year's rent as the minimum of compensation, because that subsection says that he shall, then the minimum provision is to be wholly disregarded, that the reduction referred to in subsect. (8) and calculated in accordance with that subsection shall be deducted from the actual loss or expense proved as the condition precedent of the right to the minimum, and that then the tenant shall get only that actual loss or expense, less the reduction applicable by reason of his possession of the other holding which enables him to reduce the disturbance caused by the notice to quit.

A In my view, that is an impossible construction of subsect. (8). I will state my construction of the two sections together in this Act first, before considering the cases that have been cited. In my judgment, in order to read them together so that they shall not clash, the best test is to imagine the two put into one section divided into three subsections.

B The first subpara. (a) would include the first half of subsect. (6) ending with the word "compensation" at the end of the brackets. Then subsect. (8) would be read as subpara. (b). That follows on, as it seems to me, quite clearly and intelligibly. Then subpara. (c) is what is in effect a proviso, on top of the two substantive enactments, as to how the actual loss or expense is to be calculated—the proviso that, where the sum payable for compensation is to be given, it shall be one year's rent, unless it is proved that the loss and expenses exceed one year's rent. That I read as an overriding provision. If that is so, then, since the special case here finds as a fact that, taking into account the possession of the other holding, the only actual loss or expense incurred, at any rate within the meaning of the Act, was £10 10s. expense through the necessity of preparing the outgoing claim, and since that was less than the year's rent—or, rather, it was not more than the year's rent—the year's rent figure becomes applicable.

D I am unable to see how the two subsections in the same section dealing with the assessment of compensation for disturbance in respect of the particular holding quitted can be read together unless one reads them in that way. It is impossible to elaborate argument on a short question of construction of that nature. One must form one's opinion as to the correct construction and stand by it, even though it may be an opinion which is capable of being overruled by a higher tribunal.

E However, Mr. Richardson, for the landlord, says that, although there is no direct authority or an actual concrete case, there is a decision of the Court of Appeal—*Westlake v. Page* (1)—which is inconsistent with the view which I have just expressed. First of all, the difference between the position of the court in that case and the court in the present instance is that the present case is a concrete appeal on actual facts in which we have to apply the Act of Parliament in a case where the tenant has proved his facts and the landlord has proved his facts, and we know what the actual position is. In *Westlake v. Page* (1), as far as I can see,

the reality of the position was a request to the Court of Appeal kindly to supply a key to the correct interpretation of the Act in advance, in order that the arbitrator might know how to read it. In my very respectful and humble submission, to give a decision *in vacuo* is very dangerous, and, at any rate, if it is *in vacuo*, I think that, in subsequently considering a question of concrete facts, where a decision has to be made in order to give the parties a solution of their actual difficulties, a court of equal jurisdiction is entitled to regard what has been said in the earlier case as *obiter dictum*, however much respect the court may pay, and should pay, to what has been said. A

I have considered very carefully what was said in that case. We have had read to us the whole of the judgments, in so far as they deal with this question, and, as it seems to me, all three Lords Justices are in agreement that it is exceedingly difficult to see what subsect. (8) was intended by the legislature to mean, because it was very difficult to visualise circumstances in which it could come into operation. On the other hand, the alternative to saying that the subsection has no meaning in a case where the total disturbance is less than one year's rent is an alternative which they hesitated to attribute to Parliament. They consequently said in effect, "We find it very difficult to see what the meaning is, or what its application is." I quote one sentence from the judgment of WARRINGTON, L.J., at p. 309 : C D

I do not think it is possible to say as a matter of law that subsect. (8) is not applicable to the conventional sum provided by subsect. (6).

That is the highwatermark of the decision, as it appears to me. WARRINGTON, L.J., goes on to say, at p. 309 : E

There may possibly be circumstances under which it would be not unreasonable to apply it, though I find it difficult to imagine a case in which it would be applicable. We do not know the facts of the present case. Therefore all that we can say on the present occasion is that it would be going too far to lay down that there cannot be such a case.

Mr. Richardson, for the landlord here, has boldly said : "I am prepared to concede that, if the tenant had had only his one holding, he would have been entitled to, we will say, £50, and he would then have got his £100 minimum compensation. If, however, I prove that he would have been saved, or was in fact saved, £40 out of that £50 by reason of his possessing the other holding, the legislature must be taken to have indicated in that case that the award of £100 should be reduced from £100 to £10." That does not seem to me to be a reasonable interpretation of the language of the section, and I cannot obtain such a meaning from the section. The only sense I can make of subsect. (8) is as I have suggested, reading the two subsections together, as far as the first half of subsect. (6) is concerned, with subsect. (8), and then treating the second half as an overriding provision coming at the end of both. I think that that is really all that I desire to say upon that matter. The appeal will be allowed, and I will discuss the result after MACKINNON and GODDARD, L.JJ., have delivered their judgments. F G H

MACKINNON, L.J.: I agree. The problem of ascertaining the meaning of subsect. (8), following as it does, after subsect. (6), is, I think, one of extraordinary difficulty. Under subsect. (6), the tenant has to show that, by quitting the holding, he has unavoidably sustained some loss. If he does so, and if the loss which he proves is less than
A a year's rent, he is entitled, for the avoidance of dispute, to one year's rent. Subsect. (8) then provides that, if, in addition to the holding he is quitting, he has another holding, the compensation for disturbance in respect of the holding which he is quitting shall be reduced by such amount as is shown to the satisfaction of the arbitrator to be less than
B the reduction (if any) due to the notice to quit.

Inasmuch as, under subsect. (6), the arbitrator has to find the loss unavoidably sustained by quitting, the fact that he is in possession of another holding would necessarily be one of the factors to be taken into account in order to ascertain the unavoidable loss, and, therefore,
C if the amount of loss that is unavoidable has been ascertained under subsect. (6), the fact that he has in his possession another holding has necessarily to be taken into account, and it is difficult, therefore, from that point of view, to give any meaning to subsect. (8). I can only suppose that subsect. (8) was put in through the excessive care of the
D legislature as a warning to a hypothetically stupid arbitrator. Bearing in mind the possible contingency of a stupid arbitrator, it is put in as a warning to him that, in ascertaining the unavoidable loss under subsect. (6), he must not estimate that loss *in vacuo*, as though the tenant had to move his stock to some unascertained place, but must
E take into account the fact that the tenant has an available place to which to move them, and the cost of moving them to that available place will be one of the factors to be taken into account in ascertaining how much of the tenant's loss is avoidable and how much unavoidable. That is the only meaning or purpose of subsect. (8) that I can imagine
F to exist.

If the landlord is to succeed in this case, and uphold the decision which was given in the court below, subsect. (8) must be construed as meaning that, in any case where the man under notice to quit one holding is in possession of another holding, in such a case the provision
G in favour of the tenant of a minimum of one year's rent under subsect. (6) shall not apply, and he shall recover only his actual proved loss, without any increase to a minimum. That construction of subsect. (8), I think, is perfectly impossible. There are no words that justify giving it any such meaning. That being so, I think that, where
H a loss has been proved to exist, as it has here, and that loss is less than the year's rent, under the provision of subsect. (6), the tenant is entitled to the minimum allowance of the one year's rent, and I am clear that there is nothing in subsect. (8) which says that, where he has another holding, that provision of the minimum in his favour shall not apply. In the result, I think that this appeal succeeds.

GODDARD, L.J. : I agree. For myself, I am not ashamed to admit that I have not the least idea what subsect. (8) means. I cannot give any meaning to it in the least satisfactory in my own mind, but I am quite satisfied that it does not bear the meaning which has been put upon it by the county court judge. Speaking for myself, I do not think that it can possibly be applied in any case to deprive the tenant, once he has shown an actual loss, of his right to proceed. I do not propose to attempt to say what I think it may mean, or what I think Parliament may have thought that it meant. I can only say that I do not understand the subsection. I am sure that it does not apply in this case, and, therefore, I agree that this appeal should be allowed. A

Appeal allowed.

Solicitors : *Ellis & Fairbairn*, agents for *Cyril Jones & Gittins*, Oswestry (for the appellant) ; *Gibson & Weldon*, agents for *Henry Lee, Bygott & Eccleston*, Whitechurch (for the respondent). B

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.] C

D

SQUARE v. MODEL FARM DAIRIES (BOURNEMOUTH), LTD.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), January 23, 24, 25, 1939.]

Food—Milk—Breach of warranty—Fraudulent misrepresentation—Breach of statutory duty—Action for damages—Whether remedy restricted to penalty—Infected milk—Sale of Goods Act, 1893 (c. 71), ss. 13, 14—Food and Drugs (Adulteration) Act, 1928 (c. 31), s. 2.

The plaintiff S. arranged with the defendants, who were large distributors of milk, to supply him, his family and household with milk. In August, 1936, a serious outbreak of typhoid fever occurred. S.'s wife, two children, his niece and governess, who were also plaintiffs, contracted the disease, and S. himself, though escaping typhoid, was incapacitated for some little time through inoculation. Before they commenced to supply S., the defendants wrote asking him to deal with them, and enclosed a brochure describing the way in which they carried on their business, and in particular the care taken to ensure a pure supply of milk, which was stated to be mainly produced on their own farm. It was proved at the trial that, during the summer season, they drew the greater part of their supplies from a large number of other farms, most of the milk being mixed together, at the defendants' distributing depot, before being delivered to customers. For the purpose of the trial, it was admitted that the infection was carried in the milk supplied by the defendants. The plaintiffs founded their actions, not only upon negligence, fraudulent misrepresentation, and breach of warranty, but also upon breach of the statutory duty imposed by the Food and Drugs (Adulteration) Act, 1928, s. 2, which requires sellers of food to supply food of the nature, substance and quality demanded:—

HELD: (i) there had been no fraudulent misrepresentation, as there was no proof that the defendants did not honestly believe what they had represented, which representation the court found to be that they had taken all reasonable steps to see that the milk was of good quality.

(ii) where a statute imposes a penalty for its breach, the court must consider the general purpose of the Act in order to see whether the legislature intended to provide a civil remedy for a breach. On the assumption that what was done in this case did constitute a breach of sect. 2 of the Act (a point which the court found it unnecessary to decide), the Act imposed a penalty for what would, in any event, give rise to a right of action at common law. The Act did not of itself give any right of action for a breach of the duty imposed by it.

(iii) the Act was dealing with the relationship of vendor and purchaser, and could not on any view give a right of action to anyone not a purchaser. The plaintiffs, other than S., therefore, failed in their action.

Decision of LEWIS, J. ([1938] 2 All E.R. 740), varied.

EDITORIAL NOTE. The plaintiffs in this case founded their action both in tort and in contract. In tort, they alleged both negligence, fraud and breach of statutory duty. The judge, at the hearing, found, on the evidence, that there was no proof of either fraud or negligence. No appeal was brought on the question of negligence, but the cross-appeal sought to have the judge's finding on the question of fraud reversed. The appeal is concerned with the question of breach of statutory duty imposed by the Food and Drugs (Adulteration) Act, 1928, s. 2, and the question is whether the remedies are restricted to the penalties mentioned in the statute so that an action for damages for the breach of duty is excluded. This, as is well settled, depends upon the construction of the provisions of the Act as a whole, and the principles of construction to be applied are fully considered. In contract, the actual purchaser, Mr. Square, succeeded in a claim based upon the Sale of Goods Act, 1893, ss. 13, 14, and as to this there was no appeal. The plaintiffs other than

Mr. Square were not, of course, parties to the contract of purchase and sale of the milk, and they could only succeed if one of their claims in tort could be successfully maintained.

AS TO ADULTERATION OF MILK, see HALSBURY, Hailsham Edn., Vol. 15, pp. 208-211, paras. 383-389; and FOR CASES, see DIGEST, Vol. 25, pp. 126-131, Nos. 474-512.]

Cases referred to:

- (1) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- (2) *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; 42 Digest 759, 1850; 46 L.J.Ex. 775; 36 L.T. 761; *revsg.* (1871), L.R. 6 Exch. 404.
- (3) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 42 Digest 759, 1858; 67 L.J.Q.B. 862; 79 L.T. 284.
- (4) *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608; 39 Digest 445, 733; 74 L.J.K.B. 386; 92 L.T. 527. *
- (5) *Sandys v. Small* (1878), 3 Q.B.D. 449; 25 Digest 83, 113; 47 L.J.M.C. 115; 39 L.T. 118.
- (6) *Jebsen v. East & West India Dock Co.* (1875), L.R. 10 C.P. 300; 17 Digest 125, 340; 44 L.J.C.P. 181; 32 L.T. 321.
- (7) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 42 Digest 870, 197; 93 L.J.K.B. 5; 129 L.T. 777.
- (8) *Kenny v. Cox* (1920), 89 L.J.K.B. 1258; 25 Digest 130, 509; 124 L.T. 221.
- (9) *Hunt v. Richardson*, [1916] 2 K.B. 446; 25 Digest 128, 492; 85 L.J.K.B. 1360; 115 L.T. 114.
- (10) *Ward v. Hobbs* (1878), 4 App. Cas. 13; 39 Digest 464, 902; 48 L.J.Q.B. 281; 40 L.T. 73.
- (11) *Few v. Robinson*, [1921] 3 K.B. 504; 25 Digest 128, 495; 91 L.J.K.B. 42; 126 L.T. 94.
- (12) *Williams v. Rees* (1918), 87 L.J.K.B. 639; 25 Digest 129, 501; 118 L.T. 356.
- (13) *Couch v. Steel* (1854), 3 E. & B. 402; 42 Digest 750, 1739a; 23 L.J.Q.B. 121; 22 L.T.O.S. 271.

APPEAL AND CROSS-APPEAL from a decision of LEWIS, J., dated May 10, 1938, and reported [1938] 2 All E.R. 740. These were consolidated actions brought by Alwyn Holberton Square and various members of his family and household for damages in respect of illnesses contracted through drinking milk supplied by the defendants and containing typhoid germs. The facts of the case are fully set out in the judgment of SLESSER, L.J.

Sir Walter Monckton, K.C., and *L. C. Graham-Dixon* for the appellants.
H. J. Wallington, K.C., and *H. H. Maddocks* for the respondents.

Monckton, K.C.: There was here a sale of objectionable matter, and an offence was committed against the Food and Drugs (Adulteration) Act, 1928. There is a penalty for such an offence provided by that Act, and therefore no civil action lies: *Atkinson v. Newcastle Waterworks Co.* (2). However, if an action does lie, then it is only the purchaser who can sue: *Groves v. Wimborne (Lord)* (3) and *Phillips v. Britannia Hygienic Laundry Co.* (7). [Counsel referred to *Monk v. Warbey* (1), *Frost v. Aylesbury Dairy Co.* (4), *Kenny v. Cox* (8) and *Sandys v. Small* (5).] The Food and Drugs (Adulteration) Act, 1928, s. 2, was intended to apply to the relationship between vendor and purchaser, and nothing

- more. It is extremely unlikely that Parliament would have given a remedy to third parties without clearly saying so. At common law, a warranty exists only where the circumstances are such as to show that the purchaser relied upon the vendor's skill and knowledge. There was here no breach of statutory duty. The question is whether or not there
- A can be any breach in a case where a natural (as opposed to a manufactured) product is sold, such as milk straight from the cow. Such milk must be goods of the nature, quality and substance demanded by the purchaser. [Counsel referred to *Hunt v. Richardson* (9), *Ward v. Hobbs* (10), *Few v. Robinson* (11) and *Williams v. Rees* (12).]
- B *Wallington, K.C.*: The legislature had in mind that a buyer could himself exercise remedies. The machinery of the Act and the language used are such that the legislature must have had in mind the protection of the public against bad or injurious food. Purchases are made in such circumstances as not to give rise to any remedy under the Sale of
- C Goods Act. Sects. 1 and 2 are the only sections which impose a penalty. If a statute imposes a duty, and a penalty for non-performance of that duty, then one must look at the Act and see whether or not it withdraws other remedies. [Counsel referred to *Couch v. Steel* (13).] The purpose of this Act is to protect the public. The penalty is the public remedy,
- D but it leaves untouched the ordinary right to pursue common law remedies. The failure of a criminal prosecution does not affect a civil remedy. This is one of the cases where the legislature, desiring to protect the consumer of food, has not negatived his right to a civil remedy. There is room for both actions. It is unfortunate if members of the
- E public other than the purchaser have no remedy. With regard to the cross-appeal, if the plaintiff was induced by fraud to take the milk, that is sufficient for him to recover.

Maddocks: It is expressly stated in the brochure that milk from the other farms was produced under the same conditions as those which

F obtained on the defendants' farm. It was also stated that the *main* supply came from Knighton Farm. This was not so.

Monckton, K.C., was not called on to reply.

- G SLESSER, L.J.: This action arises out of the fact that certain milk which was consumed by a number of persons, the plaintiffs, proved to be contaminated, so that most of them became seriously ill and had to remain in hospital, and undoubtedly they suffered serious loss both by way of physical suffering and in other ways. With regard to what happened after the drinking of this milk there is really no dispute between
- H the parties, and, indeed, most of the facts of this case either were admitted before the case was heard or have subsequently been found by the judge. Nevertheless, the case raises some difficult questions which we have to determine.

The action was started in the first place by Mr. Alwyn Holberton Square, a solicitor of the Supreme Court, who lives at Twyford. He

desired to spend a holiday in the neighbourhood of Bournemouth, and he did in fact take a house known as "Suntrap," Panorama Road, Sandbanks, Poole, in the summer of 1936. It being known in the district that he was coming there, he received before he went to his summer residence a circular letter and a brochure which were published by a firm then known as the Model Farm and Frowd's Dairies. They have since altered their name, and they are sued under the name of Model Farm Dairies (Bournemouth), Ltd. The circular which Mr. Square received was dated May 28, 1936, and was in the following terms :

It having come to our knowledge that you will be taking up residence at Sandbanks shortly, we are taking the liberty of writing to ask if we may have the pleasure of your kind patronage for milk and dairy produce. We would mention that our Model Farm is quite near, being situated in Sandbanks Road, and the hygienic conditions under which the milk is produced and bottled enable us to maintain an adequate supply of pure, rich, clean milk, delivered twice daily. We need hardly say that any instructions with which we may be favoured will receive our most careful attention and everything possible done to ensure entire satisfaction.

There is a heading to that circular, which purports to come from the Model Farm, Sandbanks Road, stating that the firm had two farms, Model Farm. Sandbanks Road, Parkstone, and Knighton Farm, Canford. It also states : " Please reply to the Model Farm, Sandbanks Road." The enclosed brochure makes it quite clear, however, that certain statements in the circular are not accurate. For example, with regard to the Model Farm in Sandbanks Road, which is said to be quite near, it is stated in the brochure, which is said by Mr. Square to have been read by him and understood to the extent that he acted upon its representations :

The farm at Sandbanks Road. In 1927 the herd from this farm was awarded first prize in the Dorset County Clean Milk Competition. Owing to the land being developed for building purposes, it was found necessary to transfer this herd to Knighton, and the Model Farm has been turned into a distributing depot, fitted throughout on the latest hygienic principles, with up-to-date machinery for dealing with the milk. This depot is open for inspection at any time.

Thus, at the time when the circular was written, as appears from the accompanying statement, this farm did not exist in Sandbanks Road as a farm. It had become a distributing depot, and the herd which had been there had been transferred to the other farm at Knighton. The little booklet which was sent with the circular is, in ordinary commercial language, a puff or advertisement for the milk which is supplied by these dairies. It opens with the words : " How clean, pure milk is supplied to Bournemouth." Then there is a story about a gentleman in Scotland which I do not think is very material, but it goes on to give the gist of the story by saying this :

Elaborate organisations exist to supply our wants and as often as not we know little or nothing about them.

That seems to me to be a profound truth. Then follow these important words :

Take an example from milk and let us consider the costly and extensive organisation which enables the Model Farm and Frowd's Dairies to maintain all the year round for the people of Bournemouth and district an adequate supply of rich, pure milk free from all possibilities of contamination.

That statement is quite general in itself, and it is before the particular reference to Knighton Farm, and, in my opinion, it does state that the arrangements which have been made by this dairy are such as to provide all the year round "an adequate supply of rich, pure milk free from all possibilities of contamination." I think that that must mean "free from such possibilities of contamination as may reasonably be provided against." It is not an insurance that in no case will contamination arise. As DU PARCQ, L.J., indicated during the course of the argument, so long as milking is done by hand, it is impossible absolutely to guarantee that the udder of some cow may not unfortunately be touched by someone who is a typhoid carrier, and there must be many other circumstances in which it may be imagined that sources which could not reasonably be anticipated or guarded against may be in operation. I think that one must read the phrase commercially, and that one must read it: "free from all possibilities of contamination which may reasonably and fairly be anticipated." Then the brochure passes on to deal with their farm at Knighton, to which I have referred, under the heading: "The 100 cows at Knighton." That is preceded, however, by a most important statement, which, to my mind, has a very considerable effect upon the whole construction of this document. It begins:

The main source of supply is the well-known Knighton Farm on the banks of the charming River Stour at Canford.

That certainly means, at any rate, that Knighton is not the only source of supply. It may be read to mean that at any particular time the greater part of the supply comes from Knighton, or it may mean that Knighton is relied upon as a basic source of supply, and that other supplies will flow into the general store of milk which the firm have to maintain to deal with the varying consumption from different sources, or it may mean, or may mean in addition, that, at any rate, at no time will there be less supply from Knighton than from anywhere else, and that it is, of all the various supplies, the largest individual supply at any particular time. Whatever it may mean, it is perfectly clear that there is no representation here that all the supply which Mr. Square or any other consumer could hope to get will come from Knighton, and that whether or not he gets a particular supply from Knighton at any particular time must be a question of chance. There is even no undertaking that supplies from Knighton and the supplies from other people will not be mixed before they reach the consumer. Then I think the rest of this part of the brochure goes on to deal with the conditions at Knighton. It states that there is a palatial cowshed there. It states how the farm "was awarded the first prize and Gold Medal in the Dorset County Clean Milk Competition." It states that scrupulous attention to cleanliness "is shown at every stage of the journey taken by the milk from the farm to the customer's door," and then it states:

... and it is no idle boast that the Model Farm and Frowd's Dairies are able to supply the cleanest and safest milk in the district.

That, I think, is a reference primarily to Knighton Farm. The last passage is as follows :

Those anxious to study for themselves the conditions under which their milk is procured are specially invited to visit the Knighton Farm any afternoon between the hours of two and four.

Mr. Maddocks says that that is a representation that all the supplies of milk are procured under the conditions of Knighton Farm. As CLAUSON, L.J., has pointed out, if that were to be construed strictly, it would mean that all the milk—and I have already pointed out that it is only the main supply which comes from Knighton—would have to be produced in sheds built regardless of cost, not exactly perhaps the same sheds, but substantially sheds built in the magnificent manner of those in which the milk is produced at Knighton. I disagree. I think that it is a representation that those who go to Knighton can see the conditions under which their milk which comes from Knighton is procured. Generally, one cannot go further than go back to before Knighton was ever considered, to the statement that “the Model Farm and Frowd’s Dairies are able to supply the cleanest and safest milk in the district.” Before that, it says :

Take an example from milk and let us consider the costly and extensive organisation which enables the Model Farm and Frowd’s Dairies to maintain all the year round for the people of Bournemouth and district an adequate supply of rich, pure milk free from all possibilities of contamination.

So much, therefore, for this circular, which Mr. Square, as I have said, duly received before he went to Bournemouth. To continue the history of the case, which, as I have already said, is really not in dispute, on Aug. 28, 1936, Mrs. Square was taken ill, and had to go to hospital. The daughter became ill with typhoid on Aug. 28. The son was taken ill, and went to hospital, too. The niece got typhoid fever, and also the governess. All these persons are parties to a subsequent action which was brought after Mr. Square’s action, and which was ultimately consolidated with it. In that second action there is also a claim by the mother of the niece, who was also taken ill.

The claims are put in various ways, and the various ways in which the claims are put I must now proceed to consider. First of all, with regard to the plaintiff Mr. Square, he says, in the first place, that it was a term of his contract that the milk supply should be clean and free from contamination or infection by disease, and he relies upon sects. 13 and 14 of the Sale of Goods Act to say that he had made known to the seller the particular purpose for which the goods were required, that he relied on the seller to supply him with good and wholesome milk—that is to say, not contaminated with typhoid possibilities—and that it was so described in the leaflets and brochures which they sent to him. As regards that matter, the judge has found in favour of the plaintiff Mr. Square, and he has given him damages to the extent of £400 in respect of the damage he has suffered, which damage is partly special damage owing to the expenses to which he had been put—it is unnecessary to detail

them—in connection with the assistance rendered to his children when they were ill. With regard to these damages, which have been given on the basis of a breach of the implied term of the contract of sale, there is no appeal, and with that matter we are not concerned. However, Mr. Square put the matter in certain other ways, and, with regard to
A the other ways in which the case is put, other than the implied contract of sale, they are substantially the same as those upon which the other plaintiffs—the wife, the children, and so forth—rely, and it is convenient, I think, to deal with them together. Some of them were made by the plaintiff Mr. Square by way of amendment of his original statement of
B claim, but that is now immaterial.

It is said, first of all, that there was made to him a representation which was false as to the conditions in which this milk was produced, the falsities being contained in the brochure to which I have referred. That is one way in which it is put. It was then said, with regard to the
C children and dependants, that, if it could be shown that Mr. Square had an action in deceit in that way, then they also, on the authorities, would be entitled to bring their actions. The judge has ruled in this case that there was no evidence of any fraud, and that is one of the grounds of the cross-appeal which is brought by Mr. Wallington here. That cross-appeal
D with regard to fraud is made both with regard to Mr. Square, although he has already obtained his damages, as I have said, for breach of the implied warranty under the Sale of Goods Act, and with regard to the rest of the plaintiffs. Then the second way in which the case was put was in negligence. With that plea we are not here concerned. The judge has
E negatived negligence on the part of the defendants, and there is no appeal with regard to that matter. Thirdly, however, and here perhaps the most difficult question of law arises, the action was framed on the basis that damages ought to be awarded to the plaintiffs as a result of a breach of statutory duty on the part of the defendants—namely, a
F breach of their duty under the Food and Drugs (Adulteration) Act, 1928, s. 2. On that basis, the judge has found in favour of the plaintiffs, and he has awarded damages of £250 to the wife and varying sums to the other plaintiffs—which it is not necessary here to set out—and it is
G against those damages so awarded to the wife and to the children and to the other plaintiffs, on the basis that they were damages flowing from a breach of a statutory duty, that Sir Walter Monckton appeals on behalf of the defendants. It is, I think, convenient, therefore, to deal with that question first.

The general law with regard to the right of persons who are injuriously
H affected by breach of duty imposed by statute upon someone injuring them is now scarcely in dispute. The matter is, I think, put with great clarity by MAUGHAM, L.J., as he then was, in *Monk v. Warbey* (1), where he sets out the general principles upon which the matter is to be determined, and with regard to the general principles it is scarcely necessary here to speak. It is now clear that, where there is a duty imposed by

statute, and someone is injured by reason of a breach of that duty, in the absence of any penalty or remedy provided in the statute itself, normally an action will lie. In fact, authorities will be found for that proposition. Then has arisen the second question, whether, when the statute has itself provided for penalties, different considerations may arise. MAUGHAM, L.J., in *Monk v. Warbey* (1), says, at p. 84 :

At various times doubts have arisen as to the circumstances which will enable the court to determine whether or not in any particular case there can be a remedy other than or in addition to the special remedy provided by the Act. The intention of the legislature is to be gathered from the particular Act under consideration, and I doubt whether anything more lucid can be found on the subject than in the passage in LORD CAIRNS' judgment in *Atkinson v. Newcastle Waterworks Co.* (2). I think, however, one may say this that if the Act provides a special remedy for a contra-

vention of its provisions the *prima facie* rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed. The court has sometimes resolved that question in one way and sometimes in another.

Therefore, I now look to the particular legislation which we have here to consider in order to decide, from the language employed and the purview of the legislation, whether it was here intended that there should be any remedy other than the enforcement of the penalty specifically provided in the Act. In my opinion, this case differs fundamentally from such cases as that of *Groves v. Wimborne* (Lord) (3), where the legislature for the first time has imposed a duty enforceable by penalty which did not, or would not, exist in most cases at common law. There, for example, where the subject under consideration was the Factory Acts, there was imposed upon the employer obligations under the Factory Acts and the regulations made thereunder with regard to those in his employment which did not necessarily, and, in many cases, would not in fact, arise out of any implied term of the contract of master and servant—that is to say, imposing a new duty upon the employer. I need not discuss here the considerations which urged this court in *Groves v. Wimborne* (Lord) (3) to decide that those remedies provided by the statute there in question did not exclude the right of the injured person to bring an action in a civil court, notwithstanding the fact that penalties for breaches of the statutory duties were also provided. It is enough, perhaps, to quote one passage from the judgment of A. L. SMITH, L.J., in *Groves v. Wimborne* (Lord) (3), where, speaking of the Factory Act, he says, at pp. 407, 408 :

The Act now in question, as I have said, was clearly passed in favour of workers employed in factories and workshops, and to compel their employers to perform certain statutory duties for their protection and benefit. It is to be observed in the first place that under the provisions of sect. 82 not a penny of the fine necessarily goes to the person injured or his family. The provision is only that the whole or any part of it may be applied for the benefit of the injured person.

He is there referring to the penalty and the provision that part of it may be ordered to be paid by the employers. Then he says, at p. 408 :

This consideration and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family lead me to the conclusion that it cannot have been the intention of the legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the *prima facie* right of the workman to be fully compensated for injury occasioned to him by that neglect.

The difference, as I see it, between that class of case with a new duty and the present one is this. In substance, for one has to look at the whole purpose of this legislation, the duty or right which is contemplated in the section which we have here to consider—namely, the Food and Drugs (Adulteration) Act, 1928, s. 2—is to be found in the provisions of sects. 13 and 14 of the Sale of Goods Act, which are themselves no more than, for the most part, a consolidation of the existing common law, and, when the two statutes—the Sale of Goods Act, 1893, on the one part, and sect. 2 of the 1928 Act, on the other part—are considered, it appears to me that, although, as the judge points out in the present case, there may be exceptional cases which are not covered by the Sale of Goods Act and are covered by the Act of 1928, yet, nevertheless, looking at the matter in substance, the Food and Drugs (Adulteration) Act, 1928, s. 2, does no more than impose penalties and other consequences to which I shall have to refer in the circumstances of cases where there would be a right under the Sale of Goods Act to bring a civil action.

In the court below, LEWIS, J., in giving consideration to the matter to which I have just referred, points out that there are distinctions in the matters which have to be proved in the case of a civil action under the Sale of Goods Act and a prosecution under the Act of 1928, and he points out, at p. 748, that, in *Frost v. Aylesbury Dairy Co.* (4), there was, as in the present case:

... abundant evidence that the purpose was made known, so as to show that the buyer relied on the seller's skill, but I could well imagine cases in which the purchaser would be in a difficulty in establishing that fact. If there is a right of action under the Food and Drugs (Adulteration) Act, 1928, s. 2, the plaintiff would not have to prove this, and I therefore think that it cannot be said that the right of action given by the Sale of Goods Act is the same as that which I hold is given by the Food and Drugs (Adulteration) Act, 1928, s. 2.

Respectfully, I agree, but, in my view, the judge was in error in accepting as a final test of the right to bring the civil action in respect of the breach of duty under the Food and Drugs (Adulteration) Act, 1928, the question whether or not the two remedies, as he puts it, are identical. I think rather that what one must look at in considering whether the legislature intended a civil remedy under the Act of 1928 is the general purview and purpose of the sanctions there provided, and one must not examine whether there may be a remedy, if there be a remedy in civil actions under the Act of 1928, in cases where, in the circumstances of the case, the matters required to be proved in sect. 14 of the Sale of Goods Act do not apply. In substance, I have come to the conclusion that the Act of 1928 is dealing with the same subject-matter as that which would arise in most cases of the sale of goods where a civil action would lie, as in the *Aylesbury Dairy Co.* case (4), which has been mentioned by the judge, and in most cases where persons buy foods they would rely on the seller's skill or judgment, although, indeed, there may be exceptional cases, where that would not apply. However, that criterion, as I think, does not seem to me to be conclusive.

I turn, therefore, to the Food and Drugs (Adulteration) Act, 1928, to see what may be found, from a consideration of that Act, as to the true purpose of the legislature therein. In the first place, I would observe this. In my view, the Act, which is a consolidation Act, as is stated in the title, is "to consolidate the Sale of Food and Drugs Acts." In particular, it embodies the legislation in the Sale of Food and Drugs Act, 1875, which provides in its preamble that it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition shall be amended. To my mind, it is clear that, whatever may be the effect of the Acts of 1875 and 1928, they are dealing with the subject-matter of sale. For example, in sect. 1 of the Act of 1928, it is provided as follows :

(1) No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain or powder (a) any article of food with any ingredient or material so as to render the article injurious to health . . . with the intent that the article of food . . . may be sold in that state.

That section is dealing, amongst other matters, with the question of intent. In sect. 2 there is no such question of intent, but there is an absolute prohibition :

(1) No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, or not of the substance, or not of the quality, of the article demanded by the purchaser.

Then it has been pointed out by Mr. Wallington that it must be considered that the purpose of this section was to protect the public, and that protection is, I think, provided by sect. 2 (3), which provides as follows :

In any prosecution under this section it shall be no defence to allege that the purchaser, having bought only for analysis, is not prejudiced.

There follows the machinery regarding the purchase of the suspected food for purposes of an analysis, the appointment of analysts, powers of sampling, and general powers which do in the result have the effect of protecting the public against being sold food which is not of the nature, or substance, or quality of the article demanded. The machinery by which that is done is the treatment of the person who is buying for the purposes of analysis as a purchaser. Both the protection of the public and the relationship of vendor and purchaser are preserved by the section. In other words, I think that this Act—and there are many other sections to the same effect which I need not detail—is dealing solely with the question of the sale of goods as between the purchaser and the seller, and in substance it is imposing a penalty for doing that which, as I have said, might otherwise give rise to a civil action where there is a contract between the parties under the Sale of Goods Act. In those circumstances, I find it impossible to think that the purview of this legislation was that a civil remedy should be provided for a breach of this Act when this Act itself in substance is imposing a penalty for that for which a civil remedy already in most cases existed. However, I want to make this clear. It has been argued in the present case that,

on the facts of the present case, in any event it has not been shown that the defendants have sold an article of food which is not of the nature, or not of the substance, or not of the quality of the article demanded by the purchaser. A number of cases have been cited to us, mostly decided in the Divisional Court, as to the extent and meaning of the words "nature, substance and quality" as they appear in the section. I am not prepared, without further consideration, to give a definitive opinion on that matter. I think that, when it comes to be decided—and, for reasons which will appear, I do not think that it is necessary to decide the point in the present appeal—it probably will be decided on a criminal prosecution which may come on appeal to the Divisional Court, as have the various cases which have been cited to us in this action. However, I will assume for the purpose of this case, without pronouncing an opinion one way or the other, that what was here done—that is to say, to sell milk which was still in a sense milk, but milk contaminated by the presence of typhoid germs—was to sell an article of food which was not of the nature, or not of the quality, of the article demanded by the purchaser. Even if that be so, and leaving that question open, for the reasons I have indicated, I do not think that that supports the right on the part of the purchaser, who has been damnified by not receiving the article of the nature, substance or quality demanded, to bring an action for damages in a civil suit.

There is yet another reason why I think that in this case those who depend upon the breach of statute for their remedy must fail. In the judgment of MAUGHAM, L.J., in *Monk v. Warbey* (1), at p. 85, to which I have already referred, it is pointed out that, where a duty is imposed by statute, a civil action must be

... brought by a person pointed out on a fair construction of the Act as being one whom the legislature desired to protect.

In my view, as I have stated, this Act is dealing with the relations of vendor and purchaser, and I am quite unable to see how it can be said on any view that there is any person to be protected under the statute except the purchaser. Sect. 2, to which I have already referred, refers to the obligation not to sell to the prejudice of the purchaser any article of food, and it is interesting to observe, in relation to that phrase "to the prejudice of the purchaser," to which apparently, on the face of it, the matter is limited, that there may be cases where the purchaser has not been prejudiced, such as in *Sandys v. Small* (5), for example, by the headnote of which it is now settled that:

Where the seller of an article brings to the purchaser's knowledge [before the sale is effected] the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not "to the prejudice of the purchaser," within the meaning of the Sale of Food and Drugs Act, 1875, s. 6 . . .

I took by way of illustration the case of a scientist who, for purposes of bacteriological culture, desired to have milk in which there were typhoid germs, a not impossible proposition, and asked for milk which was contaminated in that particular way to use as a culture. In such

a case, as I understand the decision in *Sandys v. Small* (5), and cases which followed it, it could not be said to be to the purchaser's prejudice that he had asked for the particular article contemplated in sect. 2. If that be so, consider the case where that purchaser, in his turn, out of charity or in ignorance, passes on that contaminated milk to a third party. It is said, as I understand it, notwithstanding the fact that in certain cases it would have to be admitted that the article was not sold to the prejudice of the purchaser, that, nevertheless, if the article itself was not of the nature, substance or quality demanded, in such a case the third party would have a civil action, notwithstanding that the purchaser himself would have none. I only mention that as an illustration of the impossibility—which is, to my mind, patent throughout the whole of this Act—of saying that there is any duty owed under the Act by the seller to any person other than the purchaser. For that reason, if for no other reason, the plaintiffs, other than Mr. Square, who have recovered damages in the present case according to the judgment of the judge, must fail here to support that judgment, and the appeal as regards that matter must be allowed. That really concludes the question as regards the appeal of the defendants.

There remains for consideration the cross-appeal. As to the cross-appeal, it is said that the judge was wrong in refusing to allow the consideration of fraud here to be fully considered. It is said that he was wrong, at any rate, in that he prematurely ruled that there was no evidence of fraud. The position with regard to fraud is this. I have already read the circular and the document which is attached to it, and I have already expressed the opinion that, properly regarded, those documents do no more than represent that reasonable care will be taken that there shall be no contamination and that the milk shall be pure, but there being no question of negligence now before us, the sole point for our consideration on the question of fraud is whether, in making the statements which were made in the circular and in the accompanying brochure, it can be said that there is any evidence that the defendants had not a genuine belief in the truth of those statements. I have already said what I think the statement amounts to. What is the evidence which was before the judge on this matter? It really consisted, at that stage, of certain answers to interrogatories, upon which reliance was placed, and which were put in. There were two material interrogatories, the one in one action and the other in the other action, but, in so far as the actions were consolidated, I think that it is right to make reference to both. In regard to the interrogatories of Feb. 17, 1938, the following question was asked :

Did you at any time between Apr. 1, 1936, and Aug. 22, 1936, and, if so, upon what dates and with what result cause to be made in respect of milk procured or sold by you any bacteriological or other tests of such milk?

The answer is as follows :

No, as the defendants relied on frequent samples of milk taken by the local authorities which were always at their disposal.

As I read the circular, there was in fact no representation that any bacteriological tests of the milk had been made. Perhaps the more material interrogatory for this purpose is No. 12 in the interrogatories of June 23, 1937, which is as follows :

A Before obtaining supplies of milk from the said farms [including the farm of Mr. Newman, from whom the contaminated matter came], did you make any inspections thereof, or inquiries as to the possibility of the cows gaining access to land or water which might be polluted with sewage and as to the conditions under which milk was produced thereon ?

The answer is as follows :

B No. The defendants always rely on local authorities particularly the county council who own the said farms, dealing with possible pollution.

The facts of this matter are these. It was agreed between the parties that a report on this unfortunate outbreak of enteric fever in Bourne-mouth, made by the late Dr. Vernon Shaw, should, so far as concerns the matters to which I am about to refer, be treated as admitted.

C Inquiries were made about the condition of affairs at Newman's farm, as in the case of the other farms, and the following statement as to the state of that farm is made :

D Since Oct., 1935, [Newman] has lived in one of the two cottages with his wife and son aged 12 years. His holding consists of 26 acres and he had 11 cows in milk at the time of my visit ; he did all his own farm work. His cottage is of two storeys ; on the ground floor are a parlour, a kitchen, and off the kitchen a small scullery in which cold water is laid on ; on the first floor are three bedrooms. Five or six yards to the north of the cottage is a one-roomed dairy (10 ft. by 9 ft.) with a concrete floor and bench ; it contains no means of heating and cold water only is laid on.

E That statement—"it contains no means of heating and cold water only is laid on"—if intended as criticism, is the only criticism of the state of the premises. Nowhere is it suggested that the premises were unhealthy or unfitted for dairy work. What happened in this particular case was that unfortunately a man who was a typhoid carrier had occasion to use a lavatory which emptied into a stream above the spot at which the cows were in the habit of drinking. However, that is beside the point, as I see it, when we are to consider the question whether the defendants had a genuine belief in the statement which they made. I should add that, the judge having ruled there was no evidence of fraud, the case proceeded upon the basis of negligence, F and, giving evidence on the matter of negligence, the witness G Mr. Long said that his answer to the interrogatory which I have read had reference only to the question of river pollution, but that in fact he had inspected the premises of Mr. Newman and was satisfied with them. The same evidence is given in corroboration by Mr. Newman H himself. It is said that, in so far as that evidence was given after the ruling on the question of fraud, it ought not now to be regarded, but, whether it is contended here that for that reason this question should be reconsidered, or that, if it were reconsidered, the result—there really being no serious cross-examination on the negligence point—would be such that, in the end, it would be found to have caused no mis-

carriage of justice sufficient to allow an appeal, seems to me immaterial. The fact is that, on the question of negligence, where really in substance the same question would arise as to the condition of these premises, although in a sense the burden on the plaintiff would be lighter than in the case of fraud, where he would have to prove absence of genuine belief, this man does say, and the judge accepts his evidence, that the interrogatory is to be read subject to this: "I did not make an inspection to see if there was pollution, but I did inspect Mr. Newman's and these premises." Also, of course, there is the fact that he relied upon the county council, who owned the farms, dealing with possible pollution. In those circumstances, it seems to me that there is not here a shadow of any evidence to suggest, on the interpretation which I put upon these documents and this circular, that this man had not an honest and genuine belief in that which he represented—namely, that he had taken all reasonable steps, as I interpret the circular, to see that the milk was of good quality. It follows, therefore, that any action based upon fraud must fail, and I think that the judge was right in coming to the conclusion that there was no evidence of fraud in this case. In the result, the appeal succeeds, but, as regards the plaintiffs other than Mr. Square, the cross-appeals fail.

CLAUSON, L.J.: I agree. In my view, the appeal succeeds, and the cross-appeals fail. In view of the full and lengthy judgment which SLESSER, L.J., has just delivered, I do not feel it necessary to add anything.

DU PARCQ, L.J.: I agree. I have nothing to add with regard to the cross-appeals, but, as we are taking a different view from that which was taken by LEWIS, J., on the present appeal, I should like to state shortly in my own words the reasons which particularly influence me. The Sale of Food and Drugs Act is not an Act making it a criminal offence to sell or supply food likely to be injurious to the consumer. The material section of the statute enacts that certain specified breaches of a contract of sale by a vendor shall, in defined circumstances, have penal consequences. A large number, possibly the great majority, of breaches of contract mentioned in that section do not result in the sale of anything likely to be injurious to the purchaser or consumer, but merely in the sale of something different from that which the purchaser demanded—for instance, coffee with a little chicory added, instead of pure coffee, or whisky diluted with a larger amount of water than the Act permits. I think, therefore, that it is impossible to read into the Act an intention to give new rights to consumers who are not parties to the contract with which it deals. It seems to me to be a surprising proposition that the legislature intended to enact that, in the case of these breaches of contract, the ordinary rule that persons who are strangers to the contract have no remedy for the breach of it should no longer apply. This would

have been to effect a revolution in one branch of our law, and it is, I think, fair to say that, if such a revolution was effected by the Act of 1875, it escaped everybody's notice until now. I should like to adopt the words of DENMAN, J., in the well-known passage to which I referred in *Jebsen v. East & West India Dock Co.* (6), at p. 304, where he refers to :

- A** The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.
- B** I also think, although it is perhaps not necessary to decide it, that the Act gives no new remedy to the purchaser, who was in 1875 already adequately protected by the common law. Like SLESSER, L.J., I desire to leave open the question whether or not there was here an offence committed against sect. 2. I have assumed, without deciding it, that
- C** there was such an offence. On the view we take, that the section has only penal consequences, it is better to leave that question to the criminal courts. The Divisional Court of the King's Bench Division is the final Court of Appeal in a criminal cause or matter. The question may some day come before that court for decision, and, as it is not necessary for us to decide it, it is, in my view, better to leave it to their consideration when that day arrives, without any expression of opinion by this court. I agree that the appeal should be allowed.

Appeal allowed. Cross-appeals dismissed with costs. Leave to appeal to the House of Lords on the question of breach of statutory duty, but not on the question of fraud.

E Solicitors: *Peacock & Goddard*, agents for *Mooring Aldridge & Haydon*, Bournemouth (for the appellants); *Clarke, Square & Co.* (for the respondents).

F [Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

MARGINSON v. BLACKBURN BOROUGH COUNCIL.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), January 18, 27, 1939.]

G *Estoppel—Res judicata—Two actions depending on same facts—Actions for damage to property and for personal injuries due to collision—Different causes of action—Plaintiff in second action third party in first—Plaintiff in second action suing in representative capacity.*

- H** The plaintiff sued the defendants for damages in respect of injuries received by his daughter and himself, and in respect of the death of his wife, arising out of a collision between a car driven by the plaintiff's wife and a motor omnibus driven by the defendants' servant. Prior to the commencement of this action, 3 persons whose premises had been damaged as a result of this accident had, in a county court, sued both the present plaintiff and the present defendants, each of whom then served upon the other a third-party notice claiming indemnity and contribution in respect of any sum which the plaintiffs in the county

court action might recover. In addition, the present defendants had claimed damages against the present plaintiff in respect of damage to their omnibus. In this prior action, judgment was given against the present plaintiff and present defendants jointly and severally, and it was ordered that they should be liable for the sum and costs in equal shares. With regard to the claim relating to the omnibus, it was also found that both parties were to blame, the judge treating that claim as a separate action. The defendants contended that, by reason of the judgment in the county court, the plaintiff was estopped from proceeding in the present action, which was on the same facts as was the action in the county court. The defendants' contention was argued as a preliminary point:—

HELD: (i) the plaintiff was estopped from bringing a personal claim for damages, as that point had been decided in the earlier litigation.

(ii) the plaintiff was not estopped from bringing his other claims, as he was making them in a representative capacity, whereas the third-party claims against him in the earlier case were against him in his personal capacity only.

(iii) in deciding the plea of *res judicata*, the court is entitled to look at the judge's reasons for his decision, and is not restricted to the record.

Decision of LEWIS, J. ([1938] 2 All E.R. 539) *varied*.

[EDITORIAL NOTE. LEWIS, J., decided that the plaintiff was in no way estopped from bringing this action, but the Court of Appeal have held that so far as he brought this action in his personal capacity there is an estoppel, but so far as he brought it in his representative capacity there is no estoppel. In considering the question of estoppel, the Court of Appeal have held that this was not a case of estoppel by record, but a case of *res judicata*. That being so, the court was entitled to look at the full transcript of the previous judgment and consider the reasons for that judgment in order to discover the question of law or fact which had been decided as between the parties to the second action. Here, it being necessary in the first action to decide the question of negligence as between the parties to the second action, there was an estoppel upon that point so far as the present plaintiff was suing in his personal capacity.

AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 412-414, paras. 467-469; and FOR CASES, see DIGEST, Vol. 21, pp. 205-211, Nos. 472-506.]

Cases referred to:

- (1) *Re Graydon, Ex p. Official Receiver*, [1896] 1 Q.B. 417; 13 Digest 505, 554; 65 L.J.Q.B. 328; 74 L.T. 175.
- (2) *Ord v. Ord*, [1923] 2 K.B. 432; 21 Digest 152, 140; 92 L.J.K.B. 859; 129 L.T. 605.
- (3) *Bainbrigge v. Baddeley* (1847), 2 Ph. 705; 21 Digest 217, 535.
- (4) *Leggott v. Great Northern Ry. Co.* (1876), 1 Q.B.D. 599; 21 Digest 207, 479; 45 L.J.Q.B. 557; 35 L.T. 334.
- (5) *Kingston's (Duchess) Case* (1776), 1 East, P.C. 468; 21 Digest 159, 213.
- (6) *Priestman v. Thomas* (1884), 9 P.D. 210; 21 Digest 168, 251; 53 L.J.P. 109; 51 L.T. 843.
- (7) *Green v. Weatherill*, [1929] 2 Ch. 213; Digest Supp.; 98 L.J.Ch. 369; 142 L.T. 216.
- (8) *Beardsley v. Beardsley*, [1899] 1 Q.B. 746; 21 Digest 188, 362; 68 L.J.Q.B. 270; 80 L.T. 51.
- (9) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 21 Digest 207, 480; 53 L.J.Q.B. 476; 51 L.T. 529.

APPEAL from a decision of LEWIS, J., dated Mar. 22, 1938, and reported [1938] 2 All E.R. 539, on a preliminary issue of law as to whether the

plaintiff was estopped from proceeding in the present action by reason of a prior county court judgment upon practically the same facts. The facts of the case are fully set out in that report and in the present judgment.

Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the appellants.

A *William Gorman, K.C.*, and *T. M. Backhouse* for the respondent.

Clothier, K.C.: The damage to the third parties followed directly from the first collision. A party cannot avoid the plea of *res judicata* by changing his capacity. There is even authority for saying that, once a point has been determined by the court, it cannot subsequently be litigated even by other parties. This county court action was so framed that it became a struggle between the present plaintiff and defendants as to which of them was negligent. The court may look at the transcript of the judgment in order to decide a plea of *res judicata*: *Priestman v. Thomas* (6). Even the evidence may be looked at: *Ord v. Ord* (2).
B [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 409, THE ANNUAL PRACTICE, p. 433, and *Re Graydon, Ex p. Official Receiver* (1).]
C

Gorman, K.C.: There is no case where this point has been considered. A question of estoppel arises when a point had been decided by the court.
D The issues were put on record, and the judge decided them. The record shows how the issues were decided. The judge's reasons do not matter. There was a period of time in this case between the collision of the bus with the car and the collision between the bus and the wall. The judge held that both parties were to blame in respect of a particular loss—namely,
E the damage to the corporation's bus. The present action is concerned with personal injuries. They need not have been caused by the same negligence that caused the damage to the bus.

Clothier, K.C.: The plaintiff, in his capacity of administrator, is bound by the finding that the deceased was guilty of negligence. Husband and
F wife are privies. Here the wife was in fact dead when the county court judge's decision was given, but still in law she was a party to it. The husband was held to be the employer of the driver, and that is another ground of estoppel. The general rule is that the subsequent litigation must be between the same parties and in the same capacity, but a mere
G change of capacity does not entitle a man to litigate the same matter again: *Green v. Weatherill* (7). The test is whether or not the matter has been decided by a court of competent jurisdiction. If so, it cannot be litigated again by a party. [Counsel referred to *Beardsley v. Beardsley* (8) and SMITH'S LEADING CASES, Vol. 2, p. 677.] By the Fatal Accidents
H Act, 1846, s. 1, a representative cannot make any claim that the deceased could not have made. In both *Brunsdon v. Humphrey* (9) and *Leggott v. Great Northern Ry. Co.* (4), the plaintiff won the first action, so the question of *res judicata* really never arose. Here the plaintiff was not successful in the first action, and the real ground of criticism is that he brought different claims in each action. The Law Reform (Married

Women and Tortfeasors) Act, 1935, seems to postulate that the question of responsibility should be determined once and for all.

Gorman, K.C.: The doctrine of estoppel has not to be considered in relation to the benefits that might come to a person. It merely says that, where a question has been litigated, the same parties shall not be allowed to litigate it again. The only other person estopped is one who is a privy. The deceased was never a party to the first action, and so her husband could not be her privy in this case. There was nothing in the earlier proceedings to prevent the wife (had she lived) from bringing these proceedings, because she would not be getting any rights through her husband, and she was not in the first action. *Leggott v. Great Northern Ry. Co.* (4) is fatal to this case. A
B

SLESSER, L.J. [delivering the judgment of the court]: This is an appeal from a judgment of LEWIS, J., upon a preliminary question of law in an action by Mr. Fred Marginson, who sues on his own behalf, and as administrator of his wife, against the Blackburn Borough Council. The action is brought (i) in respect of injuries and damage which the plaintiff alleges he has received by reason of a collision, in which his wife was killed, between a motor car owned by himself and driven by his deceased wife, and a motor omnibus driven by the servant of the local authority, such damages being due, it is alleged, to the negligence of the defendants' servant, (ii) as personal representative of his wife's estate in respect of her loss of expectation of life, and (iii) on behalf of himself and his daughter as partial dependants of the deceased under the Fatal Accidents Act. The preliminary question of law arises in this way. In answer to the claim as stated, it is said that, as the result of certain proceedings on May 24, 1937, in the Blackburn County Court, the plaintiff is estopped from making any claim or recovering any damages. The judge held that, on the facts, and in the circumstances, the plea of the defendants as to estoppel failed, and from that decision the appeal is brought. C
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The facts on which the defendants relied in their plea of estoppel are these. On Apr. 16, 1937, three persons who were the owners or tenants of premises in Canterbury Street, Blackburn, brought an action in the Blackburn and Clitheroe County Court against the defendants and the plaintiff, Fred Marginson, alleging that, on Jan. 24, 1937, a collision had occurred in Canterbury Street, Blackburn, between a motor omnibus driven by a servant of the defendants and a motor car driven by a servant of the present plaintiff—that is, his wife—and that the motor omnibus ran into the premises, causing damage to them and to goods, which, it was alleged, was due to the negligence of one or both servants or agents of the two defendants. The local authority and Mr. Marginson both denied liability, and each alleged that the accident was solely caused by the negligence of the other. Thereafter, they proceeded by third-party notice to bring claims against one another G
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for indemnity, or, alternatively, contribution, but, in addition to such claims, the local authority in their third-party notice to Mr. Marginson claimed damages amounting to £66 16s. in respect of damage done to the property of the local authority—the motor omnibus—by the driver of the motor car, the wife of Mr. Marginson. This matter came to be decided by the county court judge, together with the question of the liability of the local authority and Mr. Marginson to the owners of the shops, and, after discussing the history of the case, the county court judge came to the conclusion that the driver of the omnibus was to blame in not seeing the motor car before he saw it, and that, had he seen it a little earlier, he could have avoided it by starting his swerve at a time considerably anterior to that at which the swerve was in point of fact started—a time which he finds was very little before the actual moment of impact. The judge went on also to say that it was impossible to exonerate Mrs. Marginson from blame. If she had been keeping a proper look-out, she could have observed the oncoming bus, and, in the circumstances, he held that both the defendants were to blame, bearing the loss in equal proportions. He then proceeded to deal with the claim of the local authority by the third-party notice against Mr. Marginson, and said :

There I think I am entitled not to award any damage. I find they were both to blame for the damage to the bus.

He goes on to say that he was going to treat that claim as a separate action, and he finds both parties to blame. It will be observed that this is a direct decision between Mr. Marginson and the council—namely, that they were both to blame for the accident, which resulted in damage to the council's bus and (as now alleged) damage to Mr. Marginson. This conclusion finds expression in the formal judgment in the following words :

That the claim made by the mayor, aldermen and burgesses of the borough of Blackburn against Fred Marginson be dismissed with such costs to be paid to the latter as are referable to the claim made by them as allowed by the registrar.

The observations of the judge and his findings which I have quoted are taken from a shorthand note of the reasons for his judgment. LEWIS, J., in his judgment in the present case, says, at p. 542 :

The only evidence I had was the file of the county court proceedings, which did not include anything but the formal judgment of the county court judge. I was handed up a copy of the transcript of the shorthand notes of his judgment, which was objected to as not forming part of the records, and I have not looked at it.

In our view, however, LEWIS, J., was entitled to have regard to the reasons given by the judge, and we have not hesitated to avail ourselves of that assistance. We are dealing here not so much with what has been called estoppel by record as with the broader rule of evidence which prohibits the reassertion of a cause of action which has been litigated to a finish—estoppel by *res judicata*. In such a case, the question arises, what was the question of law or fact which was decided? For this purpose, it may be vital in many cases to consider the actual history

of the proceedings. Thus, in *Re Graydon, Ex p. Official Receiver* (1), on a question whether a judgment of the county court constituted an estoppel, VAUGHAN WILLIAMS, J., refers to an inference to be drawn from the observations of the county court judge when asked for leave to appeal. Moreover, in *Ord v. Ord* (2), also on a question of *res judicata*, references to proceedings before the judge were considered by LUSH, J., at p. 440. However, even if there were no authority to show that this had in fact been done, I can see in principle no objection, when the question before the court is what was actually decided at an earlier trial, to having recourse to that information which is to be derived from reading a record of the proceedings themselves.

On this view, and having regard to what the county court judge was asked to decide as between the plaintiff and the defendants in the present action, he has undoubtedly ruled that the plaintiff could not be responsible to the defendants, because, in the matter of alleged negligence in the driving of the motor omnibus and motor car, which, as he says, was a separate claim from that of the owners of the shops, both parties were to blame. This seems to me to be a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff, that both were equally to blame. I think, therefore, that on this head the appeal succeeds, and it should be held as a preliminary question of law that the plaintiff is estopped from bringing his first cause of action—namely, his personal claim for damages for injury and loss.

The second and third claims, however, raise different considerations. In the second claim under the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiff is suing as personal representative of the estate of his deceased wife. In the county court proceedings, the claim on the third-party notice was against him in his personal capacity, and, therefore, being, in the two capacities, in the contemplation of the law two separate and distinct persons, it is clear that a decision against him in his personal capacity is not conclusive against him in his representative character: *Bainbrigge v. Baddeley* (3), per LORD COTTENHAM, L.C., at p. 709, and *Leggott v. Great Northern Ry. Co.* (4). Therefore, no estoppel arises. The same observations apply in the case where he is proceeding as administrator of the person deceased under the Fatal Accidents Act, 1846, s. 2. Nor do I think that the fact that such action is brought, not only for the benefit of his daughter, alleged to be a partial dependant of the deceased, but also for the benefit of himself, said to be another, affects the principle. As is very clearly shown in *Leggott's* case (4), the capacity in which a person may sue under the Fatal Accidents Act is different from his capacity to sue personally, and in this connection it is enough to quote from the note to *Kingston's (Duchess) Case* (5) in 2 Smith L.C. 13th Edn., p. 675:

It must be observed that a verdict against a man suing in one capacity will not

estop him when he sues in another distinct capacity, and, in fact, is a different person in law.

This passage was quoted by QUAIN, J., in *Leggott's* case (4), at p. 606.

In the final result, therefore, we are of opinion that the point of law requires the answer that this action can proceed, so far as it is founded upon the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, but that there is *res judicata* with regard to the claim for damages brought by Mr. Marginson in his personal capacity. The appeal, therefore, to that extent succeeds.

CLAUSON, L.J. : I have been asked by SLESSER, L.J., to state the form of the order and the provision as to costs which we propose :

Discharge the order under appeal save in so far as it orders the costs of the hearing below to be reserved. Declare that the plaintiff is estopped from making any claim on his own behalf for the damages claimed in cl. A of the prayer as set out in the statement of claim, but is not estopped from making a claim as administrator of the estate of his deceased wife for damages for loss of expectation of life claimed in cl. B of the prayer, and is not estopped from making a claim as administrator of the deceased wife under the Fatal Accidents Act for damages for the death of the deceased wife in cl. C of the prayer. No order as to the costs of the appeal.

Solicitors : Robinson & Bradley, agents for Oddie & Roebuck, Blackburn (for the appellants); Gibson & Weldon, agents for Henry Backhouse & Son, Blackburn (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

WESTRIPP v. BALDOCK.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), January 26, 1939.]

Sale of Land—Restrictive covenants—Covenant against trade—Jobbing builder.

The plaintiff and the defendant occupied adjoining houses included within a building scheme, and the restrictions were enforceable by either of them against the other. The material restriction was that on no lot should any building be erected as a shop, warehouse or factory, or any trade or manufacture be carried on or any operative machinery be fixed or placed. The defendant was a jobbing builder, and placed ladders, planks, sand and such like against the side of the wall of the plaintiff's house. At the rear of the house, the defendant had erected a shed touching, or nearly touching, the plaintiff's garden wall. In front of the shed was a lean-to sloping away from the plaintiff's wall. It was closed on one side by the fact that it joined the shed, but was otherwise open. This was used as a store for builders' fittings. The plaintiff brought this action alleging a technical trespass, damage by damp through the pointing being injured by these articles, and breach of the restrictive covenant by the erection of a warehouse and the carrying on of a trade. The defendant alleged that the covenant was no longer binding, owing to the change in the character of the neighbourhood :—

HELD : (i) the defendant was carrying on a trade within the meaning of the covenant, as the business of a jobbing builder involved the buying and selling of materials, and the plaintiff was entitled to an injunction.

(ii) the neighbourhood, being still mainly residential, had not suffered such a change as would release the covenant.

Decision of TUCKER, J. ([1938] 2 All E.R. 779) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have not found it necessary to deal at length with the law in this case, as the main question argued was practically determined by a finding of fact in the court below. The judgment, however, again emphasises the heavy burden that is placed upon a party who seeks to show that a restrictive covenant has become unenforceable by reason of a change in the character of the neighbourhood. The change must be such that the covenant has become valueless to the plaintiff.

AS TO COVENANTS AGAINST CARRYING ON A TRADE, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 227-229, paras. 249, 250; and FOR CASES, see DIGEST, Vol. 40, pp. 321, 322, Nos. 2722-2724.]

Cases referred to :

- (1) *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224; Digest Supp.; 100 L.J.Ch. 52; 144 L.T. 302.
- (2) *Doe d. Wetherell v. Bird* (1834), 2 Ad. & El. 161; 43 Digest 6, 12; 4 L.J.K.B. 52.
- (3) *Higgins v. Beauchamp*, [1914] 3 K.B. 1192; 43 Digest 5, 6; 84 L.J.K.B. 631; 111 L.T. 1103.

APPEAL from a decision of TUCKER, J., dated May 18, 1938, and reported [1938] 2 All E. R. 779, where the facts are fully set out.

E. Brian Gibbens for the appellant.

W. Arthian Davies for the respondent.

Gibbens : Trade is a technical term, which cannot be extended to include a business. It depends upon buying and selling : *Doe d. Wetherell v. Bird* (2) and *Higgins v. Beauchamp* (3). The defendant did not depend upon buying and selling. The character of this neighbourhood has so changed that it would be a real hardship on the defendant if the covenant were enforced. One cannot sterilise a neighbourhood. It must develop. The test in *Chatsworth Estates Co. v. Fewell* (1) is too stringent.

Davies was not called on.

SLESSER, L.J. : This appeal, though the case below raised several points, is limited to one material point, and that is that the defendant, William Baldock, who was a builder in a small way of business, was restrained by order of the court from carrying on any trade on the land known as 43, Nelson Road, Gillingham, in the county of Kent. His predecessors were restrained under an indenture, made Aug. 29, 1874, between Robert Denney and a building development company called the British Land Co., Ltd., in sched. 2, cl. 3, in this manner :

On no lot shall any building be erected as a shop warehouse or factory or any trade or manufacture be carried on or any operative machinery be fixed or placed.

The judge tells us in his judgment, at p. 784, that he has come to the conclusion that Mr. Baldock's business, which he states to be generally that of a builder and decorator, as appears from certain photographs of announcements and advertisements of his business and from the evidence :

... inevitably consists of selling goods as well as doing work, and these premises are the seat of his business. It is true that the actual sale of the goods may not

take place at these premises, but here is where he receives the orders for work which he is to do. These are his headquarters, and here he keeps the implements and tools of his business.

A It has been argued well, on such material as was before him, by counsel for the appellant that the covenant which restrains Mr. Baldock from carrying on any trade does not cover the business which he did there, in so far as there is authority to be found in the books that a trade involves some process of buying and selling. The judge has found, however, and I think that I may say that he has found inevitably, that a local builder of this sort does sell, as Mr. Baldock himself admits, specific articles apart from the work which he does. The particular case he mentions is that B of cement, which he sells to oblige his neighbours when they ask for it, but sells in the very nature of his business, so that, when he was suing on his account, in the ordinary way, he would sue for work done and materials provided. It is not, therefore, necessary to consider the authorities, because, if trade be limited in this context to buying and selling, the C evidence and the finding are conclusive that this man was so buying and selling.

Then the second question is this. If the covenant *prima facie* is binding upon Mr. Baldock, it is sought to take advantage of the principle that the court will not specifically enforce against the covenant or a restrictive D covenant entered into under a building scheme for the benefit of the estate where, by acquiescence, the property has so substantially changed that the whole character of the neighbourhood has been altered, so that the object for which the covenant was originally entered into must be considered to be at an end. The latest authority on this subject is E *Chatsworth Estates Co. v. Fewell* (1), a judgment of FARWELL, J., the headnote of which states among other matters :

In order to succeed on the first ground [that there had been such a general change in the character of the neighbourhood as that stated] the defendant must show so complete a change in the character of the neighbourhood as to render the covenants valueless to the plaintiffs, so that an action to enforce them would be unmeritorious [and useless]. F

The facts on this matter, as found by the judge, are that he is satisfied that this street, in which the plaintiff and the defendant live as neighbours, was in 1874, and now is, a residential street. He said, at pp. 786, 787 :

G There are 186 residential houses, and out of that number no less than 88 are owner-occupied. There are some lock-up garages. . . . The evidence altogether fails to satisfy me, however, that there has been any appreciable change in the nature of the neighbourhood. People who live in those houses now may not be quite so well-to-do as were the people who lived in them in 1874. The street has recently, with the exclusion of these two shops or garages at each end, been town planned as a residential street. The scheme has not actually been approved by the Minister yet, but it has been submitted to him, and that confirms the view which the evidence otherwise gives me that this is still a residential street, as it was in H 1874, and that nothing has happened to make it unreasonable for the owner of a house in this street to desire to protect his property by preventing the street from gradually becoming commercialised.

There is, indeed, really no evidence at all on this point. Even the area of the district which was comprised by this building scheme is not defined. The nature of the business carried on is really not at all clear,

and, in order that the covenant, which, on the face of it, is binding upon the defendant, should not support an injunction, it is necessary affirmatively to prove the kind of matters which I have stated, and which are recited in the judgment of FARWELL, J. This, in my opinion, the defendant has wholly failed to do in the present case. Therefore, the judge was right in his judgment, and this appeal fails, and must be dismissed with costs. A

CLAUSON, L.J. : I agree that, on the two points that have been brought before us, the judge is in every respect correct, and this appeal must be dismissed. B

DU PARCQ, L.J. : I agree.

Appeal dismissed, with costs.

Solicitors : *H. Flint & Co.* (for the appellant) ; *Ince, Roscoe, Wilson & Glover*, agents for *Kenneth Redfern & Co.*, Gillingham, Kent (for the respondent). C

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re A SPECIAL REFERENCE IN THE MATTER OF THE UNION OF THE BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA (COUNTY OF DURHAM). D

[PRIVY COUNCIL (Lord Maugham, L.C., Lord Macmillan and Lord Romer), **December 15, 1938, January 17, 1939.**] E

Ecclesiastical Law—Union of benefices—Scheme made by the ecclesiastical commissioners—Opposition—Union entailing a measure of loss to the parishioners without any corresponding benefit—Principles to be applied—Union of Benefices Measure, 1923 (No. 2), s. 2 (6)—Union of Benefices (Amendment) Measure, 1936 (No. 2), s. 2 (1).

Under a scheme put forward by the ecclesiastical commissioners, two benefices in the county and diocese of Durham were to be united in order to remove the church and endowments of one of the benefices to one of the new housing districts in another part of the diocese. It was admitted that no benefit of any kind would accrue to the two parishes themselves from the proposed union, and both parishes opposed it :— F

HELD : while due regard should be paid to the interests of religion generally, in a scheme of this kind, those interests were not the only thing to be regarded. Regard must also be had to the circumstances and claims of the parishes. In this instance, while the sacrifices demanded from the residents of the two parishes were many, they would receive no benefit. The scheme should, therefore, be dismissed. G

Re Benefices of Great Massingham and Little Massingham (1) followed.

[EDITORIAL NOTE. The decision in *Re Benefices of Great Massingham and Little Massingham (1)* was made under the Union of Benefices Measure, 1923, s. 2 (6). This subsection has been repealed and replaced by the Union of Benefices (Amendment) Measure, 1936, s. 2 (1). The change is rather one of words than of substance, the most noticeable alteration being that the interests of religion generally are now put before, instead of after, the circumstances and interests of the parishes. There must, however, be some benefit to the parishes concerned, and, if there is H

no such benefit, the provision of a new church in a new district is not sufficient to justify the approval of a scheme.

AS TO UNION OF BENEFICES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 712-715, paras. 1288-1295; and FOR CASES, see DIGEST, Vol. 19, pp. 409, 410, Nos. 2433-2443.]

A Case referred to :

- (1) *Re Benefices of Great Massingham and Little Massingham*, [1931] A.C. 328; Digest Supp. ; 100 L.J.P.C. 93; 144 L.T. 654.

B APPEAL by the parochial church council of Westoe against a scheme proposed by the ecclesiastical commissioners for the union of that benefice with South Shields, St. Hilda. The judgment of their Lordships was delivered by LORD ROMER.

Geoffrey C. Hutchinson for the appellants, the parochial church council of Westoe.

Humphrey H. King for the respondents, the ecclesiastical commissioners.

C LORD ROMER : This is an appeal to His Majesty in Council against a scheme framed by the ecclesiastical commissioners under the Union of Benefices Measures, 1923 to 1936, for the union of the benefices of Westoe and South Shields, St. Hilda, in the county and diocese of Durham, the appellants being the parochial church council of Westoe. The parishes in question are situate in South Shields. They are both industrial in character, and are inhabited almost exclusively by persons of the wage-earning class. The parish of Westoe has at the present time a population of approximately 5,000 persons, and covers an area of 53 acres. The church of St. Thomas, the parish church, which has sittings for 570 persons, was built in 1875, largely through the generosity of a local churchman, who contributed £2,600 to the building fund and presented the organ. It appears that before that time a chapel of ease had existed upon the site now occupied by the church. The parish has also its own parsonage house, which was built about 1898, and which contains some 14 rooms. It is rated at £72 per annum. The annual income of the benefice is £366 6s. 2d., in addition to fees and Easter offerings, which amount to about £25 per annum. In the past, the ecclesiastical commissioners have made a curate's grant of £120 per annum, but that has not been fully claimed since 1933. An active and enthusiastic parish life exists in the parish. Eloquent testimony of this is to be found in the fact that, poor as the parishioners are, no less a sum than £850 has been raised by them during the past ten years and spent on beautifying and improving their parish church. H The adjoining parish of South Shields, St. Hilda, is larger in area than that of Westoe, covering, as it does, approximately 130 acres. Its population, however, is rather smaller, and consists of some 4,700 persons. It contains a church with sittings for 1,500, and a parsonage house rated at £62 per annum. The parish also contains a mission room, which is used for services. The annual income of the benefice is

£613 12s. 4d., consisting of rents of just over £180 and of £433 received from the ecclesiastical commissioners. There are in addition fees amounting to £42 per annum, and the commissioners make two grants of £120 per annum each for the stipends of an assistant curate and a woman worker. In both parishes there is an ample provision of church services, and the average attendance at such services compares not unfavourably with that at other places of worship in urban and industrial districts.

In pursuance of the provisions of the Union of Benefices Measure, 1923, s. 2, the Lord Bishop of Durham caused a commission to be issued requiring five commissioners, nominated as provided by the Measure, to inquire into and report upon the union of the two benefices. The commissioners held a public inquiry on Feb. 27, 1937. No one among the 120 or 130 persons appearing before the commissioners on that occasion was in favour of the union, and it was apparent from the proceedings that the parochial church council of Westoe and a large number of the Westoe parishioners were strongly opposed to it. This is not surprising, for the proposal for the union, which had originated with the diocesan committee, was not due to any desire to improve the existing state of affairs in the two parishes, but to a desire to remove the church and endowments of St. Thomas, Westoe, to one of the new housing districts that were springing up in the neighbourhood of South Shields, and for which such a provision was sorely needed. It was, indeed, admitted by counsel for the ecclesiastical commissioners that no benefit of any kind would accrue to the two parishes themselves from the proposed union. The commissioners, however, made a recommendation in favour of the union of the two benefices and parishes, the decision to do so being carried by 3 votes to 2. The two dissentients were the commissioners nominated by the patrons and parochial church council of Westoe and of South Shields, St. Hilda, respectively. The other recommendations, upon which the commissioners were unanimous if the scheme were to be carried out were, so far as material, as follow : (a) that St. Hilda's should be the parish church of the united benefice ; (b) that the church of St. Thomas should be removed to one of the new housing districts ; (c) that the incumbent of the united benefice should select which of the parsonage houses he preferred ; (d) that (i) the other parsonage house, (ii) the site of the church of St. Thomas, and (iii) the mission hall, be sold, and the proceeds utilised for the removal of the church of St. Thomas and its re-erection in one of the new housing districts, and for the provision of a parsonage house and new hall in such district, and that, if there were any surplus, it should be devoted to the benefice of the incumbent of the transferred church ; and (e) that the endowments of St. Thomas should be the endowments of the benefice of the transferred church.

The Lord Bishop of Durham in due course signified his approval of the report, and thereupon the ecclesiastical commissioners prepared

- a draft scheme for the purpose of giving effect to the recommendations therein contained, it being provided by the draft scheme that the new district to which the church of St. Thomas, Westoe, and its endowments were to be transferred should be a district in the diocese of Durham to be selected by the Lord Bishop. The draft scheme further provided
- A that the bells, organ and other furniture and fittings of the church of St. Thomas, Westoe, or such of them as the Lord Bishop should select, should be removed to the parish church of the united benefice, and that any such articles not so removed should be appropriated for use in the proposed church of the new district, or be removed to any other church
- B or chapel within the diocese as therein mentioned. The draft scheme, however, differed from the report in that the mission hall of South Shields, St. Hilda, was allowed to remain. The draft scheme, after its publication, continued to meet with the most strenuous opposition on the part of the parochial church council of Westoe. Their objections,
- C however, met with no success, and on Dec. 16, 1937, the ecclesiastical commissioners certified the scheme under the Union of Benefices Measure, 1923, s. 10 (2). The parish council, accordingly, now present this petition of appeal to His Majesty in Council asking that the scheme may be disallowed.
- D In support of their appeal, the appellants call in aid the decision of this Board in *Re Benefices of Great Massingham and Little Massingham* (1). In delivering the judgment of the Board in that case, LORD TOMLIN summed up the facts thus, at p. 332 :

E Each of the parishes concerned is a complete unit, fully equipped with all that is necessary for parochial church life, including adequate emoluments for the incumbent, nor has there been in either parish any change of circumstances calling for a readjustment of conditions. It is admitted that the union must result in a measure of loss to the parishioners, and no advantage from union can be indicated as likely to accrue to them.

Every word of this is true of the two parishes the subject of the scheme

F now under consideration. In the earlier case, moreover, as in the present one, the object of the scheme was to take away a part of the joint endowments of the two benefices and apply it in endowing some other benefice. In those circumstances, the Board reported to His Majesty in Council recommending that the scheme should be dismissed. It was

G held, to use the words of LORD TOMLIN, at p. 332 :

... to justify a union it is not enough to show that one incumbent could serve the parishes affected, and that a union would therefore save man power and might also produce surplus income available for other benefices. The circumstances and interests of the parishes themselves must be regarded.

H At the time that this decision was given, the principles to be observed by the commissioners appointed to inquire and report upon a proposed union of benefices were enunciated in the Union of Benefices Measure, 1923, s. 2 (6). The subsection was in these terms :

The commissioners shall in making any report under this Measure have full regard to the circumstances and interests of the parishes affected by their inquiry, and it shall be the duty of each and every of the commissioners to consider the

matters under inquiry in their relation to such circumstances and interests and to the interests of religion in England generally.

This subsection was repealed by the Union of Benefices (Amendment) Measure, 1936, and has been replaced by sect. 2 (1) of that Measure, which is as follows :

The commissioners to whom a commission under the principal Measure has issued shall have due regard to the interests of religion generally as well as to the circumstances and claims of the parishes affected by their inquiry and shall determine in their discretion the effect of all these considerations and shall report accordingly.

The alteration in the law thus effected would seem to be rather one of words than one of substance. The word "interests" in the repealed subsection is replaced by the word "claims" in the new one, but it is by no means apparent why this change was made, or what effect, if any, it was intended to produce. The other change to be noticed is that, of the things to be considered by the commissioners, the interests of religion generally are mentioned first in the new subsection, whereas in the old subsection they were to be found at the end. It is possible that it was intended by this change to ensure that the interests of religion generally should be the first care of the commissioners in making their report, but it is plain that those interests are not the only thing to be regarded. In the words of the subsection, regard is to be paid to those interests "as well as to the circumstances and claims of the parishes." In the present case, their Lordships find themselves unable to avoid the conclusion that sufficient regard has not been paid to those circumstances and claims. The joint income of the two benefices at the present time is £980, or thereabouts, exclusive of fees and grants made by the ecclesiastical commissioners for curates' stipends. The income of the united benefice would be no more than £613 12s. 4d. The parishioners of Westoe, St. Thomas, would lose their parish church, upon which, as already stated, they have spent some £850 in the course of the last ten years. There is, moreover, in the present church a west window placed there as a memorial by the families of those in the parish who lost their lives in the Great War. The scheme, it is true, provides for the re-erection of the church in a new district, and steps would no doubt be taken to have the window placed in the church when so re-erected, but this would be but a poor consolation to the parishioners, who happen to have feelings of attachment to their church, and to the relatives of those in whose memory the window was erected, especially in view of the fact that the new district in which the church is to be re-erected is not even specified in the scheme, and may in the end prove to be a mile or more distant from the parish.

There is yet another circumstance connected with the two parishes which deserves the most careful consideration. The traditions of the parish of South Shields, St. Hilda, appear to be high church, whereas the traditions of the parish of Westoe are low church, and there is grave reason to fear that many of the parishioners of Westoe would dislike the character of the services of St. Hilda's, and would not care to attend them. It is said by

the ecclesiastical commissioners in their answer to this complaint that services similar in character to those held in Westoe parish church are held in two neighbouring churches. These churches, however, appear to be situate at some distance from the church of St. Thomas, Westoe, and, though they can be reached by omnibus, the parishioners of Westoe who, as already stated, are of the working class, must necessarily include some to whom even an omnibus fare is a matter of moment. Their Lordships realise to the full that every union of two benefices must result in some deprivations and some inconveniences to many, or, it may be, to all, of the residents in the two parishes, but these residents must be prepared to make some sacrifices in order to obtain the benefits accruing to them from the union. In the present case, unfortunately, though the sacrifices demanded are many, of benefits there are none. The result is that their Lordships must humbly propose to His Majesty in Council that the scheme be dismissed.

C *Scheme dismissed.*

Solicitors: *Evill & Coleman* (for the appellants); *Milles, Jennings White & Foster* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

D

WARD v. BARCLAY PERKINS & CO., LTD.

[KING'S BENCH DIVISION (Oliver, J.), **January 23, 1939.**]

E *Master and Servant—Contract of service—Duration—Endowment and pension scheme for permanent staff—Right of dismissal of persons admitted to the scheme.*

The plaintiff was employed by the defendant company, who had established a staff endowment and pension scheme, to which the plaintiff had contributed for several years on the footing that he was a staff employee. The rules of this scheme indicated a distinction between employees in temporary or other employment and employees on the staff. "Staff employee" was defined as meaning "every male employee on the permanent staff." The defendants gave the plaintiff 3 months' notice to leave, as it appeared that there was no scope for advancement for him. No reflection of any sort was made upon his character. The plaintiff contended that there was an implied contract that, if he came into the pension scheme, he became a member of the permanent staff, and that he thereby became, subject to such considerations as health, good conduct and the continuance of the company's business, entitled to permanent employment, and could not be given ordinary notice until he attained the age of 65, and obtained the full benefit of his contributions:—

H **HELD:** such a stipulation could not be implied in a contract unless, on the evidence, it was shown to have been mutually intended, and necessary to give business efficacy to the document. This could not be said in the present case, and the plaintiff, therefore, failed in his action.

[EDITORIAL NOTE.] It was here sought to suggest that the admission of an employee into a scheme for pensions for the permanent staff of the company incorporated into the contract of service a term providing for permanent employment. It was admitted that this permanency must be subject to the health of the employee.

his good behaviour and competence, and the main argument turned upon the meaning of the words "subject to the exigencies of the defendant's business," which it was contended did not prevent the permanency of the employment. The court, construing the rules as a whole, and applying the principle of giving business efficacy to them, found no difficulty in negating the contention.

AS TO DURATION OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 144-146, paras. 235-239; and FOR CASES, see DIGEST, Vol. 34, p. 59, Nos. 353-355.] A

Case referred to :

- (1) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.

ACTION for damages for allegedly wrongful dismissal. The facts are fully set out in the judgment. B

Michael Hoare, for the plaintiff.

D. P. Maxwell Fyfe, K.C., and *Valentine Holmes* for the defendants.

OLIVER, J. : In this case, the plaintiff bases his claim upon what his counsel, Mr. Hoare, who has argued this case with much ability, says is the true inference to be drawn from the rules of Barclay Perkins & Co.'s staff endowment and pension scheme. He says that the true inference to be drawn from those rules is that there was, I do not think he put it as high as an express contract, but an implied contract, that, if he came into the pension scheme, he became a member of the permanent staff, and thereby was placed in a position in which the company could not get rid of him upon ordinary notice, such as would suffice for an ordinary employee. In other words, he contends that, subject to certain disqualifications which Mr. Hoare conceded, he had the right to permanent employment. In para. 4 of the statement of claim the matter is summarised thus : C D E

It was a further term of the agreement constituted by the said rules and the acceptance by the defendants of contributions from the plaintiff as a member of the said scheme to be implied from the terms aforesaid and all the other express terms of the said rules that subject to the exigencies of the defendants' business and to the good health of the plaintiff and his competence and good behaviour in his said employment the defendants would not dismiss the plaintiff from his said employment until he should attain the age of 65 and would continue to make and permit the plaintiff to make contributions to the said scheme so as to afford to the plaintiff the opportunity of obtaining the full benefit of his said contributions . . . F G

I emphasise the words "subject to the exigencies of the defendants' business." After having remained in the service of the company for some six or seven years after the inception of this pension scheme, which took place in 1929, the plaintiff was given 3 months' notice to leave, and left. He contends that there was no right to give him notice. It is only right to say—and I say at once that it has been fully acknowledged by Mr. Maxwell Fyfe, who appears for the company—that there is no complaint of any kind against the plaintiff. His work has been at all times satisfactory, and there was absolutely no reason for getting rid of him beyond, apparently, that given to him—namely, that there was H

no scope for advancement for him. There is no other reason given, at any rate. No sort of justification for getting rid of him on the ground of any incompetence or misconduct is even suggested.

In asking me to imply that stipulation from the rules, Mr. Hoare quite properly pointed out the passages upon which he relied. I think
A that I am doing full justice to his argument if I say that the most outstanding passages on which he relied appear in r. 2 :

After the appointed day all employees under 50 years of age entering the staff service of the company, or being transferred from temporary or other employment with the company to the staff (hereinafter referred to as new members) . . .

B He points out there the distinction drawn between employees in temporary or other employment and employees on the staff, and he again desires to rely very strongly upon the following definition :

The expression " staff employee " shall mean every male employee on the permanent staff of the company whose name appears in their registers as such, and the expression " the staff " shall be construed accordingly.

C Mr. Hoare says that, when one looks back and sees any reference in the rules to the staff, one must read it as a reference to the permanent staff.

If the matter stood there, there might be, perhaps, a good deal more difficulty. However, it does not stand there. In my judgment, one has
D to read a great many of these rules in order to see whether or not the stipulation is to be implied—in other words, whether or not it is consistent with other passages in the rules. It must be borne in mind—indeed, it is conceded—that no stipulation ought to be implied in a contract unless, upon the evidence, it must be taken to have been mutually
E intended, and necessary to give business efficacy to the document, which I think is the expression as quoted in *The Moorcock* (1), and is the one usually adopted. Looking through these rules, I am bound to say that, far from finding it necessary to imply the stipulation, I should find the greatest
F difficulty in getting over the language of many of the rules if I were to imply it. It is sufficient, I think, that I should point to certain passages in r. 10 :

The company's proceeds (if any) shall be dealt with in the following manner :

(A.) In the event of a member leaving or retiring from the service of the company :
1. Through ill-health (subject to such leaving being with the consent of the board).
2. On or after attaining 65 years of age. 3. Before attaining the age of 65 years of
G age under circumstances to which the provisions of r. 13 (B) apply. 4. Owing solely to reductions or alterations by the company in the number of staff employees.
5. In the event of the death of a member [certain results follow which for this purpose do not matter.] (B.) In the event of a member leaving or being dismissed from the service of the company for reasons other than those enumerated in (A) or (C) . . .

I have just read the stipulations in (A) governing it, and (C) merely
H deals with the question of dismissal for dishonesty.

It was conceded by Mr. Hoare that there must be limitations to this implied stipulation that the plaintiff was entitled to remain with the company for the rest of his business life. Some of them would be obvious limitations. One could not imply such a contract without (for instance) saying that it must depend upon his being in sufficiently good health

to perform his part. That would have to be a stipulation. Another would be that, if he were grossly incompetent, or disobedient, they would have to have the right to dismiss him. Another would be that, if he were dishonest, they would have to have the right to dismiss him. All those were conceded, as they would have to be. All those would arise in any contract, including a contract for a fixed term of years. Obviously, A the contract here could have been avoided on the part of the employers, I will not say if the employee committed any of those acts, but if any of those conditions arose. However, Mr. Hoare realises, of course, that he cannot stop there. He has to concede something further—namely, B that the company have the right to dismiss the plaintiff for reasons arising out of the exigencies of their business. I am bound to say that, once that concession is made, it seems to me that the portcullis is opened and the fort is put at the mercy of the enemy. I cannot see any reason myself for allowing that exception without allowing also the exception that, C if they desire to give him notice for any reason at all in the ordinary way to terminate their contract, they can do so. Looking at the language that I have already quoted, I find that there are other passages similar in effect. I do not think that I need multiply them. One of them, for instance, to which I might just refer, gives the board the power to determine the whole scheme by giving the trustees not less than 6 months' D notice in writing. When one finds that they have that power, it is, to my mind—particularly putting it with the other matters I have stated—quite impossible to envisage a stipulation implied against the company that their servants on the permanent staff are entitled to remain for ever in their employment, for the whole of their business life. I cannot E find anything to support this implication. I cannot, therefore, find that there was any such implied term. It follows that there must be judgment for the defendants.

Judgment for the defendants, with costs.

Solicitors: *Owen White & Catlin* (for the plaintiff); *Lewis & Lewis* F (for the defendants).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

E. WORSLEY & CO., LTD. v. COOPER. G

[CHANCERY DIVISION (Morton, J.), January 18, 19, 20, 23, 24, 25, 1939.]

Master and Servant—Duties of servant—After termination of service—Setting up competing business—Use of knowledge honestly and properly acquired. Trade Names—Passing off—Representation that employers have gone out of business—Employee commencing similar business on own account—Malice—Special damage. H

The defendants, partners in the defendant firm of Cooper-Kelland Paper Co., prior to Aug., 1937, were in the employment of the plaintiff company, a firm of paper merchants, and from Mar., 1934, onwards they were directors of that company. One of the defendants for several years had travelled for the company, and had prepared a sample book

and price list of the papers which the company sold. In it the various types of paper bore names—in some cases those in general use in the trade, and in others names of a fancy description—the names of the mills from which the papers came being, as far as possible, kept secret. In Aug., 1937, the defendants were bought out of the plaintiff company, and resigned their directorships. They thereupon set up in business on their own account as paper merchants, and sent to a large number of the customers of the plaintiff company a circular worded in a manner capable of creating the impression that the Cooper-Kelland Paper Co. were the successors in business of the plaintiff company. Subsequently, they issued a price list of precisely the same arrangement as that of the plaintiffs, save that in many cases the papers had been given new fancy names. A key was also sent to certain of the old customers by means of which they could identify a paper under its new name from the name it had borne in the plaintiff company's sample book :—

HELD : (i) the defendants had not sold and passed off goods so as to mislead the purchasers into believing that they were buying goods of the plaintiffs.

(ii) the circular and price list sent out by the defendants were capable of conveying to a recipient that the plaintiff company had gone out of business, and were so worded with an indirect and improper motive.

(iii) the misrepresentation in the circular and price list would support an action for passing off, in which case it would not be necessary to prove either malice on the part of the person making the statement or special damage. A general loss of business, which was proved, would be sufficient to support a claim under this head.

(iv) the confidential information which the defendants had acquired while in the employment of the plaintiff company, and the use they had made of it subsequently, were not a breach of any express contract. It had been obtained openly and honestly, and was of such a nature that they were bound to acquire it and they were largely responsible for it. It was not in the nature of a trade secret, and the conduct of the defendants in the use they made of it was not an actionable wrong.

[EDITORIAL NOTE. Two points of importance are decided in this case. The first is that it is a species of passing off for a defendant to misrepresent that the plaintiffs have gone out of business, the defendant having at the same time commenced a business of the same kind as that of the plaintiffs. This species of passing off requires no proof of malice or special damage. The other point concerns the use that an employee can make of the knowledge acquired in his employers' business after he has left it and is free to set up in the same business on his own account. In this connection it must be noted that the defendants in the present case were under no restriction of any kind not to compete with the plaintiff company after the determination of their directorships, and that the knowledge which the defendants acquired was acquired openly, and was such that they must acquire it in the proper discharge of their duties. A further point in the case is that, where, for their own purposes, distributors of goods do not willingly disclose the name of the manufacturer of those goods, the fact that such names are kept secret does not make the knowledge of them a trade secret in the sense in which that term has been used in the cases dealing with the disclosure of trade secrets.

AS TO COMPETITION AFTER EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 184, 185, paras. 308, 309 ; and FOR CASES, see DIGEST, Vol. 34, pp. 121, 122, Nos. 923-941.]

Cases referred to :

- (1) *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 ; 32 Digest 170, 2086 ; 61 L.J.Q.B. 535 ; 66 L.T. 794.
- (2) *Harrison v. Pearce* (1858), 1 F. & F. 567 ; 32 Digest 169, 2078 ; subsequent proceedings (1859), 32 L.T.O.S. 298.

- (3) *Herbert Morris, Ltd. v. Sazely*, [1915] 2 Ch. 57; Digest Supp.; 84 L.J.Ch. 521; 112 L.T. 354; *on appeal* [1916] 1 A.C. 688.
- (4) *United Indigo Chemical Co., Ltd. v. Robinson* (1931), 49 R.P.C. 178; Digest Supp.
- (5) *Balden v. Shorter*, [1933] 1 Ch. 427; Digest Supp.; 102 L.J.Ch. 191; 148 L.T. 471.
- (6) *Harper v. Pearson* (1860), 3 L.T. 547; Digest Supp. A
- (7) *Scott v. Scott* (1866), 16 L.T. 143; 43 Digest 290, 1179.
- (8) *Albert (Prince) v. Strange* (1849), 1 Mac. & G. 25; 13 Digest 176, 125; 18 L.J.Ch. 120; 12 L.T.O.S. 441; *subsequent proceedings*, 2 De G. & Sm. 708.
- (9) *Robb v. Green*, [1895] 2 Q.B. 315; 34 Digest 121, 928; 64 L.J.Q.B. 593; 73 L.T. 15. B
- (10) *Exchange Telegraph Co., Ltd. v. Gregory & Co.*, [1896] 1 Q.B. 147; 13 Digest 179, 147; 65 L.J.Q.B. 262; 74 L.T. 83.
- (11) *Merryweather v. Moore*, [1892] 2 Ch. 518; 34 Digest 121, 926; 61 L.J.Ch. 505; 66 L.T. 719.
- (12) *Lamb v. Evans*, [1893] 1 Ch. 218; 34 Digest 121, 927; 62 L.J.Ch. 404; 68 L.T. 131.
- (13) *Spalding & Brothers v. Gamage (A. W.), Ltd.* (1915), 84 L.J.Ch. 449; 43 Digest 264, 1018. C
- (14) *Tolley v. Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333; Digest Supp.; 100 L.J.K.B. 328; 145 L.T. 1.
- (15) *Amber Size & Chemical Co., Ltd. v. Menzel*, [1913] 2 Ch. 239; 34 Digest 122, 933; 82 L.J.Ch. 573; 109 L.T. 520.
- (16) *Tuck & Sons v. Priester* (1887), 19 Q.B.D. 629; 13 Digest 211, 467; 56 L.J.Q.B. 553. D
- (17) *Wessex Dairies, Ltd. v. Smith*, [1935] 2 K.B. 80; Digest Supp.; 104 L.J.K.B. 484; 153 L.T. 185.
- (18) *Triplex Safety Glass Co., Ltd. v. Scolah*, [1937] 4 All E.R. 693; Digest Supp. E

ACTION by a company against two directors who had resigned their directorship for the purpose of commencing a competing business. The matters complained of were the letters, circulars and price lists distributed to customers of the company, the action seeking damages for infringement of copyright, passing off, publication of false and malicious statements and disclosure of confidential information. The pleadings and the facts are fully stated in the judgment. F

A. T. Denning, K.C., and *Geoffrey Howard* for the plaintiff company.

R. E. Burrell, K.C., and *R. A. B. Shaw* for the defendants.

Denning, K.C.: There is an implied term in this particular contract of service that a servant shall not make use of the information which he has obtained in the course of his service, in reference to the mills and the paper, so as to solicit custom from customers holding the sample books of the plaintiffs. He cannot use the information to the detriment of his employer after he has left his service. [Counsel referred to *Albert (Prince) v. Strange* (8), *Robb v. Green* (9) and *Exchange Telegraph Co., Ltd. v. Gregory & Co.* (10).] G

Burrell, K.C.: The bulk of the trade done by Worsley & Co. at the date of the severance was personal to Mr. Cooper, junior, and would inevitably have followed him, whether he set up on his own or went to H

- another firm. Those customers who transferred their business from Worsley & Co. to the defendants, having previously done their business through Mr. Cooper, would inevitably use the same names for the same papers. If the Coopers had adopted the same names for the papers as those used for the same papers in Worsley & Co.'s sample book, they would
- A have exposed themselves to an action for passing off. The same risk would also arise if, in response to an order, Mr. Cooper were to supply the goods without pointing out that the goods were his merchandise. Mr. Cooper had to determine how to carry on his trade and satisfy his customers. He drew up the price list, in which every single name was
- B different from that used by Worsley. To enable customers to identify the papers, he provided the key, which would also enable the customers to order the papers under their proper names. In preparing his price list, Mr. Cooper unfortunately infringed Worsley's copyright in their price list as a compilation: *KERLY ON TRADE MARKS*, 6th Edn., p. 655.
- C There is no implied contract not to use information obtained in the plaintiff company's service, and the sources of the various papers have not been disclosed by the defendants. Such information as the defendants obtained was obtained honestly and openly, and they had a duty to acquire it. It is not in the nature of a trade secret, such as a
- D secret process. [Counsel referred to *Morris (Herbert), Ltd. v. Saxelby* (3), *United Indigo Chemical Co., Ltd. v. Robinson* (4), *Merryweather v. Moore* (11), *Lamb v. Evans* (12), *Ratcliffe v. Evans* (1) and *Spalding & Brothers v. Gamage (A. W.), Ltd.* (13).]

- Denning, K.C.*, in reply: We must look and see whether the information is the property of the employer or merely the outcome of the plaintiff's skill. The information here is the master's information. The source of each individual paper was information which belonged to the master, and Mr. Cooper could not have produced the price list and key without it. [Counsel referred to *Ratcliffe v. Evans* (1), *Tolley v. J. S. Fry & Sons, Ltd.* (14), *Spalding & Brothers v. Gamage (A. W.), Ltd.* (13), *Exchange Telegraph Co., Ltd. v. Gregory & Co.* (10), *Lamb v. Evans* (12), *Amber Size & Chemical Co., Ltd. v. Menzel* (15), *Tuck & Sons v. Priester* (16), *Morris (Herbert), Ltd. v. Saxelby* (3), *Wessex Dairies, Ltd. v. Smith* (17) and *Triplex Safety Glass Co., Ltd. v. Scorah* (18).]

- G
- MORTON, J.: The plaintiffs in this case, E. Worsley & Co., Ltd., are a limited company carrying on the business of paper merchants in the city of London. The defendants, Robert George Cooper and George Frederick Cooper, are partners in the defendant firm of Cooper-Kelland
- H Paper Co., who carry on an identical business nearby. The plaintiffs claim relief under 4 heads, (i) that there is an infringement of the plaintiffs' copyright in a buff price list or catalogue, (ii) in para. 7 of the statement of claim, that the defendants

. . . have wrongfully sold and passed off goods under the names appearing in the plaintiffs' said price list and have thus misled and mislead the public into

believing that they are buying the goods of the plaintiffs, whereby the plaintiffs have suffered damage. . . .

(iii) that the defendants have caused to be written and published of and concerning the plaintiffs certain false and malicious statements—that is an action on the case—and that they have published these of and concerning the plaintiffs in their business, and (iv) that the defendants A have disclosed confidential information, or have made an improper use of such confidential information in breach of duty or an implied contract.

About Aug., 1922, Mr. Ernest Worsley began business in partnership with his brother as paper merchants. On Aug. 14, 1922, the defendant Robert George Cooper, then 16½ years of age, joined the firm as a junior B clerk. Some four months later the plaintiff company was formed to carry on the business. The defendant Robert George Cooper had been introduced by his father, the other defendant, Mr. George Frederick Cooper. The father had been in the printing trade all his life, and knew Mr. Ernest Worsley, and I may say at this stage that the chief customers C of the plaintiff company are printers. Mr. Cooper, senior, introduced his son into the business, and, after he had been in the office some three or four months, Mr. Cooper, junior, who was, I think, and has been throughout, a very intelligent and enterprising person, asked Mr. Worsley if he could go out and travel for the purpose of soliciting custom. D

By 1927 the business had grown considerably. Mr. Cooper, junior, says that about half the business was business which he had obtained by personal canvassing, and I think it may well be so, as I have no doubt that he was an able and energetic man, and I think he had some useful connections through his father. Mr. Cooper at this time was paid by E commission on the business which he obtained. He was appointed manager by Mr. Worsley about 1927, and it was in that year that the first price list was issued by the company.

At a subsequent stage, in 1934, the plaintiff company issued a sample book. I think it is true to say that many, and probably most, of the F names of the papers which were used by the plaintiff company were selected by Mr. Cooper, junior, who appears to have played a very leading part in the preparation of the sample book and the buff price list to which I have already referred. In fact, I think that the sample book was very largely his own work. The names under which the G plaintiff company sold various types of paper were, as to some of them, names which were quite generally used. Some of them, I think, were peculiar to the merchants who sold that particular paper, but other names were what might be called fancy names, given by the plaintiffs to a particular type of paper which they sold, and the evidence showed H that, even in the case of names which were not registered as trade marks (and none of the plaintiff company's names was registered as a trade mark), there was a general custom in the trade of paper merchants for one paper merchant not to use a name which had already been adopted by another. There is plenty of evidence of that. As regards the source

- of any particular type of paper which was sold, I think that it was never suggested to Mr. Cooper, or stated to him in so many words, that that was a secret, but I think that, on the evidence, paper merchants generally do not desire their customers to know the individual mills from which come the papers which they supply, since they wish the business to go
- A through them. I think that the evidence may be summed up in these words: if a particularly good customer particularly wanted to know the source of supply of a particular paper, it might be that the paper merchant would tell him to oblige him, but, as a general rule, it is not a matter which paper merchants would desire to have broadcast to their customers.
- B The manner of carrying on the plaintiff company's business appears to have been this. Mr. Cooper, junior, and Mr. Worsley, and another traveller called Mr. Othen, went and saw customers, and, one of them having obtained an order, he saw that that order was carried through, and supervised it. No doubt that had the result that the customer
- C thought that he would get, and probably did get, the personal attention of the gentleman to whom he had given his business.

In regard to the sample books, I should add that I think they have a very definite value to the person who possesses them. They take considerable time and skill and labour to prepare, and they have,

D I think, a definite goodwill value to the firm which possesses them. I think, also, that the individual name used for paper, provided that there was a fairly large sale of paper under that name, undoubtedly had a goodwill value.

- In Mar., 1934, Mr. Cooper, junior, and his father became directors of the
- E company. At that time there had been issued 1,700 shares—1,500 to Mr. Ernest Worsley and 200 to his brother—and right up to that time Mr. Cooper, junior, was being paid on commission. He was drawing commission on about 75 per cent. of the total orders obtained by the plaintiff company. When he became a director, he was paid a salary
- F of £720 per annum. Mr. Cooper, junior, and his father—I think that it was his father who actually produced the money—put £1,000 fresh capital into the plaintiff company, and they each took up 500 new shares. From the time when Mr. Cooper, senior, came into the company, or shortly after that time, certain dissensions appear to have arisen between
- G him and Mr. Worsley. I was not told, and it was quite unnecessary to tell me, the precise nature of those dissensions. I do not think that there was any personal antagonism between Mr. Cooper, junior, and Mr. Worsley, but, in Aug., 1937, the position was that the Coopers had said to the Worsleys, in effect: "Either you buy us out or we will buy
- H you out." What happened was that, on Aug. 27, 1937, the Coopers were bought out. Their shares were bought at par, and they resigned their directorships. They resolved, as they were quite entitled to resolve, to carry on a rival business to that carried on by the plaintiffs, and on the next day—Aug. 28, 1937, which was a Saturday—Mr. Cooper, junior, went to the office of the plaintiff company, as he says, to straighten out

various things. He had a discussion with Mr. Ernest Worsley as to whether he (Mr. Worsley) would make any sort of proposition to the Coopers. I think that it is the fact that Mr. Cooper, junior, offered to assist as regards any outstanding orders which he (Mr. Cooper, junior) had obtained and which had not been carried out. Exactly what Mr. Worsley said in response to that I am not very sure, but, at any rate, A that there was no definite agreement reached as regards these outstanding orders I am perfectly satisfied. On the Monday, Mr. Cooper, junior, and Mr. Worsley went to see two or three customers of the plaintiff company in regard to outstanding orders. I do not think that it is necessary to prolong this judgment by going into the details of those B interviews, because there was nothing in them to my mind, which could justify the steps which were subsequently taken by the Coopers.

On the same day—Monday, Aug. 30, 1937—Mr. Robert Cooper sent out a circular, and it is the sending of that circular which is the first matter in regard to which complaint is made in this action. Before that C circular was sent out, Mr. Cooper had ascertained that certain important members of the plaintiff company's staff were prepared to come with him. Again, there is no suggestion that, in obtaining the services of those members of the staff, Mr. Cooper did anything improper. It is not suggested that he induced them to break their contracts with the D plaintiff company, but it is the fact that they left the plaintiff company and went to Mr. Cooper. Amongst these servants was Mr. Othen, who, as I have said, was another traveller.

The circular is dated Aug. 30, 1937, and would appear to have been sent on that day. It is in the following terms: E

I am writing to advise you that by mutual arrangement I severed my connection with Messrs. E. Worsley & Co., Ltd., on Saturday last. I am starting from to-day a new company under the title of the Cooper-Kelland Paper Co., 1-3, St. Paul's Churchyard, London, E.C.4, with the majority of the old firm's staff to assist me to carry out your wishes.

The circular was sent to a large number of the customers of the plaintiff F company, as, indeed, appears from its terms. The circular proceeds:

I shall be glad if you will send all communications to me at the above address, whether in connection with orders given to me for the old firm, which I shall personally follow up when necessary, or for any new orders or inquiries which you may care to send me. My intention is to market the same products as before, with similar delivery arrangements for the present, making improvements from time G to time where necessary. I shall write again shortly, giving a price list and further information as to the new arrangement. Thanking you for all past favours and hoping to receive your continued support in my new venture, etc.

P.S.—You can get into touch with me by phone at City 5641, or at home address.

In my view, that was a most improper circular for Mr. Cooper to send out. The first paragraph, I think, is perfectly proper, in referring to H Mr. Cooper's severance of his connection with E. Worsley & Co., Ltd., by mutual arrangement. In the second paragraph, Mr. Cooper says:

I am starting from to-day a new company . . . with the majority of the old firm's staff to assist me to carry out your wishes.

That, taken by itself, might be harmless, but the words "old firm," I

think, rather suggest that the old firm was at an end and that the new firm was taking its place. Mr. Cooper suggested that these words were meant to refer to the old-established firm, but I think that it is a curious phrase. We then come to this striking paragraph :

A I shall be glad if you will send all communications to me at the above address, whether in connection with orders given to me for the old firm, which I shall personally follow up when necessary, or for any new orders or inquiries which you may care to send me.

B I think that it is perfectly plain that Mr. Worsley had not given Mr. Cooper any authority at all which entitled him to tell customers to send all communications to him, whether in connection with orders given to him for the old firm or in connection with new orders, and I think that a customer might naturally conclude from that paragraph that the business of Worsley & Co. was now being carried on by Mr. Cooper as the Cooper-Kelland Paper Co. It is quite true that the words "orders given to me" occur, and reliance has rightly been placed by Mr. Burrell on these words. It is not "all orders," but "orders given to me." However, the paragraph still was not justified by any arrangement between Mr. Worsley and Mr. Cooper, and was, I think, calculated to create a false impression. The next paragraph says :

D My intention is to market the same products as before with similar delivery arrangements for the present, making improvements from time to time where necessary.

E The position was that Mr. Cooper had not been in business on his own account at all. He had been a director of the plaintiff company, and he had been a traveller for the plaintiff company. Here, again, I think, there is a strong suggestion that what he is doing now is carrying on some business which was in existence before. That is not, of course, what he intended to do. He was going to start a new business. Then he goes on :

F I shall be writing again shortly, giving a price list and further information as to the new arrangement.

That is, again, a sentence which strikes one as meaning that new arrangements are being made in regard to the conduct of the plaintiff's business. Then he refers to "past favours," which I think can fairly be attributed to the orders which he obtained for the plaintiff company, and says :

G . . . and hoping to receive your continued support in my new venture. . . .

H There again, these words suggest to me that Mr. Cooper had had a venture in which these persons had supported him, and that he was now embarking on a new venture. However, I do not think that these particular words carry the matter very much further.

On Sept. 12, the plaintiff company, having heard of these circulars, issued a circular which, it is agreed, was sent out on or about Sept. 12. I need not read the circular at length, but it made it perfectly plain to all the persons to whom it was sent that Mr. Cooper had not succeeded to the business of Worsley & Co., Ltd., that Worsley & Co., Ltd., had

not gone out of business, as was, I think, suggested by the terms of the circular which I have just read, and that Worsley & Co., Ltd., were carrying on business and desired to obtain orders. Thus, that circular contradicted the statements which were, I think, contained by implication or by suggestion in the circular sent out by Mr. Cooper. On Sept. 3, 1937, there was a letter which showed plainly that at least one of the persons to whom the Cooper circular was addressed had read it as meaning that he had taken over the business of E. Worsley & Co., Ltd. That was the letter which was sent by Mr. Howe, who gave evidence before me. It is dated Sept. 3, 1937, and is addressed to the plaintiff company :

We have received a letter from the Cooper-Kelland Paper Co., 1-3, St. Paul's Churchyard, E.C.4, stating that they have taken over the business of E. Worsley & Co. Not having received any communication from you to this effect, will you please confirm that these people have taken over your company and that in future we are quite in order in sending inquiries to them and not to you.

I am quite satisfied that Mr. Howe read the circular from Mr. Cooper as meaning that the defendants had taken over the business of E. Worsley & Co., Ltd. On Oct. 6, 1937, Mr. R. G. Cooper, on behalf of the defendant firm, sent a further circular. This was again sent to a number of the customers of the plaintiff company, and it is in the following terms :

Referring to my personal letter dated Aug. 30, advising you that I was no longer connected with Messrs. E. Worsley & Co., Ltd., of which company I was, as you may know, a director, and that I had from that date commenced trading on my own account, I now have pleasure in enclosing herewith a price list as promised. May I, as managing director of the Cooper-Kelland Paper Co., take this opportunity of again pointing out that this company have complete stocks actually available of all the lines which I have previously offered to you.

In my view, that can only refer to the lines of paper which Mr. Cooper, when in the employment of the plaintiff company, had previously offered to the customer.

Our warehouse is conveniently situated in the same building as these offices, and our own motor vans are available to give prompt delivery of any urgent orders. Will our country friends please note that all London warehouse stock orders will be despatched on the same day as the order is received. Trusting to be favoured with your esteemed inquiries and orders, which will have our most careful attention, etc.

With regard to these price lists which were sent with that circular, it appears from two invoices that some 1,500 had been printed. There was also delivered on Oct. 13, the day on which the price lists were delivered, a number of cards. They were green cards, folded with "C. K." on the outside of them, and they have been referred to in this case by the not inappropriate name of the key. The price list is a document of some importance, and its arrangement is precisely the same as the arrangement of the plaintiffs' price list in that it starts off, for example, with "Cream Laid and Woves" and there are a number of papers, and then it says "Printings M.E.S./Cald and Antique." It is divided into section 1 and section 2, just as is the plaintiffs' price list, and there is no dispute that it was so divided, because the plaintiffs' price list was so divided, and it followed the outline of the plaintiffs' price list

precisely. Therefore, the further point is involved that the plaintiffs' price list was intended to be used in conjunction with the plaintiffs' sample books. The sample books were in two sections, and the papers were inserted in each book in a certain order, beginning with cream laid and woves, so that the customer, on referring to the price list, could use it in conjunction with the sample book. If he saw a sample of paper which he liked, he could look up the price in the price list, and, by looking from the price list to the sample book, could identify the paper specified in the price list. There are these differences between the defendants' price list and the plaintiffs' price list. In the first case, I should say at once that the defendants' price list is clearly marked: "Price List of Papers Stocked by the Cooper-Kelland Paper Co." There is nothing objectionable at all in the first page. On the first inner sheet, they state their terms of business, and then, at the top of p. 3 of the defendants' price list, occur these rather striking words: "All previous price lists cancelled." These words cannot have got into the defendants' price list by mistake, because these words do not appear in the plaintiffs' price list at all. It cannot have been a mere copying error. It must have been deliberately inserted, as the defendant company had never issued a price list at all. I do not feel the slightest doubt that these words mean, and were intended to mean, that all the price lists issued by the plaintiff company were cancelled. Mr. Robert Cooper stated in his evidence before me that these words referred to certain individual quotations which had been sent out by him after leaving the plaintiff company's service and before this price list was issued, but I do not believe that evidence.

I now turn to the key. The key was arranged as follows. It takes each section, starting again with cream laid and woves. In the left-hand column there is a list of names headed "Old Reference," and in the right-hand column there is a list headed "New Reference." There is not the slightest doubt, nor is it disputed by Mr. Cooper, that the names which appear under the heading "Old Reference" are the names under which the papers were sold by the plaintiff company. The issue of such a key referring to the plaintiff company's names as "Old Reference" was quite indefensible, and most impertinent, but I have to consider the legal consequences of it, which I shall do later. It is to be observed that, while in many cases there is a new name opposite each old name (for example, Vulcan becomes Cromer, and Carston becomes Kayrite), in some cases Mr. Cooper put opposite a particular name, which is called the "Old Reference," in the right-hand column "As Old Reference." In other words, the name is unchanged. These, I think, were the names which were used, not only by the plaintiff company, but generally. In other cases, in the righthand column appears the word "Discontinued," which presumably means that Mr. Cooper did not intend to sell any paper under that particular name. The result, if a customer of the plaintiff company had both the price list and the key, was that he was

able to give orders to Mr. Cooper in his new capacity by making use of the price list and the sample book of the plaintiff company, which he already possessed. Indeed, there is evidence that that was done. Mr. Cooper, it is only fair to say, was very careful not to make use of the plaintiff company's names, but, if anyone had the defendants' price list and the key, and wanted to order again, let us say, the same paper Carston which he had had before from the plaintiffs, and wanted to order it from the defendants, all he need do was to look at the key and order the appropriate quantity of Kayrite from the defendants. The defendants, having no sample book of their own, were, in my view, at a disadvantage in that respect, and the very simple result of the price list and key would be that the plaintiff company's customers could use the plaintiff company's sample book and price list for the purpose of giving orders to the defendants. Some of them, I think, made little or no use of it, but others did make use of the key. There is clear evidence of instances in which customers wanted to order—I think generally in the case of a repeat order—a particular paper and used the defendants' key to see under which name the defendants were selling it.

The next document of which complaint is made is a business card, which was largely used by Mr. Cooper, junior. He has described how it was left in the offices of a number of people on whom he called with the object of soliciting business. The card is in the following terms. There is a heading, "Everything in Paper and Boards," and then there is the name of the defendant firm: "The Cooper-Kelland Paper Co., 1-3, St. Paul's Churchyard, London, E.C.4." At the foot, in the righthand corner, there are two telephone numbers, and in the lefthand corner there are these words: "Mr. R. G. Cooper, director, formerly E. Worsley & Co., Ltd." There again, in my view, these words are undoubtedly calculated to lead to the belief that Mr. Cooper was formerly carrying on as E. Worsley & Co., Ltd., because, in the eyes of the law, a company is an entity separate from any of the individuals who carry it on. I think, however, that these words would be likely to lead to the belief that Mr. Cooper was formerly E. Worsley & Co., Ltd., but was now the Cooper-Kelland Paper Co. It would have been so simple to have said "formerly with E. Worsley & Co., Ltd.," or "formerly of E. Worsley & Co., Ltd.," or "formerly director of E. Worsley & Co., Ltd." That would have been perfectly clear, but those words were not inserted.

That brings me to this point in the case. This card was in fact drafted by Mr. Cooper, senior. Mr. Cooper, senior, had no part in the preparation of the other documents to which I have referred—the circular, the price list and the key—and it is not brought home, to my mind, that Mr. Cooper, senior, was intending to deceive. I go so far as to say, however, that I think that it is strange that he did not think it more appropriate to put "formerly of E. Worsley & Co., Ltd." I also think that it is strange that he was not struck by any impropriety in the other documents to which I have referred when he saw them. However, the

plaintiffs have not succeeded in convincing me that Mr. Cooper, senior, was himself guilty of malicious falsehood. I should add, of course, that Mr. Cooper, senior, takes full responsibility in the witness-box for these documents, which were prepared by his son, or in one case by himself, and issued by, and for the purposes of, the defendant company.

- A On Oct. 25, 1937, there was a letter, to which I should refer, because I shall have to refer to it in considering the legal aspect of this case. It is a letter in the following terms :

Messrs. E. Worsley & Co.'s catalogue has a Maxine tinted bank at 3½d. per lb. If you can supply this same paper at this price or not more than 4d. per pound, we shall require 10 reams D/CAP. 20 lb. Before placing this order, however, we shall be pleased to receive samples and price.

- B
- Then they enclose a sample of paper. That was sent by a gentleman who has given evidence before me. On the next page of the correspondence appears this : " 26th October, 1937 : Crendon Blue Bond."
- C Then there are some numerals, and then, in brackets, " Maxine." Then it says : " 10 reams 4½d. as net." It is signed with the initials " D. C." Referring to the key, at p. 3 I find that what the defendants sell as Crendon is the same as what the plaintiff company sold as Maxine. Thus, it comes to this, that Mr. Cooper is asked, " Here is a sample ; can you
- D supply the same paper as Maxine ? " and he says : " Here is our Crendon (Maxine)."

The writ in the action was issued on Nov. 11, 1937, and on Nov. 18, 1937, the defendants made an offer in settlement of the whole matter, which is in an open letter, and certain negotiations followed, which are

E not without prejudice. I do not think I need go through them, because they did not in fact result in any agreement, but they may have some bearing when I come to consider the question of costs.

- These being, I think, the relevant facts leading up to the action, and these being the documents of which complaint is made, I must now
- F consider the first cause of complaint in the statement of claim. As to that, no dispute arises. The defendants admit in their defence that the catalogue or price list and key which they issued are an infringement of the copyright in the plaintiffs' buff price list. I should have said, in regard to the key, that it does not appear to have been sent to all the
- G persons who received the price list. I think that there were instances in which a customer would ask for something to identify the papers, and the key was handed to the customer in question. I think that in some cases also, however, the key was handed out without request. As to the copyright claim, the defendants are agreed that an injunction
- H shall be granted in the terms of para. 4 of the prayer of the statement of claim, that there shall be an order for the delivery up to the plaintiffs upon oath or destruction of all copies of the defendants' catalogue and key and all plates used for the production thereof in the possession of the defendants, and that there shall be an inquiry as to damages for infringement of copyright, and also an inquiry as to damages for con-

version. I shall make an order accordingly, the costs of these inquiries being reserved.

I now come to the second allegation. I do not think that the plaintiffs have succeeded in establishing that the defendants have wrongfully sold and passed off goods in such a manner as to mislead the public into believing that they were buying the goods of the plaintiffs, whereby the plaintiffs have suffered damage. I do not think that there is a single instance proved before me in evidence in which a witness said: "I bought goods which were in fact the goods of the Cooper-Kelland Paper Co., believing that they were the goods of the plaintiffs." The plaintiffs fail to establish that allegation. There is another aspect of passing off which may, however, be material.

The next claim is this:

By a circular letter dated Aug. 30, 1937, and widely distributed among the plaintiffs' customers and other persons in the paper trade, the defendant Robert George Cooper and the defendants the Cooper-Kelland Paper Co. contriving and intending to injure the plaintiffs in their said business and to divert to themselves the plaintiffs' custom falsely and maliciously caused to be written and published of and concerning the plaintiffs in their said business the words following, that is to say . . .

Then there is set out the circular, and then there is a second paragraph, para. 9, in the same form, which is complaining of the business card. There is in para. 10 a similar allegation with regard to the words in the catalogue "All previous price lists cancelled," and it is said in para. 11:

By the said words complained of in paras. 8, 9 and 10 the defendants meant and were understood to mean that the plaintiffs had ceased to carry on business at 19, Ludgate Hill aforesaid or elsewhere or at all that the plaintiffs' said price list and all previous price lists issued by the plaintiffs were cancelled and had been superseded by the defendants' said catalogue that the defendants were carrying on the business formerly carried on by the plaintiffs at Ludgate Hill aforesaid and that the defendants were alone able to satisfy the requirements of the plaintiffs' said customers and other persons whether in respect of orders already placed with the plaintiffs or to be placed in future for goods ordinarily supplied by the plaintiffs.

This particular complaint is an action on the case which has been described by BOWEN, L.J., in *Ratcliffe v. Evans* (1), at p. 527, in the following words:

That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred.

It seems to me, therefore, that the plaintiffs have to satisfy me that the words of which complaint is made expressly or by innuendo convey a statement of facts which is untrue, that the words were written maliciously—that is to say, with an indirect or improper motive—and that the plaintiffs suffered special damage. It is further said by the plaintiffs—and I must deal with this later—that this case is of a kind in which a general falling off of business is sufficient evidence, without proof of actual loss of any particular customer, if, and indeed I might say

because, the words are such as are likely to produce such a falling off of business. Taking, first of all, the circular, does it expressly or by innuendo convey a statement of facts which is untrue? In my opinion, the circular is capable of conveying to a recipient that the plaintiff company have gone out of business and that the defendant company have succeeded to that business. It is, I think, capable of other interpretations, but that is one of which I think it is clearly capable. I am further satisfied that that is the meaning which was attributed to it by Mr. Howe, and I think it is a meaning which would not unnaturally be attributed to it by other persons, although I have no evidence before me that any other person gave it that meaning. In the second place, I come to the conclusion that the circular was worded in that way with the indirect and improper motive of seeking to convey to the customers that Mr. Cooper or the Cooper-Kelland Paper Co. had succeeded to the plaintiffs' business.

Then I come to the question of damage. The case upon which Mr. Denning relies as establishing that, in the present case, special damage need not be proved in any other way than by proving a general falling off of business is *Ratcliffe v. Evans* (1), to which I have already referred. That was a case in which THE COUNTY HERALD, a weekly newspaper which circulated in Flintshire and some of the adjoining counties, had published certain words which imported that the plaintiff had ceased to carry on his business of engineer and boilermaker, and that the firm of Ratcliffe & Sons did not then exist. BOWEN, L.J., in delivering judgment in the Court of Appeal, said, at p. 527 :

This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester Assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial.

The fact was that the plaintiff had proved a general loss of business since the publication, but he gave no specific evidence of the loss of any particular customer or order by reason of such publication. Then, after stating the facts briefly, BOWEN, L.J., makes use of the words which I have already quoted with regard to the nature of this action on the case, and he points out that in the case in question it is the damage done that is the wrong. He then goes on to discuss the question of what is sufficient evidence in regard to that damage, and he says, at p. 529 :

In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action?

Later, he says, at p. 529 :

But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage"—

says POLLOCK, C.B., in *Harrison v. Pearce* (2)—“it is general damage resulting from the kind of injury the plaintiff has sustained.”

Again, he says, at p. 531 :

Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty. A

He then refers to earlier cases, and proceeds, at p. 531 :

But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss.

Again, he says, at p. 532 :

As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. B

Mr. Burrell says in this case, first of all, that this is not a case in which there was any real difficulty in proving special damage if special damage existed, and he says that it is not a case in which general loss of custom can be relied upon at all. That argument seems to me to be one of some weight, but I have decided that it is not well founded. It is true to say that the present case is not such a strong one for allowing general loss of business to become sufficient evidence of damage as was the case in *Ratcliffe v. Evans* (1), because in *Ratcliffe v. Evans* (1) the publication was in a newspaper, and it would really be a matter almost of impossibility to ascertain who in particular had acted on it. In the present case, according to the evidence of Mr. Cooper, which is, I think, the only evidence I have in the matter, the circular was sent out to customers—he gave the number, but I do not think, in the present state of the evidence, one can be quite sure to how many customers it was sent out—and I think that it would be insisting upon too much from the plaintiffs in a case of this kind, when the words used were calculated to lead to damage and loss of custom, and when a general loss of custom is proved, to insist upon more, and to say that instances of special damage must be alleged and proved. There must be a line drawn somewhere, in view of the words of BOWEN, L.J. In this case, however, I am satisfied that, if I insisted upon special damage, I should be insisting on too great certainty and particularity—to quote the words of BOWEN, L.J., “more certainty and particularity than is reasonable.” C D E F G

Mr. Burrell says also in the present case that there is no reason to suppose that the loss of custom was due to the false statements. On the contrary, the evidence shows that it was not. I think that I ought to say this, in fairness to Mr. Cooper, junior. I have already said that he was an energetic and capable business man, but I should add that I think his customers thought very highly of him in the business. I think that he was attentive to them, and I think that he was a thoroughly good and efficient traveller. Moreover, I think that it is true that some of the business of the plaintiffs would have gone to Mr. Cooper even if H

he had adopted methods which were beyond reproach in all respects. I think that it is fair also to say that I have had a substantial body of evidence from people who say that they did appreciate Mr. Cooper's attention, and that, either by reason of the good service he gave them or because of personal reasons, they transferred their business
A to Mr. Cooper. I think that some of them went so far as to say that they would have given the business to Mr. Cooper whether he had started on his own or gone into another company.

Giving full weight to that, one has this position—a very substantial falling off in trade and turnover, which is estimated, in a statement
B which has been put in evidence, at £27,919 drop in sales as between the year ending Sept. 30, 1937, and the year ending Sept. 30, 1938. I do not think that I ought to infer in favour of Mr. Cooper, who has, in my view, committed a wrong, that that falling off is due entirely to the loss of his personality and the transfer of his personality and energy to
C the defendant company. The argument of Mr. Burrell, as I have said, caused me some hesitation, but I have arrived at the conclusion that, on this branch of the case, the damage is sufficiently proved by the evidence of general loss of business.

With regard to the other statements which were said to be false and
D malicious, which, perhaps, I should logically have dealt with before dealing with the damages, I think that the business card is capable of bearing the meaning that the Cooper-Kelland Paper Co. were the successors in business of E. Worsley & Co., Ltd. In the case of Mr. Cooper, senior, as I have said, I am not satisfied that he realised that they could
E bear that meaning. Mr. Cooper, junior, however, is an extremely intelligent man, and, when he used those cards with that wording on them, I think, treating that in conjunction with the other matters to which I have referred, that he must have realised that a false impression might be created, and that he had no objection to creating that false
F impression.

As regards the price list, Mr. Burrell has pointed out that the words
"All previous price lists cancelled"—occurring, as they do, in a price list of papers stocked by the Cooper-Kelland Paper Co.—would naturally bear the meaning "previous price lists of the Cooper-Kelland Paper
G Co." That, I think, is true if one considers somebody who has the price list and nothing else. However, in the case of anyone who had received from Mr. Cooper the two circulars to which I have referred—and more especially, perhaps, in the case of a person who had also seen the key—I do not think that he would have the slightest doubt in reaching the
H conclusion, as I do, that the words "All previous price lists cancelled" referred to the price lists of the plaintiffs, and that was a false statement. I think that the statement was made with an improper and indirect motive. I do not want to enlarge upon that, but I entirely decline to accept the explanation given by Mr. Cooper, junior, and, for the reasons I have given, I have reached the conclusion that the reason was to

suggest that the plaintiffs' price lists were no longer applicable to the goods, and that the defendants had succeeded to the business of the plaintiff company.

That brings me to the last question in the case, which is, I think, a very difficult one indeed. It is the allegation which is in the following terms in paras. 13 and 14 of the statement of claim :

13. Further and in the further alternative prior to Aug. 27, 1937, the defendants Robert George Cooper and George F. Cooper were in the employment of the plaintiffs and were directors of the plaintiff company. In the course of their said employment they obtained information as to the mills from which the papers sold by the plaintiffs under the names appearing in the plaintiffs' said price list were supplied and as to the precise nature and identity of the papers aforesaid. Such information was communicated to the defendants aforesaid in confidence and under an implied contract by them not to publish or divulge the same or alternatively was obtained in the course of confidential employment.

14. In breach of their duty and/or of the contract to be implied from the matters pleaded in the last paragraph the said defendants Robert George Cooper and George F. Cooper have since the termination of their said employment divulged the said information to the plaintiffs' customers and others and/or have made improper use of the said confidential information to the detriment of the plaintiffs whereby the plaintiffs have suffered damage. The plaintiffs repeat the particulars already delivered under paras. 3, 5 and 12 hereof. . . .

Para. 3 refers to the issue of the price list and key by the defendants, para. 5 is merely an allegation of damage, and para. 12 is also an allegation of damage by reason of the three publications to which I have last referred—namely, the circular, the card and the price list. It is said that the defendants threaten and intend to repeat each of these matters, unless restrained by the court. I do not myself think that there has been any threat to repeat these matters, but the defendants have contended that what they have done does not, under this head, involve any infringement of legal rights.

The position as regards the divulging or improper use of confidential information is this. I think that it is the fact, as I have already said, that paper merchants would not wish the source from which each one of their whole range of papers came to be disclosed to their customers, who are generally printers, or to their competitors. However, they might, in any individual instance, tell a good customer, if he wanted to know, where a particular paper came from. The first circular sent out by Mr. Cooper, junior, contains this remark : " My intention is to market the same products as before . . . " That is to say, he is saying, as I read it : " The same products as I have previously marketed I shall continue to market." Only a man with an intimate knowledge of the plaintiff company's business could be quite certain that every paper which he himself, having left the plaintiff company's employment, was going to sell was exactly the same as a particular paper sold by the plaintiff company. That knowledge was acquired by Mr. Cooper. He knew, for example, exactly what the paper was which the plaintiffs sold under the name of Carston. He is saying in that circular, " I am going to market the same products," and he could say it with confidence because he knew exactly what the products were and where they came from. I may say at once that there is no evidence that Mr. Cooper disclosed to the cus-

tomers of the plaintiff company the mills from which the various papers sold by the plaintiff company came. That is not the ground upon which Mr. Denning put his case in his final speech. He says that the source of the range of papers sold by the plaintiffs was confidential information, and that, by the circular, and perhaps more particularly by the price list and key, Mr. Cooper has made an improper use of that information. A I have had various eminent paper merchants and printers before me as witnesses, and I do not think that a single one of them had ever before seen a document like the key, and I do not think that they regarded it with very much approval as a means of doing business. However, the B key amounts to no more than this: "If you order from me a paper, to take an example, under the name Kayrite, you will be getting exactly the same paper as that which the plaintiff company used to supply under the name of Carston, and so on throughout the whole range of the plaintiff company's papers." That was a perfectly true statement, and the C question, which I do not think is an easy one, is whether or not it is actionable to do that, first of all, with regard to an individual paper, and, secondly, with regard to the full range of the plaintiffs' papers. It is pointed out by Mr. Burrell, in the first place, that it is not alleged that there is any breach of any express contract in the present case. That is D clear. In the second place, no warning was ever given to Mr. Cooper that information as to the source from which the paper came was to be treated as confidential, from the point of view either that it was not to be disclosed during his employment or that it was not to be disclosed subsequently. In the third place, the information as to the source of E each of the plaintiffs' papers was obtained quite openly and honestly, and, indeed, it was of such a character that Mr. Cooper, junior, could not have helped acquiring it. In fact, it was his duty to acquire it, if he was going to be an efficient salesman. In the fourth place, it was not information which was communicated to Mr. Cooper by his employer. F It was information for the very existence of which Mr. Cooper himself was largely responsible, since he compiled, or in substance compiled, the sample book and price list, although he may have had some assistance. In the fifth place, it is not pleaded that Mr. Cooper or his father took away any materials and used them for compiling their books. The G information as to the source from which the various papers came was information which was in Mr. Cooper's head, and which formed part of his knowledge acquired in the course of the business.

I may pause here to deal with a somewhat different point which arises. It is quite clear that Mr. Cooper did take away with him a price list of H the plaintiffs, and there is evidence that he also had a sample book. It may be—I express no opinion on the point—that the use of those materials, for the purpose for which he did use them—namely, for that of compiling the key—might possibly have given rise to some cause of action. I am not sure. At any rate, I am dealing with the use of this information, which is the matter of which complaint is made, and the

information is the information as to the source of each of the plaintiffs' papers.

In the sixth place, it was pointed out by Mr. Burrell that the information is not information in the nature of a trade secret or secret process, and he said, lastly, that the information was not confidential. I agree that this information was not in the nature of a trade secret. It was, I think, information which a determined and persistent trade rival, with sufficient skill and knowledge of the paper business, could have ascertained at the cost of considerable inquiries of considerable length. Even then he would have been, I think, in doubt as to foreign papers, and could not have identified more than the country of origin. He would also, I think, have been in doubt where some paper had been made to a special requirement of the plaintiff company. There might also be cases in which, while he could identify the group of mills from which the paper came, he might have difficulty in identifying the precise mill. That difficulty, I think, he could have resolved by writing to the group of mills and finding out. It was information of that kind, which was not information which the paper merchant would desire to be spread about to his competitors, but it was not, I think, in the nature of a trade secret; in the way in which that phrase is used in the case. It is quite clear that the defendants were entitled to stock the same papers as the plaintiffs did, and it cannot be any breach of duty, I think, if an ex-employee, knowing the source of a particular paper, goes to that particular mill and says: "I want to buy some."

We now come to this point. Suppose that a particular customer says: "I want a paper which is exactly the same as the paper sold by the plaintiffs under the name of Maxine." Mr. Cooper, owing to his knowledge of the plaintiffs' business, knows how Maxine is made, and knows where it comes from, and he is able to say confidently: "Yes, I can supply you with the same paper as Maxine." Is he doing an actionable wrong in replying that he can do so? In my opinion, he is not. I cannot see why, knowing the answer to the question, he should not answer it truthfully, and thereby no doubt get the advantage of an order. Supposing that one multiplies instances of that kind. Supposing he was asked: "Do you know the source of all the plaintiffs' papers?" "Yes, I do." "Can you supply the whole range of the plaintiffs' papers?" Is there any actionable wrong in saying: "Yes, I can"? If a stranger found out the sources of the whole range of papers, there would be no actionable wrong in his saying that he knew the sources and was prepared to supply them. Can it be actionable, apart from the question of breach of copyright, which it is admitted takes place, to announce to the customers of the plaintiff company: "I know exactly where all the plaintiff company's papers come from. I am not going to tell you where they come from, I am not going to disclose that, but I can tell you that, if you order the plaintiff company's Carston and I supply my Kayrite, you are getting exactly the same paper?" This part of the case has

caused me some anxiety, because I do not regard with any favour the means which the defendants adopted in the use of the price list and the key. However, I have arrived at the conclusion, with some hesitation, that, apart from the fact that the price list and key were a breach of copyright, Mr. Cooper, junior, did not commit an actionable wrong

A under this heading. I am assisted to this conclusion by the observations of the House of Lords in *Herbert Morris, Ltd. v. Saxelby* (3), which was quoted by Mr. Burrell in argument, and also by the observations of BENNETT, J., in the recent case of *United Indigo Chemical Co., Ltd. v. Robinson* (4), in which BENNETT, J., made these observations, at

B p. 187 :

In those circumstances [the circumstances being that the particular substance in question, Algaloid, had been actually made by the defendant while in the plaintiffs' employ], it seems to me almost impossible, in justice to the servant, to restrain him when he leaves his master's employment from using—not disclosing—information which he could not help acquiring. It seems to me that to try to restrain him by injunction from using knowledge, which in that way has become his own, is to try to do something which the court really has no power to do, or rather it has no power to enforce the injunction if one could be granted.

C

BENNETT, J., then refers to *Herbert Morris, Ltd. v. Saxelby* (3), and quotes the following passage from the judgment of JOYCE, J., in the court of appeal, at p. 88 :

D This observation of what the plaintiffs by the statement of claim ask is not, I think, altogether immaterial, because as will appear, in my opinion what the plaintiffs are seeking to do in this action is really to prevent the defendant, not from divulging or communicating confidential information, but from using the skill, experience, and knowledge that are his own in the service of any one else but the plaintiffs.

E Then BENNETT, J., continues at p. 189 :

That is really what the plaintiffs are trying to do here in connection with Algaloid. They are trying to stop the defendant from using after he has left the plaintiffs' service knowledge, skill and experience which as the result of his service have become his own. None of the cases referred to are cases in which the court has found it is able to grant an injunction against the use of that kind of knowledge when the person against whom the injunction is being sought has come by the knowledge honestly. Of course, if there had been anything dishonest in the way in which the defendant had acquired his knowledge how to make Algaloid, or if he had surreptitiously acquired knowledge of the ingredients of which Algaloid was composed, the matter would have stood on quite a different footing.

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Then he says that the knowledge which the defendant desires to use is knowledge honestly come by. There was nothing surreptitious in the way in which Mr. Robert Cooper acquired intimate knowledge of the source of origin of each of the plaintiffs' papers. He has not sought to disclose that source of knowledge, but the information which he acquired during his service with the plaintiffs he has used in advancing his own business and in damaging the plaintiffs' business. As I say, I cannot

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H feel any particular approval of the particular methods he adopted, but I think that what he did under this heading of the case amounts to no more than to say of each paper sold by the plaintiffs : " If you order the paper which I sell under the name of so-and-so, you will be getting paper which the plaintiffs sell under the name of such-and-such." That statement was true. It was the use of his knowledge, skill and experi-

once gained in the plaintiffs' service, and I do not think that it can be said that the origin of the paper was anything in the nature of a secret process. I have come to the conclusion, though with some hesitation, that, on the case as pleaded in paras. 13, 14 and 15 of the statement of claim, the plaintiffs have not made out any ground of relief against the defendants. A

I may add this one further observation. I have said that the plaintiffs have failed; in my view, to establish passing off of the kind alleged in para. 7 of the statement of claim. I may add, however, that the statements made in the circular of Aug. 30 and in the business card and in the price list issued by the defendants were, in my view, a misrepresentation, to the effect that the defendants were the successors in business of the plaintiffs. That is a species of passing off, and, treating the matter as one of passing off, and not as an action on the case for false and malicious statements causing damage, the plaintiffs could still succeed on that issue by establishing that the misrepresentation was made and that it was of such a nature as to give rise to a strong probability of actual damage. In that case, it would not be necessary for the plaintiffs to prove either malice on the part of the person making the statement or special damage, and, if I am wrong in thinking that, in the present case, the general loss of business is sufficient to support the plaintiffs' claim under the heading of the action on the case, then I express the view that the statements of which complaint is made do amount to passing off within the principle of the cases which are collected in *KERLY ON TRADE MARKS*, 6th Edn., pp. 552, 553: *Balden v. Shorter* (5), *Harper v. Pearson* (6) and *Scott v. Scott* (7). B
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D
E

Solicitors: *Windsor & Brown* (for the plaintiffs); *Woolley, Tyler & Bury* (for the defendants).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

LEWIS v. DENYÉ.

F

[COURT OF APPEAL (Slessor, Clauson and du Parc, L.JJ.), January 19, 20, 27, 1939.]

Factories—Dangerous machinery—Failure to fence—Contributory negligence—Failure of boy to use push-stick in accordance with statutory regulations—Factory and Workshop Act, 1901 (c. 22). ss. 10, 79—Woodworking Machinery, Use of, Regulations, 1922 (S.R. & O., 1922, No. 1196), regs. 11, 23 (ii). G

The plaintiff, who was 16½ years of age, met with an accident while employed on a circular wood-cutting machine in the defendant's factory, where he had been so employed, on and off, for some 17 months. At the time of the accident, he was engaged in cutting timber measuring from 3 ins. to 2 ins. in depth, and, before he commenced work, the foreman, in accordance with the practice at the factory, adjusted the guard fitted to the saw in the proper position for cutting timber this size, so that the teeth of the saw were covered by the guard, except at the point where the lengths of timber were inserted, where the teeth H

were of necessity exposed for a few inches. The plaintiff was supplied with a push-stick for the purpose of pushing through the length of sized timber, and also for that of detaching the off-cut from the left-hand side of the saw. After inserting a piece of timber, and while detaching the off-cut, the thumb of the plaintiff's left hand got caught in the saw at the point of entrance, with the result that his thumb was cut off at the op joint, and that he eventually lost his little finger and the tops of his ring and middle fingers. It was found that the accident was caused through the plaintiff detaching the off-cut with his left hand instead of using the push-stick. The Factory and Workshop Act, 1901, s. 10, provides that all dangerous parts of machinery shall be either securely fenced or be in such a position as to be equally safe to every person working in the factory as they would be if they were securely fenced. Reg. 11 of the regulations made under sect. 79 of the Act requires a suitable push-stick to be kept available for use at the bench of every circular saw fed by hand, and reg. 23 (ii) requires every person employed at the machine to use the push-stick provided in compliance with reg. 11 :—

HELD : (i) although the defendant had committed a breach of his statutory duty under the Factory and Workshop Act, 1901, s. 10, in failing securely to fence the saw, the effective cause of the accident was the plaintiff's own negligence in failing to use the push-stick to detach the off-cut as directed. In disobeying a regulation directed to ensure his safety, the defendant had failed to take such care for his own safety as a reasonable man ought to take. He therefore could not recover.

(ii) contributory negligence has the same meaning in this connection as in an ordinary action for negligence.

(iii) a workman must be taken to know the statutory regulations affecting his employment, provided they have been published as prescribed by the statute.

Decision of TUCKER, J. ([1938] 2 All E.R. 813) *affirmed*.

[EDITORIAL NOTE.] It may well be that the present case does not carry the question of contributory negligence as a defence to a claim of breach of statutory duty any further than the previous authorities, but the concise statement of the present position by DU PARCQ, L.J., will make this an authority often referred to. The question is now one for the House of Lords to consider, but until then the position is settled that contributory negligence is a defence open to the defendant in such a case, and the term contributory negligence has the same meaning as in an ordinary action for negligence. It also seems to be established that a workman must be taken to know the statutory regulations affecting his employment, provided they have been published in the manner prescribed by the statute.

AS TO CONTRIBUTORY NEGLIGENCE IN REFERENCE TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 668, para. 1269; and FOR CASES, see DIGEST, Vol. 24, p. 911, Nos. 79-81.]

Cases referred to :

- (1) *Groves v. Wimborne* (Lord), [1898] 2 Q.B. 402; 42 Digest 759, 1858; 67 L.J.Q.B. 862; 79 L.T. 284.
- (2) *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.*, [1936] 2 All E.R. 1150; Digest Supp.
- (3) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79; 24 Digest 916, 118; 70 L.J.K.B. 170; 84 L.T. 65; 3 B.W.C.C. 1.
- (4) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; *reversd. on other grounds*, [1936] A.C. 206.
- (5) *Bourton v. Beauchamp*, [1920] A.C. 1001; 34 Digest 303, 2506; 89 L.J.K.B. 1205; 123 L.T. 606; 13 B.W.C.C. 90.

- (6) *Dew v. United British S.S. Co., Ltd.* (1928), 98 L.J.K.B. 88; Digest Supp.; 139 L.T. 628.
- (7) *Grayson (H. & C.) v. Ellerman Line, Ltd.*, [1920] A.C. 466; 36 Digest 116, 780; 89 L.J.K.B. 924; 123 L.T. 65; *affg.* S.C. *sub nom.* *Ellerman Lines, Ltd. v. Grayson (H. & G.), Ltd.*, [1919] 2 K.B. 514.
- (8) *Murray v. Schwachman, Ltd.*, [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407. A
- (9) *Vowles v. Armstrong-Siddeley Motors, Ltd.*, [1938] 4 All E.R. 796; Digest Supp.
- (10) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, 71; 66 L.J.Q.B. 173; 76 L.T. 159.
- (11) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463. B
- (12) *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.
- (13) *Moore (A. G.) & Co. v. Donnelly, Fife Coal Co. v. Sharp, Fife Coal Co. v. Fyfe*, [1921] 1 A.C. 329; 34 Digest 302, 2501; 90 L.J.P.C. 49; 124 L.T. 578; 13 B.W.C.C. 458.
- (14) *Higgins v. Harrison* (1932), 25 B.W.C.C. 113; Digest Supp.
- (15) *Rudd v. Elder Dempster & Co., Ltd.*, [1933] 1 K.B. 566; Digest Supp.; C
102 L.J.K.B. 275; 148 L.T. 337; 25 B.W.C.C. 482; *on appeal*, [1934] A.C. 244.
- (16) *Hillen & Pettigrew v. I.C.I. (Alkali), Ltd.*, [1936] A.C. 65; Digest Supp.; 104 L.J.K.B. 473; 153 L.T. 403.

APPEAL from a decision of TUCKER, J., dated Apr. 14, 1938, and D reported [1938] 2 All E.R. 813, where the facts of the case are fully set out.

E. G. Hemmerde, K.C., and *A. D. Pappworth* for the appellant.

Hartley Shawcross and *C. N. Shawcross* for the respondent.

Hemmerde, K.C.: No sufficient instruction was given to the plaintiff E as to how he was to perform this operation. There was no evidence of contributory negligence here. There is no case where a breach of reg. 23 by the plaintiff has been held to be a defence. [Counsel referred to *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4), *Murray v. Schwachman, Ltd.* (8) and *Vowles v. Armstrong-Siddeley Motors, Ltd.* (9).] F

Pappworth followed.

Hartley Shawcross: The test as to whether or not a machine is dangerous is whether or not it is such a machine that danger may reasonably be expected: *Hindle v. Birtwistle* (10). The failure to use the push-stick was the cause of this accident. The plaintiff knew that it was G wrong not to use it. [Counsel referred to *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (11), *Vowles v. Armstrong-Siddeley Motors, Ltd.* (9) and *Walker v. Bletchley Flettons, Ltd.* (12).] It is no excuse to say that the plaintiff did not know the regulations. In construing reg. 11, one must not read into it words that are not there. Further, one must look at the H mischief that the statute was intended to remedy. A statutory obligation cannot be waived: *Moore (A. G.) & Co. v. Donnelly* (13). [Counsel referred to *Murray v. Schwachman, Ltd.* (8), *Higgins v. Harrison* (14) and *Rudd v. Elder Dempster & Co., Ltd.* (15).] With regard to the applicability of the defence of contributory negligence in a case of breach

of a statutory duty, the *dicta* of LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4) were *obiter*, and are inconsistent with other cases—for example, *Dew v. United British S.S. Co., Ltd.* (6) and *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (2). The duty of a workman to exercise care is in no way diminished. Here there was
A negligence in failing to use the push-stick, and that was the direct cause of the accident. The facts as found by the judge show negligence. [Counsel referred to *Hillen and Pettigrew v. I.C.I. (Alkali), Ltd.* (16).] These regulations must be construed broadly, bearing in mind the evils against which they are aimed.
B *Hemmerde, K.C.*, in reply.

SLESSER, L.J. : In this appeal from TUCKER, J., the infant plaintiff, who met with an accident while working on a circular saw, sued for damages said to have been occasioned by a breach of statutory duty
C by the defendant. The judge has found that the saw was not securely fenced or as equally safe as it would be if it were securely fenced, as is required by the Factory and Workshop Act, 1901, s. 10, and that there was, therefore, a breach of statutory obligation on the part of the employer. This finding is not contested. Notwithstanding this, he has, however,
D come to the conclusion that the act of the infant plaintiff was the real and effective cause of the accident, but for which it could never have happened, and he has, therefore, in the result, given judgment for the defendant. If his finding that the effective cause of the accident was the infant plaintiff's act is to be sustained, I have no doubt that, in
E principle, he was right in finding for the defendant, notwithstanding his breach of statutory regulation, in accordance with the principle laid down by VAUGHAN WILLIAMS, L.J., in *Groves v. Wimborne (Lord)* (1), at p. 418, that an obvious answer to an action against the master in such a case would be that the cause of the damage to the plaintiff was not the
F failure by the master to perform his statutory duty, a principle which finds its latest approval in *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (2).

The material facts of the case on this issue were these. It is not disputed that just before the time of the accident the infant plaintiff
G was engaged in pushing against the saw a length of sized timber, which he was propelling into the saw by means of what is called a push-stick. According to the infant plaintiff, he used the push-stick, not only to push through the wood, but also to knock away the subsequent off-cut, and, having so used the push-stick to knock away the off-cut, in order
H to lift the off-cut he put his hand to the end of the saw furthest from the part where it first came in contact with the wood, and suffered the injuries which subsequently caused the amputation of the thumb and little and ring fingers of the left hand. The defendant, however, while agreeing that he may have used the push-stick to push the wood into the saw, says that, in the circumstances, as the off-cut was not found

moved away from the saw after the accident, and because of other indications where the accident happened, the infant plaintiff must have attempted to pick up the off-cut with his hand at the point where the saw first cuts the wood, and not at the further end, and that he could not have used the push-stick to push away the off-cut at all. The judge, who says that the infant plaintiff's manner of giving evidence was most unconvincing, also says that he prefers the evidence for the defendant as to the position of the timber immediately after the accident—evidence which satisfied him that the accident happened at the point of entrance through failure to use the push-stick—and so disbelieves the story of the infant plaintiff. In another part of his judgment, he says, at p. 815 :

This accident could not have happened if he [the plaintiff] had been using the push-stick for the purpose of detaching the off-cut, and I am certain that, though he may have been using the push-stick to push through the sized timber pieces, he used his left hand near the point of entrance to detach the off-cut, a proceeding which, though highly dangerous, is none the less easy to perform if carefully done.

The other matters were decided by the judge. First, that the foreman left the guard with which the saw was fitted adjusted in the proper position for the cutting of timber measuring from 2 ins. to 3 ins. in depth, so that the teeth of the saw were covered by the guard except at the end from where the lengths of timber are inserted. At this point, the teeth of the saw are of necessity exposed for a few inches to admit the timber. Secondly, he found that he had some doubt whether the boy had received any detailed instructions with regard to the mechanism of the saw. He was, however, satisfied that he was a very intelligent boy, who, after having worked at the saw for 17 months, thoroughly understood how to carry out his work. The judge had come to the conclusion that the boy himself failed to perform a statutory duty, which caused the injury, and on this ground, apparently, he decided against him. It may well be that this finding by itself would not be conclusive. The mere fact that a boy himself failed to perform a statutory duty would not necessarily disentitle him to succeed unless it could be shown that in the breach of the statutory duty he had caused the accident. To my mind, the essential question, therefore, is rather whether or not the evidence goes to show that the infant plaintiff was the cause of his own injury. On this matter, it will be remembered that the infant plaintiff's own case was that he had used the push-stick for removing the off-cut. In examination in chief, he said : "The off-cut on the left-hand side, I just knocked it away." He was asked : "Do you always knock it [the off-cut] aside with the push-stick ?" To this, he answered : "Yes." It is true that in this case the judge disbelieved the infant plaintiff when he said that he used the push-stick on this occasion, but his answer remains against him that he did state unambiguously that he always used the push-stick. In cross-examination, he was asked :

Surely you know that the push-stick is used, and is intended to be used, in order to prevent your putting your hand anywhere near the blade ?—Yes, but we use it for pushing it through.

And for knocking the piece of wood off—what you call knocking the off-cut away?—For knocking the off-cut away.

That is what the push-stick is used for, is it not?—Yes. It is used for pushing it through and knocking the off-cut away.

For both, do you say?—Yes.

If you had knocked this piece of wood away with the push-stick, there would have been no need to put your hand anywhere near the blade, would there?—You would not have to knock it right off the table.

A I do not say whether you would not have to knock it right off the table or not, but you could knock it well away from the blade without any difficulty, could you not?—I think so.

On these admissions, it would appear that the infant plaintiff knew that he could have avoided all risk by using the push-stick, and that he
B failed to take reasonable care, and his omission so to do must, I think, on his own admission, be taken to have been the effective cause of the accident.

I have myself arrived at this conclusion on a careful study of the evidence in the case, and, as I have said, primarily without further
C consideration of the ground on which the judge decided the case against the infant plaintiff—namely, that he had committed a breach of a regulation. The regulation in question is the Woodworking Machinery, Use of, Regulations, 1922, reg. 23, which is to the effect that every person shall use the push-stick and holders provided in accordance with
D reg. 11. Reg. 11 provides that a suitable push-stick shall be available for use at the bench of every circular saw which is fed by hand, to enable the work to be carried on without unnecessary risk. It has been argued that the word “work” in this regulation refers only to the work of feeding the circular saw, but, on general considerations of the nature of
E the work and other uses of the word “work” in the regulations, such as reg. 3, I am satisfied that the word cannot be so narrowly construed. Reg. 3 provides as follows :

Sufficient clear and unobstructed space shall be maintained at every woodworking machine while in motion to enable the work to be carried on without unnecessary
F risk.

The removal of the off-cut, the product of the sawing, appears to me as much a part of the work as is the sawing itself. To use the language of the EARL OF HALSBURY, L.C., in *Lysons v. Knowles (Andrew) & Sons, Ltd.* (3), at p. 91, where he was speaking of the meaning of the
G phrase “loading or unloading,” it is

... [to] be treated as a whole transaction, as men in business in ordinary life would regard it ... it is part of the operations which the human labour is engaged in, in doing the very thing the legislature contemplated as requiring this protection . . .

The judge appears to have been of opinion that a breach of regulation
H as such may establish that the workman was the effective cause of his injury, or that such a breach of regulation indicates that the workman was doing a prohibited act, and so was the cause of his own injury (see *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4)), an act, that is to say, prohibited, not by the employer—in the present case, there was no evidence of such a direct prohibition—but by statute, taking the

view indicated by LORD ATKINSON in *Bourton v. Beauchamp* (5), at p. 1008:

... it passes my comprehension how a certain act can be more effectually put outside the sphere of a workman's employment than by a statutory prohibition which says that he shall not do that work.

However, as I have come to the conclusion that the evidence in this case disentitles the infant plaintiff from succeeding by reason of his contributory negligence, I would prefer to leave open the question of the legal effect of a breach of statutory regulation by him *simpliciter*, on which I think that the judge—at any rate, in part—relied. In the result, this appeal must fail, and be dismissed with costs.

CLAUSON, L.J.: I can see no escape from the conclusion of fact reached by TUCKER, J.—namely, that the real and effective cause of the accident, but for which it would never have happened, was the failure of the infant to use the push-stick provided. The judge has held (and I agree with him) that it was the statutory duty of the infant plaintiff, under reg. 23 (ii), to use the push-stick, and that, although the infant knew that this was his duty, he did not know that it was a duty imposed by a statutory regulation. It may be said that the judge has not expressly found that, even if there had been no such regulation, it would have been negligence in the infant plaintiff to use his fingers instead of the push-stick provided. On the evidence, however, I can see no escape from the conclusion that the user by the infant plaintiff of his fingers instead of the push-stick amounted to contributory negligence, apart altogether from the breach of the regulation. The appeal should, therefore, in my judgment, fail. I would only add that, if a case should occur in which it is shown that the plaintiff's conduct is in breach of a statutory duty, but it also appears that it does not amount to contributory negligence, the decision in the present case will not, in the view I take of the facts, govern that case.

DU PARCQ, L.J.: We heard a full and interesting argument as to the legal principles applicable to this case. They may, I think, be stated shortly as follows:

(1) A plaintiff who has been injured by reason of the defendant's breach of statutory duty is not entitled to recover damages if it be proved that there was contributory negligence on the part of the plaintiff: *Dew v. United British S.S. Co., Ltd.* (6), *per* SCRUTTON, L.J., at p. 631, and *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (2).

(2) The words "contributory negligence," when used in this context—namely, in relation to a workman whose employer has broken a statutory obligation—have the same meaning as in an ordinary action for damages for negligence: *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (2).

(3) In order to establish the defence of contributory negligence, the defendant must prove (i) that the plaintiff failed to take "ordinary care for himself," or, in other words, such care as a reasonable man

would take for his own safety, and (ii) that his failure to take care was a contributory cause of the accident. The doctrine of contributory negligence "cannot be based upon a breach of duty to the negligent defendant": *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.* (2), SALMOND ON TORTS, 9th Edn., at pp. 472, 473, and *Grayson (H. & C.) v. Ellerman Line, Ltd.* (7), per ATKIN, L.J., at pp. 535, 536. These propositions are, I think, unassailable in this court, though perhaps criticism might usefully be directed against the first two of them in the House of Lords. There is, however, no direct authority on the question, much debated before us, as to the circumstances in which a breach of statutory duty by a plaintiff will prevent him from recovering damages to which he would otherwise be entitled. If the act or omission constituting the breach of statutory duty is itself an act of negligence, this question does not arise. There may, however, be cases where the breach of statutory duty does not appear to the tribunal of fact to fall within the common law definition of negligence, and the question then becomes important. SIR WILFRID GREENE, M.R., was careful to leave open the question whether such a breach by a workman would necessarily defeat his claim: *Murray v. Schwachman, Ltd.* (8), per GREENE, L.J. (as he then was), at p. 155. I am of opinion, apart from authority, that such a breach must at least have the consequences which I venture to state in my next proposition.

(4) Where a statutory regulation is, on the face of it, directed to ensure the safety of the workman, and its infringement is likely to increase the risks of his occupation, any act or omission on his part in breach of the regulation is of itself at least *prima facie* evidence that he has failed to take such care as a reasonable man would take for his own safety.

I would add a fifth proposition.

(5) Where statutory regulations have been published to a workman in the manner prescribed by statute, he must be taken to know what they provide, even though in fact he may not have read them.

I now turn to the findings of fact of TUCKER, J. They are set out in a careful judgment, and, in my view, are all adequately supported by the evidence. I shall confine myself to stating, for the most part in the judge's own words, those findings which are, in my opinion, conclusive of the case. For the sake of convenience, I refer to the infant plaintiff as the plaintiff.

(1) The plaintiff had been provided with a push-stick, and he knew (p. 817) "that it was his duty to use a push-stick to remove the off-cut."

(2) As was said at p. 815:

H . . . though he [the plaintiff] may have been using the push-stick to push through the sized timber pieces, he used his left hand near the point of entrance to detach the off-cut. . .

It was when he was doing this that the plaintiff suffered injury.

(3) As was said at p. 817:

On the facts of this case, the failure of the infant plaintiff to use the push-stick

provided was the real and effective cause of the accident, but for which it could never have happened.

(4) The regulations were posted in the works (that is, they were published in accordance with the Factory and Workshop Act, 1901, s. 86), although the plaintiff had not in fact read them.

The judge described what the plaintiff did, at p. 815, as

... a proceeding which, though highly dangerous, is none the less easy to perform if carefully done.

Mr. Hemmerde contended that this description brought the plaintiff's conduct within that class of acts to which LAWRENCE, J., referred in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4), when he said, at p. 140 :

... it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

I would refer also to the words of LORD WRIGHT, at p. 214. In my opinion, the construction of the words of TUCKER, J., contended for by Mr. Hemmerde places too little emphasis on the words "highly dangerous." It is, I think, true to say that the judge has not found in express terms that what the plaintiff did, considered apart from the regulations, amounted to contributory negligence. I cannot doubt, however, that the plaintiff's conduct exhibited a lack of such care as a reasonable man would take for his own safety, and I feel bound so to hold. This would be enough to dispose of the case, but I am further of opinion that the judge's own reason for his decision was good and sufficient. I think that, on a fair construction of the regulations, "the work" referred to in reg. 11 included the removal of the off-cut, and that the plaintiff did commit a breach of reg. 23. In my opinion, this breach was, of itself, *prima facie* evidence of failure to take reasonable care, and, as it has neither excused nor explained, the judge was right in finding as he did. I wish to add, however, that, if the evidence had shown that the plaintiff was ignorant of the proper use of the push-stick, and that his ignorance was due to the defendant's neglect of his statutory duties, I am strongly disposed to think that his breach of reg. 23 would not have prevented him from recovering, if, indeed, he could have been convicted of a breach of the regulation in those circumstances. The evidence did not show this, and the fact (if fact it be) that the defendant failed in his duty to instruct the plaintiff fully as to other parts of his duty gives no assistance to his case, and is, in truth, irrelevant. I agree that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lord.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellant); *W. Stanley Eastburn*, agent for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re FARMER, NIGHTINGALE v. WHYBROW.

[CHANCERY DIVISION (Farwell, J.), November 17, 1938.]

Executors—Legacies—Abatement—Annuity—Direction to appropriate fund—Gift over of fund subject to annuity—Rights of annuitant.

A A testatrix gave an annuity of £300 and directed that a sum should be set apart to provide by its income for the annuity. Subject to the payment of the annuity, she gave the fund to three persons, or such of them as should be living at her death, as tenants in common. There were also bequests of pecuniary legacies, one of which was settled, and a residuary gift to the sister of the testatrix absolutely. The estate proved insufficient to pay the legacies and provide the fund for the annuity, and a summons was taken out to determine how these gifts should abate:—

B **HELD:** in the circumstances of this case, the annuitant had a paramount right to her annuity. The annuity should be valued, and that sum, when abated if necessary, should be paid to the annuitant. The surplus, if any, after payment of the legacies and the value of the annuity, was payable to those entitled to the annuity fund, subject to the rights of the annuitant, and not to the residuary legatee.

C **[EDITORIAL NOTE.]** The judgment in the present case distinguishes the position here from that which arose in *Re Nicholson, Chadwyck-Healey v. Crawford* (1), in which a different method of administration was ordered. The principle by which the court is guided is to give effect to the intention of the testator as found upon a proper construction of the will. The question that arises here upon the construction of the will is whether the persons who are to take the annuity fund after the death of the annuitant are given equal interests with the annuitant or whether the interests of the annuitant are paramount. In the first case, the method of abatement must provide for the preservation of the rights of those taking on the death of the annuitant, but in the latter, which is the case here, the annuity must first be satisfied, and the others will receive what, if any, then remains.]

E AS TO ABATEMENT OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and FOR CASES, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4937.]

Case referred to:

F (1) *Re Nicholson, Chadwyck-Healey v. Crawford*, [1938] 3 All E.R. 270; Digest Supp.

G ADJOURNED SUMMONS for the determination of the question whether, in the event of the real and personal estate of the testatrix being insufficient, after payment of her funeral and testamentary expenses and debts, to provide in full for the pecuniary legacies bequeathed by the will and the fund directed to be set apart to answer the annuity, together with legacy duty thereon, respectively, the annuity ought to be valued on the government scale as at the death of the testatrix, and the annuitant ought to be treated as a pecuniary legatee of a legacy equal to the capital value of the annuity as so ascertained, together with legacy duty thereon.

H The testatrix by her will bequeathed a number of pecuniary legacies, one of £250 being settled, and then gave an annuity of £300, with a direction to set aside and invest a sum the income of which would be sufficient to provide the annuity. She then disposed of the fund and its income, so far as it was not required to meet the annuity, to three persons

as tenants in common, and then charged the funeral and testamentary expenses, death duties, debts, legacies and annuities primarily on her personal estate. There was a residuary gift to the sister of the testatrix absolutely. When the time came to set aside the sum to provide the annuity, there was in the hands of the trustees of the will, after providing for the pecuniary legacies, a sum of about £4,500. The sum required to be set aside for the annuity was approximately £9,000, and its capital value was £2,200. A

M. Adams for the plaintiffs, the executors and trustees of the will of the testatrix.

G. P. Slade for the annuitant. B

E. M. Winterbotham for the pecuniary legatees.

R. Edwards for two of the three persons entitled to the annuity fund, subject to the annuity, the other being the residuary legatee.

William Cooke for the residuary legatee. C

FARWELL, J. : Clearly, the estate is insufficient to pay the legacies and the annuity in full, and there must be an abatement. The question is how the abatement is to be effected in relation to the annuity, having regard to the direction to set aside a sum the income of which shall be sufficient to meet it, with a gift over of the sum so set aside. D

If this were the ordinary case of an annuity and nothing more, there would be no doubt as to the proper mode of procedure. The actuarial value of the annuity would have to be ascertained, all the legacies, if necessary, would abate proportionately, and the annuitant would take the abated portion of the capital value of her annuity. On the same principle, the sum of £250, which is settled for the benefit of the sister and her children, would abate, together with the other legacies, and the amount of the abated sum be retained as being the capital sum of which the income was payable to the sister for life, with remainder over. However, when one comes to deal with the abatement of the annuity, a question arises, because, if the ordinary rule were applied, and the capital value of the annuity was ascertained, and that capital sum was abated and paid to the annuitant, there would be nothing left out of which that gift over could take effect. Adopting that method, the result would be that the persons ultimately interested in the fund would receive nothing. E F G

The question is a difficult one, and has already been considered by CROSSMAN, J., in *Re Nicholson, Chadwyck-Healey v. Crawford* (1), a case not dissimilar to this. In this case, as in most others of this sort, it must be borne in mind that the questions depend on the construction of the particular document before the court, and that, generally speaking, H unless some rule of construction or principle of law is concerned, authorities are of little assistance in such cases. One judge may come to a conclusion on a document which contains certain language and phrases, but that is not necessarily of any assistance to another judge who has to deal with a document containing different language. That decision

may not be any guide in a different case. I confess that, having read the judgment of CROSSMAN, J., I feel some difficulty in applying its reasoning to the present case. Judging by what CROSSMAN, J., said, it seems that he thought that, on the true construction of the will before him, the persons ultimately interested in the appropriate fund had some rights
A in it which were *pari passu*, so to speak, with those of the annuitant, and that that led him to the conclusion to which he came. In my judgment, however, those considerations are not applicable in this case. CROSSMAN, J., based his decision on the footing that, on the construction of that will, the annuitant and the persons who were to take the appropriated fund after him were equally interested in it, and that the court
B was, therefore, no more entitled to destroy the rights of one than it was to destroy those of the others.

In the present case, I do not think that that is the position here. What the annuitant is given is the right to receive a sum of £300 in each
C year. That is given to her apart altogether from anything which may be given to other persons. For the purpose of discharging the residuary estate so as to permit it to be distributed, the testatrix has directed the trustees to set aside a capital sum and to apply the income resulting therefrom in paying the annuity, with a right to resort to capital if the
D income is insufficient. When set aside, that capital sum is the fund which alone can be looked to, as between the annuitant and the residue, for the payment of the annual sum to which the annuitant is entitled, and the annuitant is entitled, if necessary, to the whole of it. In my judgment, her rights to the annuity, as between herself and the persons who may
E take the appropriated fund after her death, are paramount. Everything given to them is given "subject to the payment of the said annuity," and, in my judgment, that means subject to satisfying the annuity in full, so that nothing is to go to those persons who take after the annuitant's death until the annuitant has been given to the fullest extent, so far as
F the fund permits, all that to which she is entitled in respect of her annuity. On this construction of the will, by adopting the course which I propose to adopt I am not doing what CROSSMAN, J., called destroying the gift to these persons. I am not destroying anything. I am giving effect to the intention of the testatrix by satisfying in full, so far as it is possible,
G the rights of the annuitant. The result may be that little or nothing is left for those who would take under the gift over after her death, but that is because the testatrix has given to her rights which she is entitled to have satisfied in priority, and which will exhaust the whole fund. In this case, since the estate is insufficient, the right of the
H annuitant is to have the annuity valued, and to have that sum, when abated, if necessary, paid out to her. It might be that the effect of that would be that little or nothing would go to those who would have taken the appropriated fund, or what was left of it, if no appropriation had been necessary. The cause of those persons' misfortune is the insufficiency of the estate, but only in that way can I give effect to what, on this will, I

think to be the clear intention of the testatrix—namely, that the annuitant shall have the first right, and that her right to her annuity has first to be satisfied before those who would take on her death are entitled to benefit. I think that the point is illustrated quite aptly in this particular will in the distinction drawn between this gift of an annuity and the gift of the legacy of £250 which is settled. In the latter case, the legacy has to abate, if necessary, and the abated sum has to be invested and the income paid to the sister, with remainder over. In the case of the annuity, however, there is no question of giving the annuitant a life interest in anything at all. She has a right to her annuity, and it is only by valuing the annuity, making any necessary abatement, and paying to her that sum so abated that effect can be given to that right. The persons who would otherwise have taken on the death of the annuitant will get little or nothing, because little or nothing will be left for them when the annuitant has been given that to which she is entitled on this will, her paramount rights. A B

In this case, I propose to make a declaration that the annuitant is entitled to have paid over to her the capital value of her annuity, when abated, if necessary. C

FARWELL, J., then held that, if, after payment of the legacies and the actuarial value of the annuity in full, any surplus remained, that surplus was payable to the three beneficiaries who were to take the annuity found on the death of the annuitant. The surplus was not payable to the residuary legatee. D

Solicitors: *Frank Taylor & Nightingale* (for the plaintiffs); *Rye & Eyre* (for the defendants).

[Reported by F. HONIG, ESQ., Barrister-at-Law.] E

ANGFARTYGS A/B HALFDAN v. PRICE & PIERCE, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **January 12, 13, 16, 17, 25, 1939.**] F

Shipping—Charterparty—"Full and complete cargo"—Timber shipped in bundles—Custom to bundle—Stowage place completely filled but cargo short of carrying capacity—Dead freight.

By a charterparty in the Baltwood form the defendants chartered from the plaintiffs a steamship of the carrying capacity of about 750 standards of timber, which was to be loaded with a full and complete cargo of timber. The ship was loaded with about 727 standards. She was well stowed, and fully loaded in the sense that she could not hold any more timber or any more broken stowage. The composition of the cargo was: shipped loose, 325 standards, slatings, 77 standards, laths, 30 standards, weatherboards, 119 standards, and sawn boards, 175 standards. The weatherboards and the sawn boards were bundled. It was contended that the bundling of the weatherboards and the sawn boards was contrary to the provisions of the contract. It was also contended that there was an overriding duty to deliver a full and complete cargo, and that the bundling of the timber had prevented the cargo from being a full and complete one. The claim was for dead freight in respect of about 30 standards:— G H

Held: (i) dead freight is the damage caused by the failure to furnish a full cargo in accordance with the contract.

(ii) the contract, properly construed, did not restrict the bundling to scantlings, slatings and laths, but other timber, as to which there was proved a custom to ship in bundles, might be bundled, and such timber, so shipped, was within the contract description.

(iii) as the whole space for the stowage of cargo was filled, a full and complete cargo was shipped, although the cargo was in fact less than the carrying capacity of the ship.

A

[EDITORIAL NOTE. The obligation to ship a full and complete cargo is satisfied by filling the whole cargo space in the ship, and, so long as the stowage or the packing or preparation of the goods for shipment is done in the customary way, no complaint can be made. The real issue in the present case is that certain timber was specified in the charterparty to be bundled, and, in fact, much more was bundled than that specified. The objection founded upon this, however, was overruled as soon as it was shown that it was the custom of the trade to bundle timber of the kind that was shipped in bundles. There is no right to have the cargo prepared in other than the usual way for the purpose of saving space.

B

AS TO AMOUNT OF CARGO, see HALSBURY, Hailsham Edn., Vol. 30, pp. 304-306, para. 497; and FOR CASES, see DIGEST, Vol. 41, pp. 340, 341, Nos. 1915-1922.]

C

Cases referred to :

- (1) *Wallems Rederij A./S. v. Muller (W. H.) & Co., Batavia*, [1927] 2 K.B. 99
41 Digest 461, 2925; 96 L.J.K.B. 819; 137 L.T. 154.
- (2) *Cole v. Meek* (1864), 15 C.B.N.S. 795; 41 Digest 343, 1942; 33 L.J.C.P. 183;
9 L.T. 653.
- (3) *Cuthbert v. Cumming* (1855), 10 Exch. 809; 41 Digest 338, 1905; 24 L.J.Ex.
198; 25 L.T.O.S. 23.
- (4) *Mikkelsen v. Arcos, Ltd.* (1925), 134 L.T. 92; 41 Digest 340, 1920.
- (5) *Robinson v. Robinson* (1851), 1 De G. M. & G. 247; 17 Digest 132, 391; 21
L.J.Ch. 111; 18 L.T.O.S. 293.
- (6) *Kaye Steam Navigation Co., Ltd. v. Barnett (W. & R.), Ltd.* (1932), 48 T.L.R.
440; Digest Supp.

D

E

ACTION claiming dead freight in respect of the amount by which the cargo shipped fell short of the carrying capacity of the ship.

A. W. Roskill for the plaintiffs.

H. U. Willink, K.C., and *Patrick H. Dean* for the defendants.

F

ATKINSON, J. : By a charterparty made on Sept. 14, 1937, between the plaintiffs, a firm of shipowners carrying on business at Gothenburg, and certain timber merchants in the district of Kemi in Finland, the latter chartered from the plaintiffs a steamship called the *Taberg*, of the carrying capacity of about 750 standards of timber, or thereabouts, to proceed to Kemi in North Finland and there load a full and complete cargo of

G

... red and/or white deals and/or battens and/or boards and/or scantlings and/or slatings in bundles and/or laths in bundles and/or planed boards and/or floorings, the quantity of slatings to consist of about 30 standards with a sufficient quantity of ends 8 ft. and under for broken stowage only.

H

Except for certain deletions, the charterparty was in the Baltwood form, a form adopted in 1926 by the council of the Baltic and White Sea Conference with the approval of the Timber Trade Federation.

The ship proceeded to Kemi and there loaded the cargo of about 727 standards. She was well stowed, and was, in fact, fully loaded, in the

sense that she would not hold any more timber or any more broken stowage. The cargo contained 401 standards of bundled timber, although only 110 standards of bundled timber were specified in the charter. It was admitted that, on an average, if it is not bundled, 10 per cent. more timber can be stowed in a ship than if it is bundled. The stowing of bundled timber involves, of course, the leaving of some interstices and places which cannot be filled up, which does not occur in the stowage of unbundled timber. This particular cargo was, therefore, about 30 standards less than it would have been if nothing but unbundled timber had been shipped. A

In this action, the plaintiffs challenge the right of the shipper to ship more timber bundled than the 80 standards of slatings or 30 standards of laths specifically mentioned in the charter. They claim to be entitled to dead freight in respect of 30 standards or thereabouts, amounting to some £66. The defendants were the shippers' agents. They deposited the sum of £75 with the Port of London Authority, under the provisions of the Merchant Shipping Act, 1894, and this action is brought to establish a lien on that sum for the dead freight under cl. 22 of the charter, which provides that "the shipowner shall have an absolute lien for all dead freight." It was objected, on behalf of the defendants, that, on the admitted facts, the damages alleged to be due from the shippers were not dead freight. SCRUTTON ON CHARTERPARTIES, art. 161, states as follows : B C D

"Dead freight" is the name given to damages claimed for breach of contract by a charterparty to furnish a full cargo to a ship.

It was argued that it covers only damage caused by a ship not being in fact fully loaded, and damage caused by the cargo furnished being a cargo not within the contract, and less remunerative than cargo within the contract would be, is not dead freight. In my opinion, this distinction is unsound. I think that dead freight means the damage caused by the failure to furnish a full cargo in accordance with the contract. If the master can reduce the owner's loss, due to insufficient cargo being furnished, by taking in other, though less remunerative, cargo, he is bound to do so—bound in the sense that, if he fails to mitigate when he can, his damage will be reduced to the extent that he had an opportunity of reducing it. That seems quite clear from *Wallem's Rederij A./S. v. Muller (W. H.) & Co., Batavia* (1), at p. 105. It would be a strange result if, by reason of mitigating loss to the advantage of the shipper, the balance of the damages were to change its character and the shipowner lose his lien. In my opinion, the plaintiffs' claim for dead freight from an alleged failure to deliver a full cargo of contract timber remains a claim for dead freight, notwithstanding that it has been reduced to a small sum by shipping other cargo. It is further necessary to decide whether the claim is a good one. E F G H

The plaintiffs put their case in two ways. First, it is said that, on the true construction of this charter, there is no option to deliver any bundled

timber other than that specified—namely, 80 standards of slatings and 30 standards of laths. Secondly, it is said that, even if the shippers have *prima facie* an option to deliver bundled timber other than that specified, there is an overriding duty to deliver a full and complete cargo, and the shipper cannot elect to load timber which necessarily leaves vacant spaces, for such an election does not satisfy the obligation to load a full and complete cargo. The first contention raises a question of construction, and the only evidence that I can receive to help me is evidence as to the meaning of the trade terms used in the charter and as to customs of the trade which regulate the performance of such charters without contradicting any term of the charter, or changing its essential meaning or character. The evidence establishes the following definitions. Deals are timber 3 ins. or 4 ins. by 11 ins. or 9 ins. Scantlings are 2 ins. or 2½ ins. by 3 ins. or 3½ ins. Battens are 2 ins. to 3 ins. thick by 4 ins. to 7 ins. Boards are 1½ ins. thick, or less, and anything in width not narrower than 3 ins. Floorings are thin boards under 1 in. in thickness, tongued and grooved. Slatings are 1 in. and under by 3 ins. wide. There was no evidence as to the precise measurements of laths, though everybody knows what they are. The evidence also established that weatherboards come within the description “boards” or “planed boards,” and can therefore be, and are in fact often, shipped without specific mention. It is quite true that one often finds them specified in a charter—numerous charters were produced—but I think that it is due to the fact that many brokers, such as, for example, Mr. Robin, who gave evidence, make a practice of ascertaining and stating the composition of cargoes so that the shipowner may know precisely what is going to be loaded. It would, indeed, be strange if a form of charter obviously intended to cover all forms of timber usually shipped in the Baltic had no descriptive word which covered so common a class of timber as weatherboards.

One thing, at any rate, is absolutely certain. Weatherboards are always shipped bundled. That is a universal practice. I am satisfied that planed boards of 1 in. and less in thickness—at any rate, up to 5 ins. wide—are usually bundled, and that tongued and grooved floorings and matchings are always bundled. As to sawn boards, I am satisfied that boards ⅝ in. and ¾ in. thick by 4 ins. are often bundled, and that 1½ ins. by 3 ins. are practically always bundled. I think that Colonel Allen must be wrong in thinking that the ⅝ in. and ¾ in. timber never comes bundled, in view of the actual experience of the witnesses called by the defendants. In my opinion, it is impossible to construe this charterparty as excluding the right to ship bundled timber other than slatings and laths. The argument is that such a construction rests upon the words “in bundles” after “slatings and laths,” but I cannot see why the presence of words excluding the right to ship slatings and laths loose should indicate that I must read into the charter words excluding the right to ship other timbers bundled. The difficulty of so doing is not rendered any less by the fact that certain classes of timber specified

are not shipped in any other way. It would have been just as easy, if it had been so intended, to insert the word "unbundled" after the other descriptive words as it was to insert the words "in bundles" after "slatings and laths." I think that the charter means that the specified timber may be shipped in any accustomed way. If there is established a shipping in a particular way, such as loose as to deals and battens, or bundled as to weatherboards, that practice must be followed. •If both ways are common, I think that the shipper has an option to adopt either way. A

In my opinion, the test must be what would be within the anticipation of the shipowner as likely to happen, and, on the evidence, it is clear that any shipowner would anticipate that certain lines of timber would, or might, come bundled, including those complained of in this case. I cannot accept the evidence of Mr. Waller and Mr. Robin that there is a practice always to specify bundled if bundled goods are to be shipped, and that, under this charter, only unbundled goods can be shipped except as to slatings and laths. To establish that position, and to avoid dispute, some brokers make it a practice to explain the composition of the cargo, and others, to avoid dispute, insert the words "bundled" or "unbundled." However, I cannot, on the evidence, come to the conclusion that that is an established practice. B C D

In my judgment, the plaintiffs fail to establish that the construction contended for is the true one. The composition of the cargo was as follows: shipped loose, 325 standards, 77 standards of slatings and 30 of laths. Weatherboards, 119 standards, sawn boards 26 standards $1\frac{1}{2}$ ins. by 3 ins., 94 of $\frac{3}{4}$ in. by 4 ins., and 55 of $\frac{5}{8}$ in. by 4 ins. The bundling of the last four items, amounting to 294 standards, is complained of. As I have said, weatherboards are never shipped otherwise than bundled. Boards $1\frac{1}{2}$ ins. by 3 ins. are almost always bundled, and the thinner boards are bundled as often as not. It follows, therefore, that, subject to the plaintiffs' contention, the shipment was all within the contract description. E F

The second contention of the plaintiffs was that there is an overriding duty to deliver a full and complete cargo, and that, even if, as a mere matter of construction, there be an option to furnish bundled timber, the option cannot be exercised in a way which involves the leaving of vacant spaces which cannot be filled with broken stowage. Such a course, it is said, does not satisfy the obligation to load a full and complete cargo. The contention is based upon a passage in CARVER'S CARRIAGE BY SEA, sect. 265: G

Some kinds of cargo cannot be loaded so as to completely fill the ship's holds. Spaces are left, which are called broken stowage. If the charterer is to load a full cargo, and has the option of loading what he pleases, he cannot choose to load goods which leave broken stowage, and no others; he is bound to fill up the spaces. H

That passage is obviously referring to a leaving of spaces which can be filled with broken stowage. It has no application to a case such as this.

The case upon which the passage is based is *Cole v. Meek* (2). There the wording of the charterparty was as follows:

... to load "a full and complete cargo of sugar and other lawful produce." Certain goods were enumerated, including timber, and certain rates of freight were mentioned; and the charterparty proceeded, "other goods, if any should be shipped, to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary" (half freight).

A The ship in fact loaded a cargo of timber, and, as was stated at p. 799 :

The cargo so put on board, which was in one sense a full and complete cargo, consisted of logs of mahogany and some cedar.

The ship would hold no more mahogany or cedar, but there was room for broken stowage. The captain apparently applied for, but could not obtain, any broken stowage, and, as a result, he was compelled to keep on board 30 tons of ballast. It was in respect of those 30 tons that the shipowner was claiming for dead freight, and the point there was whether or not the shipper was under an obligation to complete the load by the furnishing of broken stowage. It was held that he was. The point to notice about the wording of the obligation, I think, is that there was no option. It was to be a complete cargo of sugar and other lawful produce. It was not "or other lawful produce." It was "and other lawful produce." ERLE, C.J., said, at pp. 801, 802 :

D Certain goods are enumerated, including timber, and certain rates of freight are mentioned; and the charterparty goes on "other goods, if any should be shipped, to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary"—that is, half freight. The charterparty is for "a full and complete cargo." The charterer has the option to put on board any merchandise he pleases; but he is bound to fill the ship. If he chooses to put cargo on board which will leave a portion of the ship which cannot be filled without broken stowage, he is bound to put on board broken stowage. The shipowner is under an obligation to receive broken stowage at half the stipulated rate of freight; and I think there is a correlative contract on the part of the charterer to put on board so much broken stowage as will complete the full loading of the ship.

E The same thing was said by WILLES, J. He said, at p. 802, that there was

F ... a space which might and ought to have been filled up with broken stowage. That which the shipowner was bound to receive, the charterer was bound to load. The obligations on either side are correlative.

If here there had been room left for broken stowage, that case would have applied. However, here there was no vacant space left. There was, in fact, a full cargo, and I cannot see how that case or that passage helps the plaintiffs. The wording of the obligation was not fulfilled by merely loading as much mahogany as the ship would take. There was not, in fact, a full and complete cargo as long as there was room which could be filled by other goods within the charterparty. It was not an obligation which could be performed by furnishing a full cargo of mahogany or other goods. There had to be a full and complete cargo of mahogany and other goods, and it is clear that in that case, if the vacant spaces had been filled with broken stowage, there would have been nothing of which the shipowner could have complained. I cannot see that that case is any authority for the proposition contended for.

That case can be usefully contrasted, I think, with *Cuthbert v. Cumming* (3), because there the obligation was to take on board a full and complete cargo of sugar, molasses and/or other lawful produce not exceeding what could be best and conveniently stowed and carried. There, the ship was in fact loaded with sugar and molasses in receptacles of a certain kind—hogsheads and puncheons—although there was another method A of packing which, apparently, might have led to a bigger load. There was room, in fact, left for broken stowage. No bigger cargo of hogsheads and puncheons could have been loaded, but, as there was room for broken stowage, in one sense there was not a full load. The question was whether there had been a breach in not filling the rest of the ship with B broken stowage. It was held that there was no obligation to fill the rest of the ship with broken stowage. It will be seen in the arguments of counsel, shortly, on p. 311, that considerable emphasis was placed upon the presence of the word “or.” It was not merely “and,” as in the other case. There was the word “or”. There was an option to C supply a full cargo of sugar and molasses or certain other cargo, and, there being that option, it was held that, as long as one has as full a cargo of the specified goods as one can get, the obligation was performed. There was evidence of a custom at that port to regard as fully loaded a ship which had been loaded with as many hogsheads and D puncheons as one could get into it. That custom was not contradicting the words of the charterer in any way, but meant merely to strengthen the case for the defendants. There being that option, as complete a cargo as possible of sugar and molasses was in fact delivered, and, so long as the kind of package in which the goods were tendered was E customary and proper, there was nothing of which complaint could be made.

It is useful just to look at what was said by MACKINNON, J., as he then was, about what that case decided in *Mikkelsen v. Arcos, Ltd.* (4). That was a case in which he was dealing with a similar point, where a ship F had been loaded with as much timber as it would hold, but, owing to inexperience and bad stowage, the cargo was not as full and complete as it might have been. There, it was held to have been a breach. MACKINNON, J., referring to *Cuthbert v. Cumming* (3), said :

I am not very clear that *Cuthbert v. Cumming* (3) decides more than that where G you have an undertaking to ship a full and complete cargo of sugar and molasses and/or other produce, you may elect to ship only sugar and molasses and you need not ship other produce as well to fill up the interstices left necessarily by reason of the sugar and molasses being stowed in hogsheads and puncheons. It may also go further and say that a shipowner who is to load a full and complete cargo of sugar at a particular port may only expect to receive sugar in the receptacles normally used in that port, and cannot complain if these receptacles give him a smaller cargo than H he might have got if receptacles of a better shape, capable of closer stowage, had in fact been used.

It seems to me that the contention I am dealing with is really completely disposed of by those two cases, and, if my view is right, the meaning of the contract is that a full load had to be supplied. It could

be a full load of any of the timbers specified, provided that, in so far as there was room for broken stowage, broken stowage was also supplied. One form of cargo might leave room for more broken stowage than another would. Here, it is common ground that the ship was in fact fully loaded, and the bills of lading show that there was a considerable quantity of ends shipped, the effect of which was, at any rate, that every available interstice or place which could be filled was filled.

A In my judgment, the shippers had the right to tender the bundled timber of which complaint was made. It was a timber invariably—or quite normally—shipped bundled. There was in fact a full and complete cargo provided, every part of which came within some of the descriptive words of the charter. The plaintiffs are, in truth, contending that a ship under the Baltwood charter must furnish the most remunerative cargo possible. There is no warrant for such contention, and I think that the claim fails.

B C I would also add that, supposing my view is wrong as to the 93 standards and the 55 standards—that is, the two lots of boards which were shipped, on the evidence, either bundled or unbundled—I think that Mr. Willink's contention, or part of Mr. Willink's contention, is sound—namely, that the damages would be only nominal. So long as it is clear under the charter that bundled timber of certain kinds can be tendered, I think that the damages would be only nominal, because the principle of *Robinson v. Robinson* (5), which was also applied by BRANSON, J., in *Kaye Steam Navigation Co., Ltd. v. Barnett (W. & R.), Ltd.* (6), would apply. That principle was that, where a man is bound by covenants to do one of two things, and does neither, and there is an action by the covenantee, the measure of damage is, in general, the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee. So, if here the master had rejected, and properly rejected, these two lots, the damage would have to be estimated with reference to what freight the goods would have earned, not by unbundled timber, but by a properly tendered cargo least profitable to the ship—in other words, unbundled timber which would have brought in the same amount of freight—and, therefore, the damages would have been nominal. There will be judgment for the defendants, with costs.

Judgment for the defendants, with costs.

Solicitors: *Sinclair, Roche & Temperley* (for the plaintiffs); *Wm. J. Crump & Son* (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

R. v. TREANOR (OR McAVOY).

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 16, 1939.**]

Criminal Law—Bigamy—Defences—Absence for 7 years—Availability of defence—Second or subsequent marriage—Offences against the Person Act, 1861 (c. 100), s. 57. A

In July, 1916, the appellant lawfully married a woman, whom he deserted in 1918. The prosecution was not in a position to prove that since that time he knew that that woman was alive. In July, 1930, he went through a form of marriage with L. A., and that so-called marriage was the first of the bigamies charged against the appellant. He deserted L. A. in 1937, and in Jan., 1938, he went through a form of marriage with K.D., and that was the subject of the second charge of bigamy against him. No evidence was offered on the first charge, and, after argument, he pleaded guilty to the second charge. It was contended that the proviso to the offences against the Person Act, 1861, s. 57, applied not only to a second marriage, but also to a subsequent marriage :—

HELD : the words in the proviso " any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of 7 years then last past and shall not have been known to be living within that time " refer to a second marriage only and not to a subsequent marriage, and the appeal must, therefore, be dismissed. B

[**EDITORIAL NOTE.** The decision herein decides the construction to be put upon the proviso, and the words " second marriage " would now appear to refer only to the second marriage and not to a subsequent marriage. It must be remembered, of course, that the only marriages to be considered in this connection are those entered into during the lifetime of the first wife, or, having regard to the possibility of divorce, during the subsistence of the first marriage. C

AS TO ABSENCE FOR SEVEN YEARS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 389, 390, para. 657; and FOR CASES, see DIGEST, Vol. 15, pp. 741-743, Nos. 8007-8019.] D

APPEAL by leave against a conviction for bigamy at the Sussex Assizes. The facts are fully stated in the judgment. E

Geoffrey Lawrence for the appellant.

Eric Neve for the Crown. F

LORD HEWART, L.C.J. [delivering the judgment of the court]: This appellant, Thomas Joseph Treanor, otherwise known as Thomas McAvoy, was indicted at the Sussex Assizes for two cases of bigamy, and also for causing two false statements to be made in the marriage registers, and finally for larceny. No evidence was offered on what was called the first bigamy, and, after argument, the appellant pleaded guilty to what was called the second bigamy. He also pleaded guilty to both the counts which charged him with making false statements, and to the indictment for larceny. No fewer than six other cases of larceny and false pretences were taken into consideration, and the appellant was sentenced to 12 months' imprisonment for the bigamy, and also to 3 months' imprisonment and 6 months' imprisonment upon the counts for making false statements. These last two sentences were ordered to be concurrent with the sentence of 12 months, but it was ordered that they should be G

served consecutively if the sentence of 12 months should be quashed. So far as the indictment for larceny was concerned, the appellant was sentenced to 12 months' imprisonment, to be served consecutively with the other sentences. The appellant now appeals against the conviction for bigamy, and he so appeals by leave of the judge. The judge did not, **A** indeed, grant a certificate, but he stated that he gave leave to appeal against the conviction for bigamy.

The very simple facts are that in July, 1916, the appellant was lawfully married to a woman named Bridget Loughran. He deserted her in 1918, and in the present case the prosecution were admittedly not in a position **B** to prove that since that time he knew that the woman was alive. In July, 1930, the appellant went through a form of marriage with a woman named Lilian Anderson, and that so-called marriage was the first of the bigamies which were charged. He lived with her until 1937, and then deserted her. In Aug., 1937, he met Kathleen Davis and in Jan., 1938, **C** he went through a form of marriage with her. It was that second bigamy—that second so-called marriage between him and Kathleen Davis—which was charged in the indictment.

In these circumstances, it was argued on his behalf that, inasmuch as the prosecution could not prove that at any time within the 7 years **D** next preceding either of these two alleged bigamies the appellant knew that his lawful wife was alive, he was entitled to be acquitted, and ought to be acquitted by reason of the proviso to the Offences against the Person Act, 1861, s. 57. That proviso is as follows :

E Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of 7 years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of **F** competent jurisdiction.

It was said that that defence contemplated by the proviso applied to the form of marriage into which the appellant entered in 1938 just as much as it did to that into which he entered in 1930. The prosecution, on their part, argued that, as the words in the proviso were "any second **G** marriage," and not "any second or subsequent marriage," the defence was available once only, on the analogy of the defence available to a man under 24 in the proviso to the Criminal Law Amendment Act, 1922, s. 2, as amended in 1928. It was further argued that the appellant could not be heard to say in one breath : "I believed my lawful wife was dead, **H** so I married again, believing that I was free to do so, and I knew my second wife was alive when I married my third. Nevertheless, I rely on the proviso."

In these circumstances, the only question for us to decide is whether the construction of this proviso contended for on behalf of the appellant is right. We are of the opinion that it is a mistaken view, and that the

true view is that advanced on the part of the prosecution, and reiterated here by Mr. Neve as counsel for the Crown. This proviso means precisely what it says, nothing more or less—any second marriage, and not any second or subsequent marriage. If it had been the intention of the legislature to extend the effect of this proviso, not merely to a second marriage, but to any second or subsequent marriage, nothing could be easier than to say so. We treat this proviso as meaning not one word more than it says, and we are not in the least provoked by the arguments, put forward with ingenuity by counsel for the appellant, concerning what might arise in some fantastic state of affairs. In our view, this case is of no importance whatever, and the meaning of the statute cannot be attacked.

The question arises whether, in these circumstances, anything ought to be done about the sentence which was passed upon this man. It was faintly suggested that, as he was convicted on his own confession, he had not the right to appeal against conviction. However, there is no ground for that suggestion, as the Criminal Appeal Act, 1907, s. 3, applies to any person convicted on indictment, and it applies to a person who has pleaded guilty. We think that the appellant is entitled, leave having been granted by the judge, though not on a certificate, to the time during which in prison he has served as a person appealing. Otherwise this appeal is, in every respect, dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

GIBBS-SMITH v. GIBBS-SMITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
January 17, 1939.]

Divorce—Desertion—Previous petition on ground of adultery not served—No effect on currency of desertion.

Upon a petition for divorce on the ground of desertion for a period of 3 years immediately preceeding the presentation of the petition, it appeared that the petitioner had filed a petition for divorce within the 3-year period, but that that petition had not been served:—

Held: the mere filing of a petition, without service thereof, did not suspend the existing obligation upon the spouses to cohabit, and there had been no interruption of the period of desertion.

[EDITORIAL NOTE.] The distinction between this case and that of *Marthews v. Marthews* (1) is that, in the latter case, the petition had been served, and it was therefore held to effect an interruption of the duty upon the spouses to cohabit, and thus to prevent the continuance of the desertion. Here the previous petition was not served, and there is held to be no interruption of the period of desertion.

AS TO EFFECT OF PETITION ON DESERTION, see HALSBURY, Halsbury's Laws of England, Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

- (1) *Marthews v. Marthews*, [1938] 4 All E.R. 377 ; Digest Supp.
(2) *Walton v. Walton*, [1938] 4 All E.R. 382 ; Digest Supp.

UNDEFENDED PETITION by wife for divorce on the ground of desertion. The parties were married in Oct., 1930. On Aug. 7, 1935, the present
A petitioner presented a petition on the ground of the husband's alleged adultery. That petition was not served, and on July 1, 1938, it was dismissed, on the wife's application. The question therefore arose as to whether the fact that the earlier petition had been on the file during the statutory period of desertion prevented a period of 3 years from running
B down to the date of the filing of the present petition on July 11, 1938.
J. B. Blagden for the petitioner. •

HENN COLLINS, J. : There is no question in this case that there was desertion, certainly from July, 1932, subject only to the fact that on
C Aug. 27, 1935, the present petitioner filed a petition for divorce from her husband, and the question is whether or not the filing of that petition, which remained upon the file until July 1, 1938, had the effect of suspending during those 3 material years the desertion which would otherwise have been completed. In fact, the petition was never served, and I think that
D that fact distinguishes this case from *Marthews v. Marthews* (1), and *Walton v. Walton* (2), which followed it, in that the mere filing of a petition, not followed by service, does not suspend the existing obligation between the spouses to cohabit, and, therefore, it has not interrupted the desertion. In this case, the petitioner has proved all that is necessary—
E namely, desertion for 3 years immediately preceding the date of the petition.

Decree nisi granted, with costs.

Solicitors : *Greene & Underhill* (for the petitioner).

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

SLOAN v. HANSON.

[COURT OF APPEAL (Slessor, Clauson and du Parcq, L.JJ.), **January 11, 13, 1939.**]
G

Discovery—Interrogatories—Defendant previously witness at inquest—Coroner's notes of his deposition appended to interrogatory—Defendant asked whether he made statements attributed to him by coroner—Whether interrogatory allowed.

H The plaintiff was a widow, and claimed damages under the Fatal Accidents Act in respect of the death of her husband, who had been killed in a motor car accident in which the defendant's car had been involved. The defendant had subsequently given evidence at the coroner's inquest. The plaintiff sought leave to deliver to the defendant an interrogatory containing the following : "Did you at an inquest . . . make any, and, if so, which, of the following statements contained in the documents served herewith, or any other, and, if so, what, statements to the like effect?" The coroner's notes of the

defendant's deposition at the inquest were served upon the defendant with the interrogatory :—

HELD : such form of interrogatory was a proper one.

[EDITORIAL NOTE.] The question of the admissibility of evidence given before the coroner has been considered in two or three cases, and, generally speaking, such evidence and the depositions of the witnesses are inadmissible in a subsequent action under Lord Campbell's Act. They may, however, be used for the purposes of cross-examination. If it were found necessary to prove the evidence given at the inquest, it would probably be necessary to call the coroner, and the object of the interrogatories sought to be delivered herein was to obtain an admission as to the evidence given at the inquest, and so save the expense of calling the coroner as a witness. A

AS TO INTERROGATORIES IN CASES OF NEGLIGENCE, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 421, 422, para. 516; and FOR CASES, see DIGEST, Vol. 18, pp. 212, 213, Nos. 1599-1610.] B

Cases referred to :

- (1) *Griebart v. Morris*, [1920] 1 K.B. 659; 18 Digest 212, 1599; 89 L.J.K.B. 397; 122 L.T. 736. C
- (2) *Calmenson v. Merchants' Warehousing Co.* (1921), 90 L.J.P.C. 134; 13 Digest 259, 402; 125 L.T. 129.
- (3) *Barnett v. Cohen*, [1921] 2 K.B. 461; 13 Digest 260, 409; 90 L.J.K.B. 1307; 125 L.T. 733.

APPEAL from an order of ASQUITH, J., dated Dec. 29, 1938, reversing an order of Master BURNAND, who refused to allow an interrogatory in the following circumstances. The plaintiff brought an action under the Fatal Accidents Act, and claimed damages in respect of the death of her husband, who had been killed as a result of a motor car accident, in which the defendant's car was involved. A coroner's inquest was held upon the deceased, and the defendant gave evidence on oath at the inquest. The plaintiff applied for leave to serve the following interrogatory : D

Did you at an inquest held by Dr. Lord, one of His Majesty's coroners for the county of Surrey, at the Guildhall, Kingston, in the said county on Apr. 4, 11, 1938 (in answer to questions or otherwise), make any, and, if so, which, of the statements contained in the documents served herewith ? E

The coroner's notes of the defendant's deposition at the inquest were served with the interrogatory. In the course of the argument in the Court of Appeal, the plaintiff offered to add to the end of the interrogatory the following words : " or any other, and, if so, what, statements to the like effect ? " F

F. G. Paterson for the appellant.

W. Blake Odgers, K.C., and *Felix Denny* for the respondent.

Paterson : An interrogatory in this form is not allowable. It is said that it is done to save the expense of calling the coroner as a witness, but in any event what was said at the inquest is not evidence. It can only be used in cross-examination. It is questionable whether interrogatories should be allowed at all in a case of this kind : *Griebart v. Morris* (1). It has been the practice to prevent this kind of thing. It is objectionable to use evidence taken in a coroner's court in an action G

brought under the Fatal Accidents Act, even when it is used by consent : *Calmenson v. Merchants' Warehousing Co.* (2). Such a deposition is not admissible as a proof of negligence : *Barnett v. Cohen* (3). That is the only reason why the plaintiff wishes to use it here. The only purpose of an interrogatory is either to establish the plaintiff's case or to demolish the defendant's. This one does neither.

Blake-Odgers, K.C. : All that the plaintiff has to do here is to establish a *prima facie* case. The answers to this interrogatory would do that. [He was stopped by the court.]

B *SLESSER, L.J.* : In this case, the court see no grounds for interfering with the discretion of the judge, and the appeal will accordingly be dismissed.

CLAUSON, L.J. : I agree.

C *DU PARCQ, L.J.* : I agree.

Appeal dismissed with costs. Interrogatory allowed as amended.

Solicitors : William Hurd & Son (for the appellant) ; Kenneth Brown, Baker, Baker (for the respondent).

D [Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

HORLICKS, LTD. v. GARVIE.

E [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, J.J.), **January 18, 1939.**]

Public Health—Advertisements—Hoardings—Erected without submitting plans and sections to local authority—Advertisement separated into a number of smaller pieces—Whether constituted a "hoarding"—Infringement of byelaw—Advertisements Regulation Act, 1907 (c. 27), s. 2 (1).

F The appellants erected or fixed, or caused to be erected or fixed, at a certain part of a public street an advertisement which was separated into a number of smaller pieces, each less than 12 ft. in height, without previously submitting plans and sections to the local authority. The appellants were thereupon charged with having unlawfully infringed a certain byelaw made by the local authority under the Advertisements Regulation Act, 1907, s. 2 (1), for the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed 12 ft. in height. The magistrate convicted the appellants, holding that the fact that the whole advertisement was separated into a number of smaller pieces, each less than 12 ft. in height, did not evade the regulations. Thereupon this appeal was brought, and the appellants contended that the panels or pieces, constructed and fixed in that manner, did not constitute an advertisement hoarding within the meaning of the byelaw :—

H **HELD** : the panels, as constructed and fixed, did constitute an advertisement hoarding within the meaning of the byelaw, and the appellants were rightly convicted.

[EDITORIAL NOTE. This case turns upon the construction of the particular byelaw, but at the same time, in so far as it deals with the permitted height of advertisements, it applies to every regulation affecting the height of such hoardings,

since it shows that such regulations cannot be avoided by building the hoardings in parts or sections.

AS TO HOARDINGS AND ADVERTISEMENTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 518-521, paras. 1099-1105; and FOR CASES, see DIGEST, Vol. 38, pp. 178, 179, Nos. 201-204.]

Case referred to:

(1) *Royle v. Orme* (1932), 96 J.P. 468; Digest Supp.

APPEAL by way of case stated from a decision of one of the magistrates of the police court of the metropolis. In or about Apr., 1938, the appellants erected over the front of the upper part of Nos. 16 and 17, Coventry Street, London, W.1, a structure which consisted of 39 metal panels. Each panel was separately constructed and painted before erection, and was attached to the wall of the premises as a separate entity from the other panels, and each of the panels was less than 12 ft. in height. The effect of the panels when so erected was to present to the public one large advertisement, consisting of a picture of a woman and a reference to the appellants' business. The whole structure measured 38 ft. 10 ins. overall in width, and 34 ft. 6 ins. in height, the bottom of it being 16 ft. from the ground. On behalf of the Westminster City Council, it was contended that this structure was an advertisement hoarding within the meaning of the London County Council byelaws, and 6 summonses were issued against the appellants, alleging infringements of the byelaws. The summonses were heard at Bow Street police court in July, 1938, and the structure was held to be an advertisement hoarding within the meaning of the byelaws. The appellants were convicted and fined on certain of the summonses, the other summonses being adjourned *sine die* by agreement. On appeal, the appellants contended (a) that the structure was not one hoarding but 39 different hoardings, and that, as each of the 39 hoardings did not exceed 12 ft. in height, there had been no infringement of the byelaws, and (b) that such a structure erected on the wall of a building was not an advertisement hoarding within the meaning of the byelaws. In support of the latter contention, they relied on certain observations made by AVORY, J., in the course of his judgment in *Royle v. Orme* (1).

Ian C. Baillieu for the appellants.

Vernon Gattie for the respondent.

LORD HEWART, L.C.J.: This is a case stated by one of the magistrates of the police courts of the metropolis. It arises in the following way. Three informations were preferred by the present respondent against the present appellants, charging them that on Apr. 8, 1938, in Westminster they unlawfully did infringe a certain byelaw made by the London County Council under the Advertisements Regulation Act, 1907, s. 2 (1), for the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed 12 ft. in height. The point was that the appellants unlawfully erected, or

fixed or caused to be erected or fixed, at a certain part of Coventry Street an advertisement hoarding without first submitting plans and sections to the council. Some other matters were raised, but, in the course which the discussion has taken, those matters need not now be discussed. The magistrate came to the conclusion that the appellants must be convicted, and imposed a small fine. The question for us is whether in coming to that conclusion he was right in point of law. It is not necessary to reread the facts set out in the case. They have been dwelt on with detail and care by counsel for the appellants. The result of it all was that the appellants contended that the panels constructed and fixed in the manner described did not constitute a hoarding. *Per contra*, on the part of the respondent, it was contended that the panels constructed and fixed as described constituted an advertisement hoarding within the meaning of the byelaws. The magistrate came to a conclusion which he has expressed clearly and concisely in these terms :

I was of the opinion that the panels were an advertisement hoarding within the meaning of that term in the London County Council byelaws hereinbefore referred to, their effect being to present one large advertisement to the public, and that the fact of the whole advertisement being separated into a number of smaller pieces each less than 12 ft. in height did not evade the regulations.

In my opinion, upon the facts found from the evidence given, the magistrate was not merely well justified, but also perfectly correct, in coming to that conclusion. I entirely agree in the opinion he expressed, and I think that this appeal ought to be dismissed.

CHARLES, J. : I entirely agree.

SINGLETON, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Tucker, Turner & Co.* (for the appellants) ; *Allen & Son* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

G. SCAMMELL & NEPHEW, LTD. v. ROWLES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.),
January 26, 27, 30, 1939.]

Income Tax—Deduction against profits—Payments made in compromise of action—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, r. 3.

B. was a director, and in *de facto* control, of two companies, one of which was largely indebted to the other. T., who was a director of the debtor company, brought an action against both companies and certain of the directors, including B. T. sued on behalf of himself and the shareholders in the debtor company, and, in so far as he so sued, claimed relief on behalf of the debtor company. He also claimed certain relief as an individual. Had T. been successful, the whole trading account and the debentures issued by the debtor company would have been exposed to attack. B. and two other directors of the creditor company then complained that T. had made defamatory statements about themselves, and

issued a writ claiming damages for slander. The whole matter was settled by a deed of compromise. B. insisted upon receiving £7,500 in consideration of his withdrawing his claim for damages for slander, and refused to execute the deed of compromise unless that sum was paid to him. The directors of the creditor company, B. having withdrawn from their meeting, considered that it was in the interest of the company that the compromise should be effected. Under the deed of compromise the creditor company paid this sum of £7,500 to B., and £62 10s. to T. in respect of his costs of the action against the companies. These sums and £53 10s., the creditor company's costs of the preparation of the deed of compromise, the creditor company sought to deduct against their profits as money wholly and exclusively laid out or expended for the purpose of their trade:—

HELD: these sums were a proper deduction against profits.

Decision of LAWRENCE, J. ([1938] 3 All E.R. 577) *affirmed*.

[EDITORIAL NOTE.] The main controversy here concerns the payment which was really in settlement of the action for damages for slander, though, for the present purposes, it is probably more correctly viewed as a payment to secure the execution by one party of the deed of compromise. The company finding it advantageous, and, perhaps, necessary, to terminate a trading relation, payments made to secure that object are held to be trading expenses, and, therefore, expenses wholly and exclusively laid out for the purpose of the trade of the company.

AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152, 153, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

Cases referred to :

- (1) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390.
- (2) *Mitchell v. Noble (B. W.), Ltd.*, [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372.
- (3) *Anglo-Persian Oil Co., Ltd. v. Dale*, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253.
- (4) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 28 Digest 57, 290; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215.
- (5) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; *affg.*, [1925] 1 K.B. 421.
- (6) *Hagart & Burn-Murdoch v. Inland Revenue Comrs.*, [1929] A.C. 386; Digest Supp.; 98 L.J.P.C. 113; 141 L.T. 97; 14 Tax Cas. 433.
- (7) *City of London Contract Corp'n. v. Styles* (1887), 4 T.L.R. 51; 28 Digest 47, 239; 2 Tax Cas. 239.
- (8) *Granite Supply Asscn., Ltd. v. Kitton (Surveyor of Taxes)* (1905), 5 Tax Cas. 168; 28 Digest 44, case h.
- (9) *Thomson (Archibald) Black & Co., Ltd. v. Inland Revenue*, [1919] S.C. 289; 28 Digest 45, case o.
- (10) *Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs.*, [1924] S.C. 231; Digest Supp.; 8 Tax Cas. 671.
- (11) *Short Bros., Ltd. v. Inland Revenue Comrs.* (1927), 12 Tax Cas. 955.
- (12) *Chibbett v. Robinson (J.) & Sons* (1924), 132 L.T. 26; 28 Digest 19, 98; *sub nom. Chibbett v. Robinson (J.) & Sons, Inland Revenue Comrs. v. Robinson (J.) & Sons*, 9 Tax Cas. 48.
- (13) *Stott v. Hoddinott* (1916), 7 Tax Cas. 85; 28 Digest 47, 241.
- (14) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *reversg.*, [1914] 2 K.B. 891.

APPEAL by the inspector of taxes from an order made by LAWRENCE, J., dated July 8, 1938, and reported [1938] 3 All E.R. 577, where the facts are fully set out.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the appellant.

A *J. Millard Tucker, K.C., and Terence N. Donovan* for the respondent company.

The Solicitor-General: It is not sufficient to show that the payment enured for the benefit of the company. It is not sufficient to show that it was for the benefit of the company's trade. The payment must be directly
B connected with the company's trade, and it must also be of the nature of a revenue expenditure. It must be for the purpose of earning the profit of the year for the company, or for the purpose of avoiding a loss. If a payment was made to avoid incurring a loss on an agreement in any particular year, it might be a payment made for the trading of that year.
C It must be wholly and exclusively so laid out. The moment the words "wholly and exclusively" are ignored, one gets out of the rule. It cannot be said that this payment, which was made to secure a compromise of the action, was wholly and exclusively referable to the company's trading. Also, the payment must not be of a capital nature.
D There is some evidence that the trading relation could be ended. The trading relation meant the whole interlocking of G. Scammell & Nephew, Ltd., with Blue Belle Motors, Ltd. It is not conceivable that Scammells would have agreed to pay this money and leave outstanding the other questions involved, such as the constitution of the board of directors. They
E also wanted a release from the action Mr. Toms was bringing against them, and from the risk of having to pay the costs of Mr. Toms in that action. The payment in question is a payment for damages for tort, which damages were claimed by a third party. The respondent company assumed the liability, and paid the money to secure a compromise. It
F was not paid exclusively to obtain a trading benefit. It also obtained benefits which ranked against the whole capital superstructure of Scammells. [Counsel referred to *Strong & Co., Ltd. v. Woodfield* (4), *British Insulated & Helsby Cables v. Atherton* (5), *Hagart & Burn-Murdoch v. Inland Revenue Comrs.* (6), *City of London Contract Corp'n. v. Styles* (7),
G *Granite Supply Assn., Ltd. v. Kitton (Surveyor of Taxes)* (8), *Thomson (Archibald) Black & Co., Ltd. v. Inland Revenue* (9), *Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs.* (10), *Van Den Berghs, Ltd. v. Clark* (1) and *Anglo-Persian Oil Co., Ltd. v. Dale* (3).]

Hills: It is not every expense which can be deducted. It must be
H an expense which is sufficiently closely connected with the trading operations. There are very many expenses which are proper expenses of the trader, and which would not be made but for the fact that he is carrying on a trade, but which cannot be deducted, either because they are too remote or for some other reason, such as being for a capital purpose. In the present case, it is sufficient to say that the commissioners have

found that the expenditure was not for the sole purpose of carrying on the trade. The compromise was something far beyond ordinary trading. The purpose of the expenditure was not an expense of carrying on the company's trade, although it was in the interest of the company's trade. It is impossible to say that the commissioners were bound to find that the payment made for carrying the compromise into effect was a payment wholly or exclusively referable to the trade. [Counsel referred to *Short Bros., Ltd. v. Inland Revenue Comrs.* (11), *Van Den Berghs, Ltd. v. Clark* (1), *Anglo-Persian Oil Co., Ltd. v. Dale* (3), *Chibbett v. Robinson (J.) & Sons* (12) and *Stott v. Hoddinott* (13).] A

Tucker, K.C.: The commissioners say that the payment of £7,500 B was made in order to terminate the trading relations of the two companies. On the facts of the case, as stated by the commissioners in their ultimate findings, the decision was erroneous in point of law. On the facts, their conclusion is a *non sequitur*. The principle to apply in the present case was that stated by LORD SUMNER in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (14). The respondent company was concerned about the effect of litigation upon the affairs of the company. An essential party to the compromise which was proposed had to agree to sell his shares in Blue Belle Motors, Ltd., and withdraw his action for alleged slander, and he stipulated for payment to him for doing so. D There was a trading relationship between the two companies because Mr. Hood Barrs had such a large shareholding in each of them. Included in the sum of over £12,000 there might have been money solely lent to Blue Belle Motors, Ltd. By capital expenditure, one gets an asset or adds to an asset already obtained. Money spent in repairing an asset and E maintaining it in good condition is a revenue expenditure. The only aspect in which the payment in the present case can be regarded as a capital payment was that it was to put an end to the trading relations between the two companies, but that is not sufficient. Even if the termination of the trading relationship was one of the objects of the F payment, it was none the less a revenue payment. [Counsel referred to *Mitchell v. Noble (B. W.), Ltd.* (2) and *Anglo-Persian Oil Co., Ltd. v. Dale* (3).]

The Solicitor-General, in reply: It was not submitted to the commissioners that one of the things that the company was anxious to do, by paying the G £7,500, was to save itself from the damaging consequences of the litigation. The company's sole contention was that the payment was wholly and exclusively for the benefit of its trading, and the commissioners have plainly negatived that submission. *Mitchell v. Noble (B. W.), Ltd.* (2) is not a guide to a decision in the present case. When the Special H Commissioners referred to the trade to which an end was put, they intended to refer to the facts that the first company owned debentures in the second company and that the first company had advanced money in order that rolling stock could be obtained to enable the second company to carry on. The compromise was to put an end to the agree-

ment whereby the Scammell company sold goods to the Blue Belle company, and took profit from it. [Counsel referred to *Anglo-Persian Oil Co., Ltd. v. Dale* (3).]

SIR WILFRID GREENE, M.R.: This appeal from a decision of
A LAWRENCE, J., arises out of a claim by G. Scammell and Nephew, Ltd., to deduct, for the purpose of ascertaining their taxable profits for 1933-34, three sums which they allege were expenses wholly and exclusively laid out or expended for the purposes of their trade. The sums in question are (i) £7,500 paid by the company to one of their directors, Mr. Hood
B Barrs, (ii) £62 10s., being a contribution paid by them to a Mr. Toms towards his costs of certain litigation, and (iii) £53 10s., representing costs incurred by them in connection with a compromise agreement.

The circumstances giving rise to that claim for deduction are of a rather complicated nature. They are set out in the case, but I must give a short
C summary of them in order to make this judgment intelligible. The company (to whom I will refer as Scammells) carry on business as motor engineers, and at the relevant time, when the story begins, they had as directors Mr. Hood Barrs, Mr. England and Mr. Scott. Mr. Hood Barrs held by far the larger part of the issued share capital of Scammells.
D In Feb., 1932, he acquired a considerable shareholding in a company called Blue Belle Motors, Ltd., whose business appears to have been that of running motor coaches. That purchase put him into a position to control the Blue Belle Motors *de facto*, and the first thing that seems to have happened is that Mr. Hood Barrs, Mr. England and Mr. Scott
E became directors of Blue Belle Motors, and a Mr. Toms, who had been a director and remained a substantial shareholder in Blue Belle Motors, was treated by the new board as though he had ceased to be a director. It appears from the minutes which are annexed to the case—and indeed one would have expected it—that one of the objects of Mr. Hood Barrs
F in acquiring that shareholding was to benefit Scammells by procuring for them a potential customer, and, after the board of Blue Belle Motors had been reconstituted, a number of transactions took place between the two companies. For one thing, a management agreement was entered into under which Scammells were appointed managers and secretary of
G the Blue Belle Motors at a remuneration of £3,000 per annum. That agreement, I think was terminable by 6 months' notice on either side. In addition to that, Scammells did a great deal of work, repair work and so forth, and rendered other services to Blue Belle Motors. It would also appear—though this is very largely inference, because there is no
H finding of fact with regard to it—that Scammells gave certain financial assistance to Blue Belle Motors. However that may be, in Apr., 1932, there was owing to Scammells from Blue Belle Motors a sum of £12,779 13s. 10d. on trading account. That is found by the commissioners in para. 5 of the case, and that is a finding to the effect that that was a trade debt owing which had become due from the one to the other in

the course of trading between the two companies. By way of security for that indebtedness, Blue Belle Motors issued debentures to Scammells to the amount of £12,000. There is one other matter with regard to which certain material appears on the face of the documents annexed to the case, and that relates to certain motor coaches which Blue Belle Motors were apparently acquiring under hire-purchase agreements. It appears that there was some financial assistance in connection with that, and that some contract was entered into. It looks as though the intention at one time was that Scammells should acquire those coaches and let them to Blue Belle Motors, and there was a reference to a hiring agreement in relation to those coaches. However, we are not in a position to know exactly what had happened with regard to those coaches, because it was not a matter that was gone into before the commissioners, and there is no finding about them. Accordingly, we cannot, I think, pay any attention to that matter, because we do not know the facts. The first fact with which we start is the existence of this trading debt in Apr., 1932, and the debenture holding of Scammells by way of security for it. A

On May 13, 1932, Mr. Toms issued a writ against Scammells, Mr. Hood Barrs, Mr. England, Mr. Scott and Blue Belle Motors, claiming a variety of relief. No copy of the writ is annexed to the case, but we have sent for a copy of it, and it appears that in that action Mr. Toms was suing on behalf of himself and all other shareholders in Blue Belle Motors except the defendants, Mr. Hood Bars, Mr. Scott and Mr. England. I should say that Mr. Scott and Mr. England had a qualifying share in Blue Belle Motors from Mr. Hood Barrs. Of course, in so far as Mr. Toms was suing on behalf of all other shareholders in Blue Belle Motors, the relief that he was seeking was relief, not for himself, but for Blue Belle Motors. The plaintiff in what is commonly called a minority shareholder's action is enforcing the rights of his company, and not his individual rights. In the present case, however, Mr. Toms was also seeking to enforce certain rights which he claimed belonged to him as an individual. B
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In his writ, he sought to have set aside or declared invalid (i) the management agreement under which Scammells were appointed managers of Blue Belle Motors, (ii) what is referred to as a transfer of 13 coaches belonging to Blue Belle Motors to Scammells, and an agreement, being the agreement which I have already mentioned, for hire of those coaches back to Blue Belle Motors, (iii) an injunction to restrain the carrying out of any of those agreements, (iv) a declaration that Mr. Toms is a director of Blue Belle Motors, and (v) an injunction to restrain his co-directors from excluding him from acting as a director, and damages. It will be seen at once, when the nature of the relief that Mr. Toms was claiming is understood, that, if he were successful in that action, taking, first of all, his claim to be a director, the proceedings of the board of Blue Belle Motors, at a time when he was being excluded from the proceedings of the directors, would have been void, and, accordingly, the whole of the trading account and the debentures issued to secure it

would have been exposed to attack. I say that it would have been void because I bear in mind that Scammells, who were the other party to those transactions, had notice, or must be taken to have had notice, of any irregularity owing to the presence of the whole of their directorate on the board of Blue Belle Motors. The position, therefore, was one of
 A very great danger for Scammells, and they foresaw the possibility that the money that was owing to them would be lost unless something were done.

There is another matter which comes into this story, and it is this. It was alleged that Mr. Toms had made defamatory suggestions relating
 B to Mr. Hood Barrs, Mr. England and Mr. Scott, and these three gentlemen issued a writ claiming damages for slander against Mr. Toms. On June 15, 1932, Mr. Toms was successful in obtaining an interlocutory injunction in his action restraining Mr. Hood Barrs, Mr. England and Mr. Scott from excluding him from the board of Blue Belle Motors, and,
 C in view of that order, the position of Scammells, of course, became very much worse. As the commissioners find in para. 9 of the case :

In view of this, Mr. Hood Barrs and his co-directors were advised by their legal advisers that the arrangements which they as directors of Blue Belle Motors, Ltd., had made with the appellant company, including the issue of the said £12,000 debentures to the appellant company could be impugned and avoided and they
 D decided that it would be in the interests of the appellant company to enter into a compromise with Mr. Toms, as otherwise the appellant company would lose the balance of the said account owing to them by Blue Belle Motors, Ltd.

It appears from the minutes and from the finding of the commissioners that Mr. Toms was willing to compromise and get rid of all those claims
 E and disputes on certain terms. I need not rehearse them in detail, because I shall have to examine in a moment the actual deed of compromise, but he was insistent on having transferred to him for a consideration the shares in Blue Belle Motors which Mr. Hood Barrs and his co-directors held. He was insisting that the slander action against himself
 F should be discontinued, and he was insisting on the cancellation of the debentures held by Scammells and Blue Belle Motors. On those terms (among others) being satisfied, he was prepared to consider the discharge, if not of the whole, at any rate, of a substantial part, of the indebtedness of Blue Belle Motors to Scammells. That being the state of affairs,
 G in order that a compromise of that description might be implemented, it was obviously necessary that Mr. Hood Barrs and his co-directors should be brought into it, because the acquisition of their shares in Blue Belle Motors by Mr. Toms was one of the things on which Mr. Toms was insistent, and also because those three gentlemen were the plaintiffs in
 H the slander action. Accordingly, any compromise, if it was to be effective, had to provide for those two matters. Mr. Hood Barrs took a serious view of the slander which it was alleged had been uttered against him by Mr. Toms. His two co-directors were more easygoing about it, but Mr. Hood Barrs insisted that it was a serious matter, and he was not prepared to give up his claim to damages for slander except for some

substantial consideration. Accordingly, the company (Scammells), in so far as they were anxious to have a compromise which would result in securing payment, if not of the whole, at any rate of a substantial part, of Blue Belle Motors, debt to themselves, found themselves bound to come to a deal with Mr. Hood Barrs in connection with the slander action. Mr. Hood Barrs demanded a sum of £7,500 before he would consent to give up that claim, and his co-directors (he having withdrawn from the board) debated the matter and resolved that it was to the advantage of the company to make that payment in order to secure the benefit of the proposed compromise. In the result, a deed was drawn up and executed containing the terms of compromise, and Mr. Hood Barrs was paid the sum of £7,500 in order to procure his execution of the deed. That sum of £7,500 is the first item arising for consideration on this appeal. The deed of compromise is dated July 27, 1932. It is made between Scammells, of the first part, Mr. Hood Barrs, of the second part, Mr. Scott, of the third part, Mr. England of the fourth part, Blue Belle Motors, Ltd. (called the motor company), of the fifth part, and Mr. Toms, of the sixth part. It contains a number of recitals, including recitals relating to certain financial transactions between the two companies and the acquisition by Mr. Hood Barrs of his shares in Blue Belle Motors, and it recites as follows :

Since Feb. 18, 1932, numerous financial intertrading and other transactions have taken place between the motor company and Scammells.

It recites the writ in the slander action issued by Mr. Toms, and the granting of the interlocutory injunction. Then it recites as follows :

... valuable services have been rendered by Scammells and its directors in the re-organisation of the business of the motor company and in placing the finances of the latter company upon a sound footing as Mr. Toms doth hereby admit and acknowledge.

It recites that prolonged negotiations had taken place in the course of which Mr. Toms had made a full investigation of all the books and documents of Blue Belle Motors in relation to transactions between itself and Scammells up to June 30, 1932, and that he was satisfied with regard to those transactions. Pausing there for a moment, that really means that the position of these two companies with their *de facto* common board and the nature of the trading and other relationships into which they had entered was such as to suggest to anyone familiar with this type of inter-company situation the possibility, at any rate, that Scammells had been exploiting Blue Belle Motors for the benefit of themselves. That is the sort of suspicion that, as I say, anyone familiar with this class of relationship might have entertained, but the recital to which I have referred and the other provisions in the document make it clear that Mr. Toms had investigated the whole of the position and had satisfied himself that there was nothing of the kind to which exception could properly be taken. Accordingly, the deed, on the face of it, shows that

there was nothing of real substance in any suggestion of that description. Then it recites as follows :

An account of the transactions matters and things between the motor company and Scammells has been prepared by the accountants (C. F. Middleton & Co.) acting on behalf of the parties hereto of the first second third and fourth parts and has been agreed by the accountants (Barnes Bryant & Co.) acting on behalf of Mr. Toms and the motor company and it has been agreed by and between the parties hereto that the said account shall be accepted by them and each of them as a final settlement of account and adjustment of all transactions matters and things as between the motor company and Scammells and that the said account shall be annexed to this deed and form part thereof.

Then, in the body of the deed, in consideration of £17,062 10s. paid (as to £10,562 10s. by Blue Belle Motors and as to £6,500 by Mr. Toms) to Scammells, and of the covenants and undertakings by Mr. Toms thereafter contained, Scammells were to do certain things. That £6,500 was in fact the purchase price which was being paid by Mr. Toms for the acquisition of the shares held by Mr. Hood Barrs as a director in Blue Belle Motors. As the commissioners find in para. 11 of the

case :

The balance of £6,500 was payable through the appellant company to Mr. Hood Barrs for the shares in Blue Belle Motors, Ltd., which he was to transfer or procure to be transferred.

That sum of £6,500, therefore, is one with which Scammells have no concern. It comes into the picture in this deed merely because the deed was an omnibus deed with a number of parties to it, and one of its objects was to deal with certain matters between certain parties with many of which Scammells, as such, were not directly concerned. They were concerned only in the sense that the making of those terms formed a condition of the compromise between the two companies and Mr. Toms.

That £6,500, therefore, may be ignored.

Then the things which Scammells were to do were (among other things) to see to the transfer of the shares, to cancel two agreements—those agreements being the management agreement and the hiring agreement in relation to the coaches, and certain other matters with which I need not deal—deliver up for cancellation the debentures, and pay Mr. Toms £62 10s. as a contribution towards his costs of the Chancery action. That £62 10s. is the second item now in controversy. Then there are certain covenants by the individual directors who were parties—that is to say, Mr. Hood Barrs, Mr. Scott and Mr. England—made with Mr. Toms, and, with regard to some of the covenants, with Mr. Toms and the motor company. The only one to which I need refer is Covenant No. 5 :

That on behalf of themselves and of the motor company they will serve notice of discontinuance of the pending proceedings for slander against Mr. Toms in the King's Bench Division subject to each party paying their own costs.

Then in cl. 3 (1) come certain covenants by Mr. Toms with Scammells, Mr. Hood Barrs, Mr. Scott and Mr. England. First, he covenants that he has made a full examination of all the books and documents of Blue Belle Motors relative to all transactions, matters and things which have taken place between that company and Scammells and to the conduct of the

affairs of Blue Belle Motors, Ltd., generally from Feb. 18, 1932, up to June 30, 1932, and is satisfied with, and accepts, them. Then, consequential upon that, he undertakes that he will not in his individual capacity or as a director or debenture holder or shareholder in Blue Belle Motors make any claim in respect of any such matters, and there is an indemnity. That release and that indemnity, of course, are merely A
for the purpose of establishing upon a proper comprehensive basis the result of his satisfaction with the investigation of the accounts and the inter-company transactions. It does not appear that there was any substantial claim which he was releasing, because, as he himself agrees and covenants, he was satisfied with everything that he had B
examined. Then, under Covenant No. 2, Mr. Toms agrees to discontinue the Chancery action. Then there are certain further covenants by Blue Belle Motors and Mr. Toms with Scammells to reimburse Scammells in respect of certain moneys which had become due by them to a tyre company, apparently in connection with tyres purchased or C
hired (hired, I apprehend) by Scammells on behalf of Blue Belle Motors. They were to pay to Scammells reasonable charges for all work which was in progress or should have been done afterwards—that is to say, matters not included in the account, which only went down to June 30, 1932. Then cl. 7 is a comprehensive mutual clause in respect of any matter D
which may have arisen out of the relationship between the two companies, and cl. 8 contains a withdrawal of charges. The only other matter in the deed to which I need refer is the account which is annexed. That account, which is signed by the two firms of accountants, is headed :

Statement of account showing a balance due of £10,500 as agreed between the parties. E

The account credits Scammells with an aggregate sum of £32,085 14s. 7d. The items making up that figure are very shortly stated, and it is quite impossible by a mere examination of the items to form any satisfactory conclusion with regard to them. Some of them would appear to be in F
the nature of advances made by Blue Belle Motors by way of financial assistance. Other items would appear to be mere trading liabilities—goods supplied and services rendered, and so forth. However that may be (and there is no finding with regard to it, for a reason which I shall presently state), on the other side the account shows Blue Belle Motors G
credited with sums amounting in the aggregate to £18,346 5s. 11d. There again, as to the dates when those payments were made, and as to the items of liability to which they were appropriated, if, indeed, they ever were appropriated, the case is silent, and it seems to me that we cannot draw an inference about it. However, the result of the account H
is to show a balance of £13,739 18s. 8d. due to Scammells. The accountants have then reduced that by an item “By credit to adjust £3,176 18s. 8d.,” leaving a balance of £10,562 10s., which is the sum of cash paid by Blue Belle Motors to Scammells, as stated in cl. 1 of the deed.

I shall have something more to say with regard to that account in a moment, but I must return to the facts as found by the commissioners. It will be remembered that the commissioners in para. 5 of the case found that in April there was a liability of Blue Belle Motors to Scammells on trading account of £12,779 13s. 10d. There is no suggestion in the case
 A that any part of that trading debt has ever been repaid. The debentures which were issued in respect of it were still outstanding at the date of the agreement, and it would appear from the passage in para. 9 of the case which I have already read that the fear of losing what the commissioners describe as "the balance of the said account" was the real
 B thing that made Scammells decide that they must compromise with Mr. Toms. In dealing with that account, there is one further statement in para. 11 of the case to which I should refer. It is this :

Scheduled to the deed was a statement setting out the financial position at the date of the instrument between the appellant company and Blue Belle Motors, Ltd. This statement showed a balance then due to the appellant company of
 C £13,779 8s. 8d. and a payment in settlement thereof of £10,562 10s.

That being the position, the commissioners in para. 15 of the case find as follows :

We, the commissioners who heard the appeal, were of opinion that the compromise was effected not for the purposes of the appellant company's trade but to enable it to terminate a trading relation which it found inconvenient with the minimum sacrifice of the balance of account resulting from that relationship. In
 D our opinion therefore the payments made to secure the assent of the parties to the compromise and the legal costs of carrying it through were not money wholly and exclusively laid out or expended for the purposes of the appellant company's trade.

It is to be noticed that there is no reference in that finding to any capital
 E element in the sum of cash of £10,000 odd paid by Blue Belle Motors to Scammells as part of the compromise arrangement. The reason for that is apparently this. When the matter was before the commissioners, some evidence was given in explanation of that account. Before the commissioners, the Crown took up the attitude that it did not care whether or
 F not some of those items were of a capital nature. Had it embarked upon a minute inquiry of that character, a number of questions might have arisen—for instance, as to whether or not the payments on account could be appropriated for present purposes as against any capital expenditure in the shape of financial assistance given by Scammells to
 G Blue Belle Motors, and questions of that kind. However, the Crown fought the case before the commissioners upon the footing that it did not matter to its argument whether or not the whole of those items represented what the £12,779 owing in April represented—namely, a real trading account. It is quite impossible for us to regard that account on any
 H other basis. It seems to me that the Crown could not now turn round and invite us to discover in that account some capital colour, or ask us to send the matter back to the commissioners in order to have the account further investigated. The Crown deliberately selected the argument upon which it wished to stand, and we must take the matter as we find it. The proper inference, in so far as the commissioners have found a fact

about it, seems to me to be that, if one starts with a figure admittedly owing in April on trading account, if one then proceeds to the fact that there is no finding that any penny of that had ever been repaid, and when we find that by June that indebtedness had gone up by £1,000 or so, and when in the finding of the commissioners in para. 15 we find the balance of account referred to as "the balance of account resulting from that trading relationship," we would not be justified in treating the sum of £10,562 10s. as anything more, for the purposes of this case, than a trading debt. Of course, if the facts had been, and there had been a competent finding of fact, that part of that indebtedness was indebtedness in respect of a loan transaction of a capital nature, or something of that kind, different considerations might well have emerged, and it is to be understood that my judgment in this case is founded upon the approach to that account which I have described. A

Before the commissioners, the Crown put its case in a very broad way. It said: "Look at the situation of these two companies. Look at this agreement. The object of the agreement was to put an end to a piece of capital mechanism, so to speak, belonging to the company, and that was something of a capital nature." In fact, the argument can best be explained by reference to the fact that the Solicitor-General before us said that the case was to be compared with *Van den Berghs, Ltd. v. Clark* (1), in which a sum of £450,000 was paid in order to get rid of a pooling agreement between two large combines, under which their profits were to be pooled, and a variety of complicated arrangements were made. That, therefore, was the type of general argument that the Crown put forward, and it put it forward, as I have said, on the basis that, so far as the Crown was concerned, it was immaterial whether this particular matter of the payment of this account was payment of a sum which was partly of a capital nature or whether the whole of it was of a revenue nature. B

I return to the finding of the commissioners, which LAWRENCE, J., thought contained an inference which was not justified by the facts which the commissioners themselves had found. I find myself in agreement with the view which he took. C

The finding in para. 15 falls into two parts. The first part states the facts which lead to the conclusion. In the second part, the conclusion is that these three payments D

... were not wholly and exclusively laid out or expended for the purposes of the appellant company's trade. E

The reasons were that those payments were made to secure a compromise, and the securing of that compromise was not, it is said, F

... for the purposes of the appellant company's trade, but to enable it to terminate a trading relation which it found inconvenient with the minimum sacrifice of the balance of account resulting from that relationship. G

With great respect to the commissioners, it seems to me that they have put the matter the wrong way round. It was not Scammells who were H

- seeking to terminate a trading relation, a phrase which I understood to be intended to cover the *de facto* business situation of the two companies *vis-à-vis* one another, as well as their existing contractual relationships. It was Mr. Toms, on behalf of Blue Belle Motors, and in his individual capacity, who was seeking to determine that trading relation. That was
- A the main object of his action. It was that that he was demanding. It was he, not Scammells, who insisted, as a term of coming to any agreement, that the shares in Blue Belle Motors held by the directors should be sold to himself. Scammells were defending, Mr. Toms and Blue Belle Motors were attacking them. What Scammells were anxious about—
- B and, on the evidence, it appears abundantly clear, and, in fact, the commissioners themselves, in para. 9, have a finding to that effect—was the balance of their account, and, in order to obtain payment of as much of that balance as they could get, they were prepared to agree to Mr. Toms' conditions.
- C It seems to me that there is no real evidence upon which the commissioners were justified in finding that Scammells entered into this compromise to enable them to determine a trading relation. If that view be correct, and if, as I think is the case, there is no evidence upon which the commissioners could find that the object of the appellant
- D company in entering into the compromise was anything except to obtain payment of as much of the balance of the account as they could persuade Mr. Toms to agree to, that account being, as I have said, a trading account, it seems to me that the compromise was a compromise effected for the purpose of the company's trade, and for the purpose of enabling it to
- E recover the payment of a trading debt owing to it from a customer which would come into computation in its trading account. On that basis, payments made as a condition of obtaining that compromise which secured that payment to them would have been payments wholly and exclusively laid out or expended for the purposes of the appellant com-
- F pany's trade. However that may be, let me take the commissioners' finding exactly as it stands. They find that the object was twofold—(i) to enable Scammells to terminate the trading relation, and (ii) to enable them to do so "with the minimum sacrifice of the balance of account resulting from that relationship." That is obscurely put. It presumably
- G means to terminate the trading relationship, and, while doing so, to get paid as much as they could of the balance of their account. So far as the object of getting payment of the balance of their account is concerned, the effect of that part of it is, as I have said, that they were trying to get payment of something due to them on trading account.
- H The real weight of the argument that was put before us, however, was on the point as to termination of trading relation. It was said that, where you have a complex relationship—two companies with interlocked boards, the chairman of one holding a controlling interest in the other, a management agreement made, a hiring agreement made, loans, debentures issued, and so forth and so on—here is a complex relationship, and a

payment for the purpose of getting rid of that complex relationship is not one which can be said to be wholly and exclusively laid out for the purposes of the appellant company's trade. It was also said that it was open to the Crown here to argue, as we were informed they had argued before the commissioners, that, although the object of the payment might be for the purpose of trade, yet it was of a capital nature. It A seems to me that, if we assume that the object was to terminate the trading relation, we must, when we deal with the matter, give proper force to the word "trading." The relation to which the commissioners are referring is a trading relation, and, therefore, in so far as there were any other relations which were not of a trading nature, their finding B negatives the idea that one of the objects was to get rid of them. It was trading relations, and trading relations only.

Therefore, we find this company finding itself in trading relationship with another company which it wishes to get rid of because it is inconvenient to it. On that basis, and giving full force to the qualifying word C "trading," it seems to me that the conclusion to which the commissioners have come—namely, that a compromise directed to obtaining the termination of such a relationship was not for the purposes of the appellant company's trade—is, with all respect to them, a complete *non sequitur*. They seem to have thought that a transaction entered into to get rid D of a trading relationship is one which, as a matter of law, can not be for the purposes of the trade. It looks as though they had thought that the compromise, if it had looked forward to some affirmative trading in the future, might have been regarded as for the purposes of the trade, but, as, on the other hand, it was merely terminating the possibility E of disadvantageous trading in the future, it could not be for the purposes of the trade. That seems to me, with all respect to them, to be quite a wrong method of dealing with the matter. The termination of a trading F relationship in order to avoid losses occurring in the future through that relationship, whether pecuniary losses or commercial inconveniences, is just as much for the purposes of the trade as is the making or the carrying into effect of a trading agreement. Therefore, I find myself in complete agreement with the view that LAWRENCE, J., took upon that matter.

I have not referred to any of the authorities which have been cited G to us, except for a passing reference to *Van den Berghs, Ltd. v. Clark* (1). It appears to me, however, after careful consideration of the many different cases to which reference has been made before us, that the true analogy to the present case is to be found in the class of case where a company, in order to get rid of a contract which is of an onerous nature, or a servant H whose continuance in service is undesirable in the company's interest, makes a payment. There were two cases referred to. One was *Mitchell v. Noble (B. W.), Ltd.* (2). That was a case where the company wished to get rid of a life director in order to save a possibility of publicity which would be injurious to the company's reputation if they dismissed

him. They came to an arrangement with him under which, among other things, he was to be paid a sum of money and was to sell his shareholding to his co-directors and surrender certain valuable participating notes. I need not quote from the judgments in that case, but this, I think, emerges from it with great clearness—that a payment made, in circumstances of that kind, to terminate the employment of somebody in the service of the company whose continuance with the company is undesirable, is properly treated as a revenue payment and a deductible expense. The other case was *Anglo-Persian Oil Co., Ltd. v. Dale* (3), where the payment was a payment made in order to terminate an agency agreement which was proving disadvantageous to the company.

In the present case, if the trading relation was one that was disadvantageous to the company, and, in order to get rid of it, the company had to enter into an agreement with Mr. Toms and Blue Belle Motors, and if, in order to secure that that agreement should be effective, it was necessary to make a payment to a third party, to wit, Mr. Hood Barrs, who was in a position to block the agreement, because his consent was necessary, and there was no means of compelling him to give it, the payment made to Mr. Hood Barrs was, it seems to me, a payment that was made for, and was directly connected with, the procuring by the company of the advantage of terminating that trading relation, and, as such, was wholly and exclusively laid out for the purposes of the company's trade. That deals with the £7,500.

The other two sums can be very shortly dealt with. One was the sum of £53 10s., which was the payment made to the company's solicitors in connection with the preparation of the compromise deed. If the view that I have taken as to the nature of the compromise is correct, the costs of preparing the deed are, of course, a permissible deduction.

The other sum, £62 10s., was a sum paid as a contribution to Mr. Toms' costs in the Chancery action. It was one of the terms that he insisted upon as a condition of his willingness to secure payment by Blue Belle Motors of the £10,000 odd to Scammells, and was, therefore, a sum paid to enable Scammells to get the benefit of the compromise. If what I have said about the compromise is right, it follows that that sum, too, is a permissible deduction.

In conclusion, I should refer to one matter that was touched upon. It was said that, when one looked at the agreement of the deed of compromise itself, one found a number of matters dealt with and cleared up in it. That was perfectly true. Many of them were things which Mr. Toms was insisting should be cleared up. The others were of a general and consequential nature, such as the release and indemnity to which I have referred in respect of possible claims, the existence of any such claims being negatived by Mr. Toms' satisfaction at his examination of the accounts. To the other matters dealt with in that deed I do not think I need refer.

The real substance of the position, I think, was, as was stated by the

commissioners, that they decided to enter into the compromise, as otherwise they would lose the balance of the account. That was the business and substantial and real object of the whole of this transaction, and that sum they secured—a sum which, upon the basis upon which it was dealt with, was a sum which would appear in their own accounts as revenue—and the sum paid, £7,500, and the other sums paid to secure it, must, in my opinion, be treated in like manner. In the result, the appeal is dismissed, with costs.

FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal dismissed, with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Radcliffe Lewis* (for the respondent company).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

R. v. CLIFFORD.

[COURT OF CRIMINAL APPEAL (Charles, Atkinson and Singleton, JJ.),
January 30, 1939.]

Criminal Law—Punishment—Borstal treatment—"Not more than 23 years of age"—*Prisoner sentenced on twenty-third birthday—Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1) (a)—Criminal Justice Act, 1925 (c. 86), s. 46 (1)—Borstal (Extension of Age) Order, 1936 (S.R. & O., 1936, No. 839).*

The appellant was sentenced to a period of detention in a Borstal institution on his twenty-third birthday :—

HELD : the appellant, being more than 23 years of age at the time when he was sentenced, could not be sent for Borstal treatment.

[EDITORIAL NOTE. It was decided in *R. v. Scoffin* (1) that the material date in deciding whether or not a prisoner can be sent for Borstal treatment is the date on which he is sentenced. In that case, the prisoner appears to have been actually sentenced on the day after his birthday, although, of course, a sentence passed upon a prisoner at assizes dates from the commission day, which in that case was the previous day. The present decision, therefore, is a clear decision that the prisoner cannot be so sentenced on his twenty-third birthday, and follows, of course, a long line of decisions on various subjects which have held that a person attains the age of, say, 21 years on the day before his birthday.

AS TO BORSTAL DETENTION, see HALSBURY, *Halsbury's Laws of England*, Vol. 9, pp. 243-245, paras. 343-345 ; and FOR CASES, see DIGEST, Supp., Criminal Law, No. 5240b.]

Case referred to :

(1) *R. v. Scoffin*, [1930] 1 K.B. 741 ; Digest Supp. ; 99 L.J.K.B. 521 ; 143 L.T. 121 ; 22 Cr. App. Rep. 27.

APPEAL against sentence at the Central Criminal Court of 3 years' detention in a Borstal institution on charges of breaking and entering and stealing a safe and other articles and of being found by night in possession of housebreaking implements, and of uttering forged cheques for two amounts, and of obtaining 8 lorry tyres by means thereof.

The age for Borstal detention was fixed at not less than 16 or more than 21 years by the Criminal Justice Administration Act, 1914, s. 10 (1) (a), but the upper age was raised to 23 years by the Borstal (Extension of Age) Order, 1936 (S.R. & O., 1936, No. 839).

D. O'Malley for the appellant.

A The Crown was not represented.

CHARLES, J. [delivering the judgment of the court]: This appellant pleaded guilty to charges of breaking and entering and stealing, and on Dec. 7, 1938, he was sentenced to 3 years' detention in a Borstal institution. That same day, Dec. 7, 1938, was his twenty-third birthday. The appellant appeals against sentence on the ground that, having passed the age of 23 on the date of his conviction and sentence, he was not eligible for Borstal at all. Mr. O'Malley, who is appearing on his behalf, has called our attention to *R. v. Scoffin* (1). That case is really on all fours with this case, and it was decided in that case, the court being presided over by LORD HEWART, L.C.J., that Scoffin, being just a day or two over 21 years of age, was not eligible for Borstal. The age has now been extended to 23 years, so that the two cases are on exactly the same footing, and we are, therefore, bound by that decision. The sentence of 3 years' detention in a Borstal institution will be quashed, and the court thinks that justice will be met by imposing a sentence of 9 months' imprisonment instead. The time that he has been in prison and treated as an appellant will count towards his sentence.

Appeal allowed and sentence quashed.

E Solicitor: *Registrar of the Court of Criminal Appeal* (for the appellant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

F LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **January 31, February 1, 1939.**]

G *Income Tax—Deduction against profits—Remuneration of employees—Issue of shares of nominal value.*

A company issued 6,000 ordinary shares to its employees at par, the par value being 5s. The market value at the time was £2 3s. 9d. The employees were assessed to tax in respect of the difference between the market value and the par value. It was contended that the difference between the par value and the market value of all the shares so issued was deductible against the profits of the company as a revenue expense:—

H HELD: the company could deduct the difference between the par value and the market value as a revenue expense.

Decision of MACNAGHTEN, J. ([1938] 4 All E.R. 689) reversed.

[EDITORIAL NOTE. The contention on behalf of the company in this case was that the amount of the difference between the par value and the market value was an amount forgone by the company. In deciding in favour of this contention,

the Court of Appeal have been influenced by the fact that the right or privilege to obtain a premium on the shares was a right or privilege which in the company's hands had a money value. That being so, the value of that right was, in the circumstances, deductible against its profits. Had it had no money value to the company, the decision must have been to the contrary. The court also remarks incidentally that a sum received by way of premium upon shares may be either capital or income according to the use the company makes of the money so obtained. A

AS TO DEDUCTIONS AGAINST PROFITS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 150-156, paras. 311-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.]

Cases referred to :

- (1) *Salmon v. Weight* (1935), 153 L.T. 55; Digest Supp.; 19 Tax Cas. 174. B
- (2) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *reveg.*, [1914] 2 K.B. 891.
- (3) *Hoare & Co., Ltd. v. Collyer*, [1932] A.C. 407; Digest Supp.; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169.
- (4) *Inland Revenue Comrs. v. Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79. C
- (5) *Gillatt & Watts v. Colquhoun* (1884), 33 W.R. 258; 28 Digest 47, 244; 2 Tax Cas. 76.
- (6) *Russell v. Town & County Bank* (1888), 13 App. Cas. 418; 28 Digest 45, 227; 58 L.J.P.C. 8; 59 L.T. 481; 2 Tax Cas. 321.
- (7) *Smith v. Lion Brewery Co., Ltd.*, [1911] A.C. 150; 28 Digest 57, 291; 80 L.J.K.B. 566; 104 L.T. 321; 5 Tax Cas. 568. D
- (8) *General Hydraulic Power Co., Ltd. v. Hancock*, [1914] 2 K.B. 21; 28 Digest 45, 228; 83 L.J.K.B. 906; 111 L.T. 251; 6 Tax Cas. 445.
- (9) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; Digest Supp.; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280.
- (10) *Banco de Portugal v. Waterlow & Sons, Ltd., Waterlow & Sons, Ltd. v. Banco de Portugal*, [1932] A.C. 452; Digest Supp.; 101 L.J.K.B. 417; 147 L.T. 101. E
- (11) *English Crown Spelter Co., Ltd. v. Baker* (1908), 99 L.T. 353; 28 Digest 48, 250; 5 Tax Cas. 327.

APPEAL by the company from the decision of MACNAGHTEN, J., dated Nov. 11, 1938, and reported [1938] 4 All E.R. 689. The company—a very successful company carrying on the business of diamond mining—desired to give a bonus to certain of its employees. In order to do so, it permitted these employees to subscribe at par for its unissued shares, the nominal value of each of such shares being 5s. and the market value G £2 3s. 9d. The employees were assessed for income tax purposes upon the value of the subscription rights given to them. That assessment was made upon the authority of *Salmon v. Weight* (1), which was before the court on the opposite point of view. The company claimed to be entitled to deduct the monetary value of the bonus in respect of its H own income tax assessment.

J. Millard Tucker, K.C., and *T. N. Donovan* for the appellant company.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Reginald P. Hills* for the Crown.

Tucker, K.C.: If the employees have received money's worth, the

company must have parted with money's worth. It was not disputed in the court below that any sum paid to an employee, even though it be a bonus, is a proper deduction in ascertaining the profits of an employer. Property given to employees stands on no different footing from that of actual money, and the company is entitled to deduct its

- A value in arriving at its profits. In the court below, the Solicitor-General very fairly said that, if the company had first given the amount of £1 18s. 9d. to each employee, and had said that the employees could subscribe for shares, the amount would have been a permissible deduction. The court has never said in an income tax case that the actual
- B source of the money which is to be given away colours the nature of the disbursement. On behalf of the Crown, it is said that no expense was incurred by the company in issuing these shares at less than their par value. In reply to that, I rely upon the decisions in *Golden Horse Shoe (New), Ltd. v. Thurgood* (9) and *Usher's Wiltshire Brewery, Ltd. v. Bruce* (2). No actual outlay had been incurred in the second of these
- C cases, but there was a notional outlay, and that case disposed of the objection that, merely because money is not actually expended, but something which could be turned into money is parted with, the amount is not deductible. Regard must be paid to the purpose for which the money
- D is expended, and not to the source from which it comes: *Banco de Portugal v. Waterlow & Sons, Ltd.* (10). [Counsel referred to *Salmon v. Weight* (1) and *English Crown Spelter Co., Ltd. v. Baker* (11).]

- Donovan*: When called upon to do so, the company is required, by the Income Tax Act, 1918, s. 105, to render to the assessor of taxes a
- E list of all payments made to its employees as remuneration for their services. To require this to be done, and to assess the employees on the amount, and yet to refuse the company the right to deduct this payment from its profits, is a wholly inconsistent attitude.

- The Solicitor-General*: I do not dispute the statement that, if the company had issued the shares in the open market, it could have utilised the money it received for them in paying additional remuneration to its employees. It is misleading, however, to say that that is the same thing as that which has happened in this case. It is no answer to say that the taxpayer could have done the same thing in a different way:
- G *Inland Revenue Comrs. v. Ramsay* (4). What has the company laid out or expended? Is it to be said that a person who, by adopting a certain course, has not made as much money as he otherwise might have done has laid out the difference? Apart from *Usher's Wiltshire Brewery, Ltd. v. Bruce* (2), there is no case which supports the proposition that the
- H forgoing of something which one could obtain is an expense which could be deducted. On behalf of the company, it is said that, because it could have sold the shares in question at £2 3s. 9d. each, but in fact sold them at 5s. each, it is entitled to deduct the difference. That proposition has no support in law. Profit which is forgone is not an expenditure which can be set off for income tax purposes unless it falls within *Usher's*

Wiltshire Brewery, Ltd. v. Bruce (2). In that case, the premises were excluded, on the ground that there would otherwise have been double taxation. In *Gillatt & Watts v. Colquhoun* (5), where the question of depreciation of leaseholds arose for consideration, it was held that the premium which had been paid on purchase could not be taken into account. The difference between two values of shares is not truly a source of income at all. No one would think of taxing a company because its shares were worth more than par. [Counsel also referred to *Russell v. Town & County Bank* (6), *Smith v. Lion Brewery Co., Ltd.* (7) and *Hoare & Co., Ltd. v. Collyer* (3).]

Hills : This is the first case in which anyone has attempted to extend the doctrine of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (2) beyond the annual value of land in relation to trade. On behalf of the appellants, one phrase from the opinion of LORD SUMNER in that case, about rents forgone, has been cited, but without any qualification whatever. On behalf of the appellant company, it is said that what is not received may be deducted. There is, however, in law no authority for that proposition. The forgoing of a profit is not an expense which may be deducted. [Counsel referred to *Hoare & Co., Ltd. v. Collyer* (3), *General Hydraulic Power Co., Ltd. v. Hancock* (8) and *Russell v. Town & County Bank* (6).]

SIR WILFRID GREENE, M.R. : This is an appeal by the Consolidated African Selection Trust, Ltd., from a decision of MACNAGHTEN, J., who reversed the decision of the General Commissioners of the City of London on an appeal in which the company was claiming to have allowed to it, for the purpose of its income tax assessment for the year ending Apr. 5, 1937, a certain deduction. The company is a prosperous one, and on Dec. 6, 1933, it passed a special resolution increasing its share capital by the creation of certain redeemable preference shares and 400,000 new ordinary shares of 5s. each. By the same resolution, it was resolved that 10,000 of such new ordinary shares be reserved for issue to employees of the company at such time or times, and upon such terms and conditions, as the directors should determine. The directors determined to issue 6,000 of those ordinary shares to employees of the company upon terms which would give to those employees a substantial benefit, and that benefit was to be by way of remuneration for services rendered. Accordingly, on June 5, 1934, a letter was sent to the employees in question offering to give them an allotment of the new ordinary shares at par—that is to say, 5s. per share. That offer was accepted. The 5s. was paid, and the 6,000 shares, which was the number the directors had determined to allot in this way, were issued to the employees. It is found in the case that the value of that opportunity to subscribe for the shares at par was £2 3s. 9d. per share, less the 5s. paid. That is to say, each employee received by way of remuneration a benefit equivalent in cash value to £1 18s. 9d. The employees were assessed to income tax in that amount, and that assessment was justified by the law as laid

down in *Salmon v. Weight* (1). It is agreed, and the case proceeds upon the footing, that, if the company, instead of making the issue in the way it did, had issued those shares to the public, it could have obtained for them £2 3s. 9d. per share. That is to say, it would have obtained a premium of £1 18s. 9d. Had it done so, the premium so obtained in the hands of the company would have been free money, in the sense that the company could have used it for any purpose that it chose. It could have used it to pay current expenses. It could have carried it to reserve. It could have used it for the purpose of acquiring a capital asset. In other words, so far as the law is concerned, the company could have dealt with the money received in respect of the premium in any way that it pleased, including, of course, if it had so minded, remuneration of employees. The position when the company created those new shares was this. When the shares were created, the company acquired the power to admit to membership such persons as should subscribe for those shares. That right was one of value to the company, because, if the company had exercised that right, it could have secured for itself, not merely the par value of the shares, which by law it would be bound to obtain, because it could not issue shares at a discount, but also a premium. It therefore had a right which was of value to itself, the exercise of which would have brought money into its coffers. That right the company did not exercise. Instead of doing so, it diverted into the pockets of its employees the equivalent of the cash profit which it otherwise would have obtained. It may be said, from one point of view, that it forbore to make that cash profit, and presented its equivalent instead to the employees. In those circumstances, the company claims to have allowed as a deduction for the purpose of its assessment the value of that premium which it might have obtained. Putting it in another way, it claims to have allowed as a deduction the amount of the special remuneration which it has given to its employees. It is incontestable that the company has remunerated its employees. It is incontestable that the remuneration in the hands of the employees is liable to tax. From where did that remuneration come? It did not come out of nothing. It came from somewhere. The place from which it came was the company. The company has provided that remuneration, and it has provided it out of a right belonging to itself—namely, the right to issue those shares.

It is said, on behalf of the Crown, that, although the employees have received remuneration for which they stand to be taxed, the company is not entitled to the deduction of the equivalent amount. It is said that to forbear the making of a profit is not an expense incurred by the company, and it was said that the argument on behalf of the company, and the decision of this court if that argument was accepted, would involve affirming the proposition that to forbear making profit is the same thing as to incur an expense. Speaking for myself, I have no intention of affirming any such proposition, nor did the argument

presented on behalf of the company expressly or impliedly affirm any such general proposition. The question that we have to decide lies in a very much narrower compass.

In the course of the argument, the question was approached by steps, pursuant to certain questions which were put to counsel for the Crown from the Bench, and, taking an illustration suggested by the opinion A of LORD ATKIN in *Salmon v. Weight* (1), counsel for the Crown were invited to consider two cases. The first case was where an employer, being a company which was mining coal, remunerated its director by giving him, instead of cash, a quantity of coal. The question was whether or not, in those circumstances, the company could treat the value of B the coal so given to the director by way of remuneration as a disbursement for the purposes of the trade. I am not quite sure whether I have the answers right, because there seemed to be some uncertainty in them, but I think that I am right in saying that the Solicitor-General assented to the proposition that, in those circumstances, the value of the coal C could be deducted. Mr. Hills, on the other hand, unless I am unconsciously doing him an injustice, maintained that, in those circumstances, the value of the coal could not be deducted, but only its purchase price. However that may be, in the next illustration there was unanimity. D The next illustration was that the company, instead of giving the coal to the director by way of remuneration, sells it to him at half its value, thereby giving him a benefit which in his hands would be a taxable benefit measured by one-half the value of the coal. The question which E counsel for the Crown were invited to answer was whether or not in that case the company could deduct as an expense one-half the value of the coal. Here both the Solicitor-General and Mr. Hills replied stoutly in the negative, and asserted that the only deduction that could be made was the actual purchase price paid by the director for the coal. I must F confess that that answer struck me as a surprising one, because, if there is one principle which the Crown, quite rightly, quite consistently and quite successfully, has always stood for in income tax law, it is the G principle that he who receives money's worth is, for taxation purposes, in the same position as is he who receives money. I cannot myself understand how it can be asserted that a person who pays remuneration to his servant in money's worth belonging to himself is not entitled to H deduct that money's worth as an expense. If an employer having two receptacles, one containing cash and the other containing goods, chooses to remunerate his employee by giving him goods out of the goods receptacle, instead of cash out of the cash receptacle, the expenditure that he makes is the value of those goods—not their purchase price, and not anything else but their value—and that is the amount which he is entitled to deduct for income tax purposes. If, instead of giving the goods to the employee, he gives the employee the privilege of acquiring those goods at less than their value, he is equally remunerating him to the extent of the difference between the cash he receives and the value

of the goods which he transfers. I myself do not see how the contrary could be argued for one moment. Nevertheless, the foundation of the Crown's argument was based on the proposition that this answer was wrong. The importance of that illustration and the relevance of it are, I think, confirmed by the observations of LORD ATKIN, which were
 A accepted and agreed to by all the other members of the House, in *Salmon v. Weight* (1), because it is from those observations that the illustration comes. I should say that that was a case where it was sought to assess the directors on the premium value of shares in their company for which they had been given the privilege of subscribing. I forget whether it
 B was at par or at a price below market value. That assessment was upheld in the House of Lords. LORD ATKIN said, at p. 193 :

I think it is really impossible to appreciate the argument which suggests that that was not an immediate profit in the nature of money's worth received by the director as remuneration for his services. It appears to me to correspond very closely in substance to a case where a company might have sold 1,000 tons of its
 C product, if the company were a colliery company, to a director who was in the coal trade, at a price which was one-third of the market price of the day. There no question could arise that the person was receiving a profit in the nature of money's worth and he was receiving that profit in the nature of money's worth to the extent of the difference between the price he could get for it and the price he had actually paid.

It is perfectly true that the case with which LORD ATKIN was dealing
 D there was the case, not of the payer, but of the recipient. Nevertheless, it seems to me that, in the case that he put, it follows, and necessarily follows, as a matter of principle, that the company which he is imagining there would have been entitled, in those circumstances, to treat as a deduction the difference between the cash paid by the director and the
 E value of the coal that was given to him. That was the method of remunerating the director. It was a remuneration in money's worth. To say that the director was receiving money's worth for his remuneration on which he was to be taxed, and in the same breath to say that the company, which, out of its own assets and to its own detriment, provided
 F that exact money's worth by way of remuneration, was not entitled to deduct the value of what it handed over, seems to me to produce an inconsistency which even in income tax law would be surprising, and I myself am quite unable to accept it.

In the present case, of course, the facts are not the facts assumed in
 G that example. Nevertheless, it is, I think, important to notice that the parallel between that case and the present case is one which, for all relevant purposes, is the same as that used by LORD ATKIN in the course of his reasoning, and, in my judgment, it is a parallel which can be used in the present case, where it is the employer whose tax is in issue, and
 H not the employee. The company, as I have said, was possessed of a valuable right. It is perfectly true that the value of that right was not one which would ever appear in its balance sheet as such. No director, no auditor, would insert as an asset in the balance sheet the value of premiums on unissued shares which the company might obtain if it chose to make an issue. No one has ever seen such a thing. That does

not alter the fact that the company in its unissued shares, having regard to its financial position, had a valuable right which it could turn into cash. If it issued those shares to the public, it would have received that cash from the public. It issued those shares to the employees, but, instead of receiving the cash from the employees, it allowed the employees to keep that cash by way of remuneration. That being so, I cannot myself see how it can be argued that the company by taking the course that it took has done otherwise than give to its employees to its own prejudice money's worth which the company, had it been so minded, could have converted into money. Instead of doing so, however, it has transferred that privilege to the employee. For all relevant purposes, it appears to me that the position is a true parallel to the case which LORD ATKIN took by way of illustration. A company, instead of selling its coal and thereby putting the market value of the coal into its pocket, gives the coal to its employee at a reduced price below its market value, thereby depriving itself of the possibility of making that profit, but using that potential profit to remunerate its employee. That is what has been done in the present case, and it seems to me that the result is one which necessarily follows. Once it is established, as it was established in *Salmon v. Weight* (1), that the value so received by the employee is received by way of remuneration, it follows that the company provides that remuneration in meal or in malt, in cash or in kind, and is entitled to deduct the amount which it has so provided. A

One other argument was put forward, to the effect that, if the company had issued its shares to the public, and had obtained the premium, that premium would not have been a taxable profit in its hands. That, of course, is indisputable. From that, it is argued, as I understand it, that the value of the premium must be treated as capital, and, accordingly, that the company has remunerated the employee out of capital. I must confess, with all respect, that I am quite unable to follow that argument. As I have said, the premium, if it had been received, would have been free money in the company's hands. To say that it would have been capital or income is completely misleading. That the company could have treated it as capital in the sense of using it for the purpose of acquiring a capital asset, or using it as a capital reserve, or something of that kind, is perfectly true. It is equally true to say that the company could have used it as income. In other words, the quality of that sum, had it been received, would have been entirely neutral, and would have depended on the volition of the company, and nothing else. The circumstance that, for income tax purposes, it would not have been taxable seems to me irrelevant, because money paid by way of remuneration to an employee is of necessity in its nature, for income tax purposes, a payment on revenue account. It matters not out of what drawer the company obtains the money or the goods for the purpose of making that payment. That is a matter with which the Revenue has no concern. If the company draws a cheque on its account to pay B C D E F G H

its employee, its situation at the time may be such that the only fund available for making that payment is part of its own capital. It may have no profits. It may have no reserves. Its sole asset may be the capital fund represented by subscriptions for its shares. Nevertheless when it draws that cheque and pays its employee, as between itself and
 A the Revenue it has incurred a revenue expense, and that revenue expense can be deducted for the purpose of its assessment.

I have not referred so far to any of the authorities which were quoted to us, nor do I find it necessary to refer to any of them except one, and that is *Usher's Wiltshire Brewery, Ltd. v. Bruce* (2). That was a case
 B in which various points arose, but the point which is relevant to the present discussion was this. The brewery company was interested in a number of public-houses, which it let to tenants upon terms that the tenants should be subject to the usual tie. Some of those houses were owned by the company as freeholders, and of some of them they were
 C leaseholders, but the rents which they charged their tenants were, in the case of the leaseholds, less than the rents the company themselves paid, and, in the cases where the company were freeholders, less than the Sched. A assessment. The company claimed to deduct, for the purpose of its ascertainment of profits, the difference between the rents
 D paid by it for the leasehold houses or the Sched. A assessments and the rents actually received from its tenants. That claim was upheld, but it is important to notice the ground upon which it was upheld. I will take a passage from the opinion of LORD SUMNER. There are other passages in the other opinions which, if I read them rightly, are based
 E upon the same view, but that view is most clearly expressed in the passage which I will now read. LORD SUMNER said, at p. 469 :

Next as to the rent. A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to
 F another. The amount of his expense is *prima facie* what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt. In principle, therefore, I think that in the present case rent forgone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack-rent in the open market, or by letting houses in the same way, which they hire
 G and then re-let at a loss, is money expended within Sched. D, Cases I and II, r. 1, and that upon the findings of the special case, which are conclusive, it is "wholly and exclusively expended for the purposes of such trade."

It is, perhaps, worth noticing that in a later case in reference to the decision in *Usher's* case (2) the House of Lords again use certain
 H expressions which agree with what LORD SUMNER was there saying. That is *Hoare & Co., Ltd. v. Collyer* (3), where LORD WARRINGTON said, at p. 414 :

Usher's case (2) is in no way inconsistent with this view. All that was decided in that case was that certain expenses incurred by the owners and certain items of rents forborne by them for the purpose of extending their trade might properly be treated as money wholly and exclusively laid out or expended for the purposes

of such trade, and therefore forming a proper item of debit in the account under Sched. D.

In the same case, LORD ATKIN said, at pp. 416, 417 :

Whether the expense allowed in *Usher's* case (2) is based upon a deduction of the Sched. A valuation as on premises used in the brewers' business, mitigated by the sum received from the tied tenant, or whether it is regarded as a notional sum paid for the advantage of the tie, it is allowed as an expense incident to the particular house in respect of which it is incurred. A

Later, LORD TOMLIN said, at p. 419 :

In *Usher's Wiltshire Brewery, Ltd. v. Bruce* (2), where tied houses of a brewery company were held by the tenants at rents below the Sched. A valuations, your Lordships' House, as I understand the case, treated the difference between the rent and the valuation in the case of each house as rent forgone or money spent exclusively for the purpose of earning profits and held that expense to be one which could be deducted for the purpose of ascertaining profits and gains under Sched. D. B

It was suggested that the decision in *Usher's* case (2) was really based upon the narrow language of certain of the rules applicable to Sched. A valuations. It appears to me that the case is based upon a broader principle—a principle which, to my mind, at any rate, in its application to the present case, is clear. As I have said, from one point of view the company in the present case has forborne to make a profit, but that is really a statement of only part of the position. The company has not merely forborne to make a profit. It has done an active thing, not merely suffered a passive thing. It has remunerated its employees, and it has remunerated its employees to its own financial prejudice, by giving to its employees the power which it had itself of obtaining a monetary sum in respect of these shares. As I said earlier in this judgment, there is nothing which I have said which in any way affirms the general proposition that money forgone is money expended. A proposition so wide and so vague is one which this court would never consciously lay down, and I am quite unable to see that anything in the opinion which I have expressed involves the assertion of any such proposition. Whether or not a company or an employer has given money's worth by way of remuneration to an employee is a question of fact. Whether or not the company, in giving that money's worth, has done so to its own pecuniary detriment is again a question of fact. I can imagine cases where a company, by way of remuneration to its employee, gives the employee a privilege which in his hands has a money value but which in the company's hands has no money value at all. Cases of that kind must be decided upon their own facts. The facts of the present case are narrow and simple, and, in my judgment, with all respect to the judge, who took a different view of it, the case is a clear one. C
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FINLAY, L.J. : I agree. H

LUXMOORE, L.J. : I also agree.

Appeal allowed, with costs in both courts. Conditional leave to appeal.

Solicitors : *Freshfields, Leese & Munns* (for the appellants) ; Solicitor of *Inland Revenue* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

ARMOUR v. LIVERPOOL CORPORATION.

[CHANCERY DIVISION (Simonds, J.), **January 17, 18, 19, February 1, 1939.**]

Local Government—Superannuation—Scheme apart from Superannuation Acts—Powers of local authority—Contract—Registration—Superannuation and other Trusts Funds (Validation) Act, 1927 (c. 41)—Companies Act, 1929 (c. 23), s. 357.

In 1897, a municipal corporation purchased the undertaking of a tramways and omnibus company, in accordance with the terms of a private Act of Parliament, which provided that existing officers and servants of the company should not be obliged to contribute to the superannuation fund of the corporation unless they desired to do so. In 1900, the corporation established a tramways benefit society, which was an unincorporated and unregistered association, to raise funds from its members by means of voluntary subscriptions and levies for certain specified purposes beneficial to its members, including the provision of superannuation allowance, if and when its funds permitted. Its funds did not admit of the payment of superannuation benefit, and in 1908 the corporation established a Tramways Benefit Society Retirement Fund, which was also an unincorporated and unregistered association, the object of which was to provide superannuation allowances. Before becoming a member of the fund, each of the corporation's many employees who joined signed a written agreement whereby he agreed with the trustees that he should be bound by its rules, and that his subscription should be deducted each week from the wages payable to him by the corporation, and paid on his behalf to the fund, in accordance with the fund's rules. These rules also provided that the corporation should make certain payments to the fund. On the authority of this purported agreement, the corporation paid its contributions, and also made deductions from wages and paid them into the fund. In 1920, the society was wound up, and its surplus assets were handed over to the fund. In Feb., 1936, on discovering the actuarial insolvency of the fund, the corporation made no more payments to the fund, but continued to deduct each member's contribution of 2*d.* per week from his wages and to pay such contributions to the fund. In an action where two of the plaintiffs sued on behalf of themselves and all other members of the committee of management, and one as treasurer of the fund and two others on behalf of themselves and all other members of the fund:—

HELD: (i) the power to contribute to a superannuation fund for the benefit of its employees can fairly be regarded as incidental to the carrying on of a tramway undertaking as well by a municipal as by any other corporation, and is, therefore, *intra vires* the corporation.

(ii) the fact that under certain general Acts provision had been made, in certain cases and under certain safeguards, for the grant by local authorities of superannuation allowances, and, further, that, under certain special Acts, the corporation had been similarly authorised to establish superannuation funds and pay superannuation allowances, did not exclude the participation by a local authority in a voluntary superannuation scheme as incidental to the carrying on of a commercial undertaking.

(iii) the fund was not an illegal association through any infringement of the Companies Act, 1929, s. 357, as it was not formed for the purpose of carrying on any business which had for its object the acquisition of gain, nor were the transactions of the fund properly described as mutual insurance.

(iv) the fund was not illegal, owing to lack of registration under the Superannuation and other Trusts (Validation) Act, 1927, as none of the

trusts or dispositions of the property of the association infringed the rule against perpetuities.

(v) there was no contract, whether on the basis of an offer by the corporation and an acceptance by each member within the principle of *Carlill v. Carbolic Smoke Ball Co.* (3) or otherwise, between the corporation and the members of the fund, or the treasurer or committee of management, which entitled the members or the treasurer or the committee of management to sue the corporation.

[EDITORIAL NOTE.] Although the defendants in the present action are a municipal corporation, the consideration of the subject of superannuation is not confined to the matters that arise upon the usual provisions made in respect thereof by the general, or by the special, Acts dealing with such payments. The fund in question here is analogous to, if not the same as, what is generally known as a superannuation or pensions scheme, such as has often been met with in the case of large limited companies and of statutory companies. The rights of the parties depend upon the construction of the provisions of the scheme and of the application of the general law to the scheme. In the present case, there is the further question of whether a municipal corporation has power to enter into such a scheme, or to adopt an existing scheme upon the taking over of a public utility undertaking by the corporation—in other words, whether payments under such a scheme or contributions to the main fund of such a scheme are *ultra vires* acts by the corporation. The further question arises whether, under such a deed, and by reason of payments made thereunder, there is any contract between the corporation and those entitled to the benefits of the fund.

AS TO SUPERANNUATION OF LOCAL GOVERNMENT OFFICERS AND SERVANTS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 71-88, paras. 123-154; and FOR CASES, see DIGEST, Supp., Poor Law, Nos. 105a-105d.]

Cases referred to :

- (1) *A.-G. v. Great Eastern Ry. Co.* (1880), 5 App. Cas. 473; 13 Digest 356, 932; 49 L.J.Ch. 545; 42 L.T. 810.
- (2) *Re Padstow Total Loss & Collision Assurance Asscn.* (1882), 20 Ch.D. 137; 29 Digest 433, 3368; 45 L.T. 774; *sub nom. Re Padstow Total Loss & Collision Assurance Asscn., Ex p. Bryant*, 51 L.J.Ch. 344.
- (3) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 12 Digest 55, 310; 62 L.J.Q.B. 257; 67 L.T. 837.

ACTION for (a) a declaration that the defendant corporation have and at all material dates had full power and authority to agree to provide and to provide (i) the sum of 2*d.* per week by way of addition to the wages of each member of a superannuation fund for the purpose of forming part of the weekly contribution to the fund in respect of each member, (ii) an annual sum of £1,500 to form a further contribution to the fund, and (iii) such further weekly sums by way of addition to the wages of each member of the fund as are or may become payable pursuant to the rules as further contributions to the fund, and (b) a declaration that the corporation were and are bound to provide those weekly sums under (a) (i) and that annual sum under (a) (ii). The facts are fully set out in the judgment.

Rt. Hon. Sir William Jowitt, K.C., and *Wilfrid M. Hunt* for the plaintiffs.

A. S. Comyns Carr, K.C., and *Hartley Shawcross* for the defendants.

SIMONDS, J. : In 1897, a company known as the Liverpool United Tramways and Omnibus Co. was carrying on the business of a tramway

and omnibus undertaking in the city of Liverpool and elsewhere. By the Liverpool Corporation Tramways Act, 1897, s. 1, it was enacted that the company should sell and the corporation purchase the whole of the company's undertaking. By sect. 8 it was enacted that every officer and servant of the company, except as therein mentioned, should be
A taken over by the corporation on the same terms as to position and emoluments as those under which they were employed by the company on Mar. 16, 1897, with a proviso that no officer or servant so taken over should be under any obligation to contribute to, or entitled to participate in, the superannuation fund of the corporation unless within one month
B from such taking over he signified to the corporation his desire so to contribute or participate. By sect. 10 it was provided that, from and after the transfer, all the powers, rights, privileges and authorities, duties and obligations of the company under the Acts and orders enumerated in the schedule to that Act should, by virtue of that Act, be transferred
C to, vested in, and imposed on, the corporation, except as therein mentioned. The only other section I need mention is sect. 38, which provided that the receipts of the corporation on revenue account from the undertaking, and any extension thereof, should be applied, *inter alia*, in paying all working and other expenses in connection with the
D undertaking, and any extension thereof, properly chargeable to revenue. Under this Act, and the later Acts of 1927 and 1931, to which I need not refer in detail, the corporation has taken over and carried on, and is still carrying on, a tramway and omnibus undertaking in Liverpool.

Connected with the company's undertaking was a society about which
E I take the following facts from a statement of facts which was agreed by the parties to this suit :

The Liverpool United Tramways and Omnibus Employees Friendly Society . . . was a society established to raise by means of entrance fees, subscriptions and fines with the aid of donations, a fund to be applied for insuring a sum of money to be paid on the death of a member, for assisting members and providing medical aid during sickness or other infirmity or while incapacitated from working through
F casualty.

3. The members of the society were to consist exclusively of persons employed by the company.

4. The rules contained no provision for resignation from the society but appeared to anticipate that so long as employees remained in the service of the company they should remain members of the society subject however to the provisions as
G to expulsion.

5. Upon leaving the company's service it was provided by r. 6 that the member should cease to be a member of the society.

6. Rules 76 and 77 of the society contained provisions for voluntary dissolution and the amendment of the rules. By r. 22 the company was expressly authorised to deduct from the weekly wages payable to each man in their employ who was a member of the society the sum of 6d. and such further sum if any as the secretary should have notified to them was due from such member to the society in respect
H of levies or fines.

7. The society was registered as a friendly society. Shortly after its formation the company decided to act upon the authority conferred upon them and from that time up to the transfer of the undertaking to the corporation the weekly sum of 6d. was regularly deducted from the men's wages. In addition to this measure the company made an annual donation to the funds of the society.

9. The company's object in assisting the society in this way was to improve the condition of their employees, encourage thrift and to make some provision for the men and their families in case of death and sickness.

10. Persons entering the company's services were apparently quite content to become members of the society and any person objecting or failing to pass the medical examination would not be appointed.

11. After the transfer of the tramways undertaking to the corporation the corporation continued to carry out the provisions of r. 22 and in fact no change was made in the relations between the tramways undertaking and the society and the tramways undertaking and their employees except that the corporation in 1897 discontinued the annual donation to the society which had previously been made by the company, the provisions of r. 50 authorising an annual distribution of the funds of the society being considered objectionable from a corporation point of view.

12. In the year 1900 there were disagreements amongst the members of the society with the result that the society was wound up.

I now leave the statement of facts. It was, however, the common desire of the corporation and its employees that, the old society having gone, some new society, with the same objects, should take its place, and in the same year a society was established under the name of the Liverpool Corporation Tramways Benefit Society, having as its object the raising of a fund by subscriptions of the members thereof, by voluntary contributions and by levy (a) for the mutual relief of members in cases of sickness or accident, (b) for providing medical attendance and medicines to members, (c) for an allowance on the death of a member, (d) for an allowance on the death of a member's wife, (e) for such other purposes beneficial to the members, including superannuation allowance if and when the funds permitted, as the committee of management might thereafter from time to time resolve upon. The rules of the society contained elaborate provisions as to membership, management, contributions and benefits.

I have heard little of the activities of this society, but it seems clear that its funds did not admit of the payment of any superannuation allowances. This was a matter of concern to the corporation, and in or about 1907 they set about devising some scheme whereby what they regarded as a defect might be remedied. In 1908, after the matter had been fully considered by the appropriate committee of the council and by the council itself, a fund was inaugurated which was originally, I think, called the Liverpool Corporation Tramways Benefit Society Retirement Fund, and later the Liverpool Corporation Tramways Retirement Fund. The exact relationship between the so-called society and so-called fund is not easy to discern. It is sufficient to say that the so-called fund was, as was also the society, an unincorporated and unregistered association. Its object being to provide superannuation allowances, it was obvious even to those responsible for its establishment, guilty though they were of grave miscalculations, that no benefits could be paid out until a substantial sum had been accumulated by way of subscription or otherwise, and it was presumably for this reason that until 1917 it was not thought necessary to make any rules for what I will now call the fund, as distinguished from the society. In the meantime, however, it was managed by the committee of management of the society, and its funds were established by means of (i) a transfer of £3,000 from the society, (ii) contributions of 2d. weekly by members

from their wages, (iii) the contribution of a further 2*d.* weekly per member by the corporation, this second 2*d.* being first nominally paid by way of extra wage to the members and then deducted, and (iv) the handing over to the fund of the proceeds of unclaimed property and money left in cars and the amount of what were called conductors' "overs." I may
A mention, though it is out of chronological order, that in 1922 this last payment was abandoned, and, by the authority of the corporation, an annual payment of £1,500 was substituted therefor.

In 1917, rules for the fund were drawn up and approved by the corporation. To some of them I must refer, and, in doing so, I will make use
B of the final edition, though it contains many amendments which were from time to time made in the original rules. By r. 1, the name of the association was the Liverpool Corporation Tramways Retirement Fund. As I have already pointed out, that name was the name adopted in substitution for the earlier and longer name. By r. 2, the object of the
C fund was stated to be to provide for the granting of superannuation allowances to members of the fund according to the rules for the time being of the fund. By r. 3, the fund was to be deemed to have been established as from July 1, 1908. Under r. 5, the membership of the fund was restricted to employees in the service of the corporation. By r. 6,
D membership of the fund was to consist of all employees in the service who should have been contributors to the fund prior to Jan. 1, 1917, and all employees in the service who should have been admitted to membership of the fund since that date. There was a certain provision with regard to applications, to which I need not refer. Rule 10 provided
E for the event of any member ceasing to be a member by reason of his leaving the service voluntarily or otherwise, and provided that in that case the committee of management should return to him the whole of his contributions paid by him during his membership. Rule 12 provided for the office-bearers of the fund. At present, they are 3 trustees, an
F honorary solicitor, an honorary auditor, secretary and treasurer, and a committee of management. Rule 14 provided for trustees. Rule 30 provided as follows :

The weekly subscription payable to the fund in respect of each member shall be (during health and illness) 4*d.* (of which 2*d.* is provided by the corporation by
G way of addition to such member's wages), and such weekly subscriptions of 4*d.* shall be deducted each week from the wages of each member of the fund so long as he continues in the service or until he becomes entitled to superannuation allowance from the fund.

Rule 31 provided for benefits, and it provided as follows :

If any member of the fund, who shall have been a member of the fund for at
H least 10 years, shall become permanently incapacitated from performing his duties, or any other duties in the service which would enable him to earn a living, by reason of old age, or infirmity of body or mind, or any other cause or causes (provided that any such incapacity, infirmity, or cause or causes shall not be due to, or the result of drunkenness, immorality, or other misconduct or to having been engaged in any unlawful act) he shall, subject to the provisions of these rules, be entitled (provided that he then retires from the service) to cease payment of his weekly subscription to the fund, and to receive from the fund for the rest of his life a superannuation allowance or annuity, as follows. If he shall have been in

the service for 15 years, the allowance shall be at the rate of 10*s.* per week. The allowance shall thereafter increase at the rate of 1*s.* per week for each complete year of service up to a maximum of £1 per week for 25 years' service and upwards.

That, as I have already observed, was the rule in the final edition which I read. Rule 40, a rule to which reference has often been made in the case, provided as follows :

If at any time hereafter the funds of the fund shall be found insufficient to meet the ordinary claims, such claims, if the deficiency is not met by a grant from the corporation, shall be met by increasing the weekly contributions of the members and the corporation in the same proportions as set forth in r. 30.

Rule 43, dealing with the alteration of rules, provided as follows :

No new rules shall be made, nor any of the rules contained herein and hereafter to be made, shall be amended, altered, or rescinded without the consent of a majority of the members present at a general meeting of the fund called for that purpose. No new rules and no resolution for amending, altering, or rescinding any rules shall have any force or effect till submitted to and approved of by the committee of management of the fund and the tramways committee of the corporation.

Rule 44, dealing with dissolution, provided as follows :

The fund shall not be dissolved or its affairs wound up except with the consent of the tramways committee of the corporation, and on such terms and conditions as the committee may determine with reference to the disposal of any funds or assets which may belong to the fund after discharging the debts thereof.

Of the fund thus established, large numbers of the corporation's employees became members, and, before doing so, each one of them signed a written agreement, whereby, after stating his desire to become a member, he agreed with the trustees of the fund that he should be bound by its rules and that his subscriptions and contributions to the fund, in accordance with the rules thereof, should be deducted each week from the wages payable to him by the corporation, and paid on his behalf to the fund. Except that, as above stated, the employee purported to agree with the trustees, it does not appear with whom the agreement is made. It is in form unilateral, but it was no doubt used by the corporation as their authority for making deductions from wages and paying them to the fund. Roughly, three-quarters of the persons eligible for membership are members, and one-quarter are not.

In 1920, the society was wound up in the Lancaster Palatine Court, and, by order of that court, its surplus assets were handed over to the trustees of the fund upon their undertaking to discharge certain obligations of the society. From 1918, or thereabouts, onwards, the fund continued to operate, collecting its revenues and paying its benefits. By 1935, it became clear that its funds were not commensurate with the scale of its benefits, and, in consequence, in May, 1935, at an annual general meeting of the fund, a resolution was passed as follows :

In view of the increasing liabilities of the fund in respect of retirement allowance and in order to meet the same it is expedient that members' contributions be raised from 2*d.* to 6*d.* per week and that the corporation be requested to contribute a similar amount in conformity with the provisions of r. 40 of the fund and that r. 30 be amended accordingly.

The corporation, having obtained a report which revealed the grave actuarial insolvency of the fund, resulting in large part, but by no means

entirely, from a policy, begun in 1931, of earlier retirement of employees, and having taken legal advice as to its position, determined to make no more payments to the fund, and have not done so since Feb., 1936. They have, however, continued to deduct the members' contributions of 2*d.* per week from their wages, and pay them to the fund. The fund has
A not yet failed to pay any covenanted benefits.

It was in these circumstances that the present action was commenced, the plaintiffs being two persons who purport to sue on behalf of themselves and all others the members of the committee of management of the Liverpool Corporation Tramways Retirement Fund, two other
B persons who purport to sue on behalf of themselves and all other the members of that fund who are not plaintiffs in this action, and one other person who is described as the treasurer of the fund. They unite in claiming :

A declaration that the corporation (a) have and at all material dates had full power and authority to agree to provide and to provide (i) the sum of 2*d.* per week by way of addition to the wages of each member of the fund for the purpose of forming part of the weekly contribution to the fund in respect of such member, and (ii) the said annual sum of £1,500 to form a further contribution to the fund [in substitution for certain other payments which were originally made], and (iii) such further weekly sums by way of addition to the wages of each member of the fund as are or may become payable pursuant to r. 40 as further contributions to the fund, and [(b) a declaration that the corporation] were and are bound to provide the said weekly sums under head (a) (i) and the said annual sum under head (a) (ii). . . .
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They also claim certain further relief, to which I need not now refer.

The defendant corporation defends the action on numerous grounds. The first defence is that, whether or not there is any otherwise enforceable contract for payment of the above-mentioned sums, it was not, and is not, competent for the corporation to pay, or to contract to pay, them. It was to this question that the greater part of the argument before me was directed, for upon its solution depends the possibility of finding a way out of the practical difficulties in which all parties find themselves as a result of embarking upon a financially unsound scheme.
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The corporation was created by Royal Charter. It has, therefore, generally speaking, all the powers of a natural person. If it transgresses the limits expressly or impliedly laid down in its charter, the result is, not that its acts are *ultra vires*, but that it runs the risk of
G having its charter revoked in appropriate proceedings. However, though in this sense the powers of the corporation are unlimited, yet it is also a municipal corporation, and, as such, subject to the general law relating to municipal corporations. Broadly speaking, this means that its activities and powers are in fact limited to those upon which it can,
H as a municipal corporation, spend its funds. Even this, however, is not an exhaustive statement of the position, for the corporation has also its own special Acts, which will have to be taken into consideration in determining whether or not any particular activity is *intra vires*.

Upon the question of *vires*, a large number of authorities have been cited to me. They appear to me to establish that the statement of the

law of *ultra vires* made by LORD SELBORNE, L.C., in *A.-G. v. Great Eastern Ry. Co.* (1), at p. 478, is applicable equally to all kinds of undertakings which are carried on by municipal or other bodies under the authority, direct or indirect, of the legislature. LORD SELBORNE, L.C., said, at p. 478 :

... this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.

Unless, then, I can find, either in the general law affecting municipal corporations or in the special Acts affecting this corporation, any prohibition, I must conclude that this corporation has, as incidental to its statutory power to carry on a tramway undertaking under the several Acts referred to at the beginning of this judgment, the power to contribute to the superannuation fund for the benefit of its employees which was established in 1908. It is not, in my view, open to any question, upon reason or authority, that such a power can fairly be regarded as incidental to the carrying on of a tramway undertaking. To assist in removing from the minds of its employees the fear of an unprotected old age, to foster their happiness and contentment, and to procure their good and efficient service, are objects which, even if economic considerations alone count, are incidental, if not vital, to the proper carrying on of any undertaking as well by a municipal as by any other corporation. Is there, then, in the general law affecting municipal corporations, or in the special law affecting this corporation, any prohibition which makes *ultra vires* what would otherwise be *intra vires*? Upon this point, Mr. Comyns Carr, on behalf of the corporation, adduced to me an argument of much cogency. He pointed out how, under the general law, provision had been made in certain cases, and under certain safeguards, for the grant by local authorities for superannuation allowances—for example, by the Poor Law Officers Superannuation Act, 1896, and by the Local Government and Other Officers Superannuation Act, 1922, and, finally, by the Local Government Superannuation Act, 1937—and, further, that, under several special Acts—for example, the Liverpool Improvement Act, 1882, and the Liverpool Corporation Acts of 1893, 1913, 1921 and 1936—the corporation had been authorised by the legislature to pay superannuation allowances and establish superannuation funds in the particular circumstances, and subject to the particular safeguards, indicated or prescribed in those Acts. He urged that, in face of this body of general and special legislation directed to the payment of superannuation allowances, I ought not to regard as fairly incidental to the carrying on by the Liverpool Corporation of this tramway undertaking a power to make contributions to a superannuation fund in whatever manner they might reasonably think expedient. I am unable to accede to this argument. If it were incumbent on me to regard the total body of legislation, general and special, as a consistent

and exhaustive whole, I might indeed be driven to this conclusion, but I cannot do so. The general Acts to which I have been referred cannot, upon any fair reading, be construed as excluding the participation of a local authority in a voluntary superannuation scheme as incidental to the carrying on of a commercial undertaking, nor can the special Acts, which, in regard to certain classes only of officers and servants of the corporation, authorise or prescribe a compulsory superannuation fund, amount to a prohibition against contribution to a voluntary scheme for its employees. It may well be—indeed, I think it is—desirable, as this case shows, that a corporation should not be allowed to join in and encourage any scheme, voluntary or otherwise, except under safeguards which reasonably insure its actuarial solvency. Nevertheless, after a somewhat long consideration of all the relevant legislation, I cannot say that this is what Parliament has done.

Upon the first point, then, I am of opinion that the corporation had, and has, power to contribute to the fund established in 1908. It was then urged that the fund contravened the Companies Act, 1929, s. 357, and was an illegal association to which the corporation could not make payments. Sect. 357 provides as follows :

No company, association, or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business (other than the business of banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof unless it is registered as a company under this Act [or satisfies certain other conditions to which it is not necessary to refer].

The fund was not registered under the Companies Act, 1929, or its predecessors, nor does it satisfy any of the other conditions. It consists of more than 20 members. Does it carry on any business, and is its object the acquisition of gain for itself or its members? I think that the answer to these questions is clearly in the negative. It was argued that the association carried on the business of mutual insurance, and that each member hoped and expected to make a gain by his participation. For this proposition *Re Padstow Total Loss & Collision Assurance Asscn.* (2) was cited. In my judgment, it is a misuse of language to describe the transactions of such a society as the business of mutual insurance. It is no doubt somewhat difficult to draw the line on one side of which such an association as the Padstow Total Loss and Collision Assurance Association, and on the other such humble institutions as the Slate Club and the Goose Club, clearly fall. Neither “business” nor “gain” is a word susceptible of precise or scientific definition. The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of a business for gain, and, applying this test, I have no doubt that the activities of this fund cannot fairly be so described.

Next, it was contended that the fund was an illegal association, to which the corporation could not contribute, because it was not registered under the Superannuation and other Trusts (Validation) Act, 1927. I cannot

help thinking that this contention was based upon some misconception. The Act to which reference is made was designed to validate certain trusts which would otherwise be void for infringement of the rule against perpetuities. In this connection, it uses the word "fund" in its natural meaning, and provides in effect that funds for superannuation and certain other purposes may, under prescribed conditions, be registered, and that, if a fund is registered, the rule of law relating to perpetuities shall not apply, and shall be deemed never to have applied, to the trusts of it. The plea which I have last mentioned is presumably intended to be a plea that there is a trust of the property of this association which is void for perpetuity and has not been saved by registration under the Act. The plaintiffs did not indicate, by their pleading or otherwise, what are the trusts which are invalid, or wherein lies their invalidity, and I have been unable myself to detect the vice of perpetuity in any trust or disposition of the property of the association.

Having decided that the corporation were not, and are not, debarred from contributing to this fund, I have next to determine whether the plaintiffs, or any of them, are entitled to the relief claimed in this action. Here the case is far from satisfactory. I have already stated who the plaintiffs are. If they are to succeed in their action, it can only be on the basis of contract. This disposes at once of the plaintiffs Armour and Griffiths, who sue on behalf of themselves and the other members of the committee of management of the fund, and of the plaintiff Bracken, who sues as treasurer of the fund. At an early stage, it became apparent that no contract to which they, or any of them, on the one hand, and the corporation, on the other, were parties could be formulated. This leaves the plaintiffs Lloyd and Glasby, who sue on behalf of themselves and all other members of the fund. Suing thus in a representative capacity, they must rely on some contract common to the class which they claim to represent. For that reason, I can attach no importance to such incidents as the encouragement given as far back as 1909 by officers of the corporation to the employees to join the fund. It may be that individual members who saw posters and listened to speeches in that year might upon them found the argument that the corporation had promised on its part to make certain contributions if they would become members, and might thus establish the necessary contractual relation. To the great bulk of the members, however, such a contention would not be open, and, for this purpose, I can only rely upon factors which, upon the available evidence, I may fairly assume to be common to them all. The only common factors that I have been able to find are (a) that the corporation in fact deducted from the wages of each member the weekly sums contributable by him to the fund, and (b) that they did so with the authority of the agreement signed by each member to which I have already referred. This agreement, as I have pointed out, was not with the corporation, but it is a proper inference from all the facts that the corporation were aware of the terms, and aware of the

fact that each member signed it. It is probably the case that each member knew that the corporation, by its officers, was taking some part in the administration of the fund, and contributing to it, but this is speculation, and I should not be justified in founding my decision upon any such speculation. Are there, then, here the elements upon which I

A can find a contract concluded with the corporation and each member by which the corporation bound itself to contribute to the fund? It is said that somewhere and somehow there was an offer by the corporation and an acceptance by each member, so that I can apply the principle of *Carlill v. Carbolic Smoke Ball Co.* (3), and say that a contract was thus

B concluded. If, however, I ask what the offer was, and how it was made, I find no answer. I have read the statement of claim with the care which its authorship deserves, and I am left with the impression that, if indeed a contractual relationship were capable of being established, it would have been stated without the vagueness and circumlocution which I

C find in that document. Even at the conclusion of the hearing, I felt the same uncertainty as to the nature of the contract for which the plaintiffs contended. They did not, I think, at any time distinguish between the source of the alleged liability of the corporation to make weekly contributions of 2d. per member and that of its alleged liability to make an

D annual contribution of £1,500 per annum to the fund. The liability in both respects was to be found in one contract, whatever it was, and so also was the alleged liability to make further contributions in accordance with r. 40 of the rules of the fund. Nevertheless, the annual contribution of £1,500 is not referred to in the rules. The contract, then, is

E not to be found in an offer by the corporation to be bound by the rules if each member would be so bound, though that appeared to me at one time an attractive way of putting the plaintiffs' case. I am not justified in further attempts to write out the terms of a contract which might have been made and to infer it from the circumstances. In fact there

F was, in my judgment, no contract, and I am inclined to think that there was no contract just because the corporation were making gratuitous contributions to the fund, and had no intention of doing anything other than keeping an absolutely free hand, reserving to themselves the right to terminate their part in the scheme, just as they had the right to put

G an end to the employment of any one of the members of the fund. Whether or not this is so, however, it is for the plaintiffs to establish without ambiguity how the contract was made, and what were its terms. This they have, in my judgment, failed to do, and their action must fail.

H I would only add, in regard to the suggested liability of the corporation to make increased contributions under r. 40, that I feel great difficulty in giving any certain meaning to the words expressing the condition upon which that liability arises. I think that I must reject the suggestion that they refer to actuarial insolvency (which would itself be a condition dependent on numerous unascertained factors), and hold that they refer to an actual present insufficiency to meet ordinary claims. If so, apart

from all other considerations, it seems clear that the condition upon which the liability to make further contributions arises has not arisen, and for that reason also the plaintiffs' claim under this head must fail.

Action dismissed.

Solicitors : *Silverman, Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool (for the plaintiffs) ; *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

WHITTLE v. WHITTLE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Hodson, J.), **January 12, 13, 1939.**]

Divorce—Summary jurisdiction—Maintenance order—Procedure—Absence of one justice during part of hearing—Evidence subsequently read over—Case remitted for hearing—Matrimonial Causes Rules, 1937, r. 67 (6).

Upon the hearing of a summons to revoke a maintenance order upon the ground that the wife had been guilty of adultery, one of the two justices hearing the case found it necessary to retire from the court for the rest of the day. During his absence, the principal witness upon the allegation of adultery was cross-examined, and three other witnesses were called and examined. The evidence was read over in the presence of that justice on the next day. No objection to this was taken by the parties. The point was, in fact, taken by the court:—

HELD : such a proceeding was wholly irregular, and, in such circumstances, no reliance could be placed upon the finding of the justices as to the credibility of the witnesses. The case was, therefore, remitted for rehearing.

[EDITORIAL NOTE.] The value of a finding of fact by a court of first instance depends largely upon the fact that in arriving at that finding the judge or justices have been influenced by the demeanour of the witnesses in the box, and by hearing the way in which the evidence has been given. The Divisional Court have found it impossible, in the circumstances of this case, to do otherwise than remit the case for a rehearing, since the conclusion of the justices was not based upon seeing and hearing the witnesses, and the court was unable to place upon that conclusion the reliance which might otherwise have been placed thereon.

AS TO PROCEDURE IN SUMMARY JURISDICTION APPLICATIONS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 844, 845, paras. 1346-1348; and FOR CASES, see DIGEST, Vol. 27, pp. 562-564, Nos. 6185-6217.]

Cases referred to :

- (1) *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; Digest Supp.; 97 L.J.K.B. 229; 138 L.T. 537.
- (2) *Knott v. Knott*, [1935] P. 158; Digest Supp.; 104 L.J.P. 50; 153 L.T. 256.

APPEAL by husband from a decision of the Bury Justices, Lancashire, refusing to revoke an order made in favour of the wife on Sept. 14, 1938, on the grounds alleged by the husband in a complaint dated Sept. 29, 1938, that his wife had been guilty of adultery on a date or dates antecedent to the date on which the order was made. It appeared during the appeal that one of the justices had been absent from the court during

part of the hearing, and this report is concerned with the effect of such absence upon the findings of the justices.

J. Roland Adams for the appellant.

J. B. Latey for the respondent.

A SIR BOYD MERRIMAN, P.: In my opinion, this case raises questions of general importance. It is a case in which there was definite evidence that the parties had been seen in bed together by a witness who was called before the justices. It is a commonplace to say that evidence of that character may have been overwhelming or it may have been the least reliable evidence on which to find a charge of adultery. I have no hesitation whatever in saying that it is the experience of every judge in this Division that evidence of that sort, though sometimes overwhelming, may be the least reliable evidence that can be given.

C In this case, the justices have given as the reason for their decision that they do not believe the witness who gave that evidence. Speaking for myself, if that were all in this case, I should find it very difficult indeed, if not impossible, to overrule the finding of justices when their finding depends (on their own statement of the reasons for their decision) on their view of the credibility of a particular witness who has given direct evidence of adultery. If they disbelieved that particular witness, it goes without saying that the rest of the evidence, circumstantial evidence of association, is very much weakened in effect, if not entirely destroyed. It is common ground in this case that the crux of the matter is the truth of the story told by the witness Mrs. Blenkhorn. Most unfortunately, as I think, in this case, one of the two justices who heard the case retired from court for the rest of the first day's sitting in the middle of the cross-examination of this particular witness—the eye-witness to the main allegation of adultery. Three other witnesses were called on that day whose evidence was not, perhaps, of so great importance, but they were witnesses who spoke of the association of the wife with a man who was not clearly identified. Of the importance of the cross-examination of Mrs. Blenkhorn there cannot be the slightest possible doubt. It is almost enough to say that half of the cross-examination which the senior of the two justices did not hear dealt with the suggestion that the witness had been bribed to give the evidence that she was giving. It may be worth adding that Mr. Latey himself has asked us—if this case goes back, as we intend to order that it shall go back, for a rehearing—to ask that that part of the cross-examination which this justice did not hear, in relation to some letter which Mrs. Blenkhorn wrote, shall be further elucidated.

It is true that, by the consent of both parties, the part of Mrs. Blenkhorn's cross-examination which the justice did not hear, and the evidence of the rest of the witnesses who were called on the first day's hearing, were read over in his presence the next morning, and for that reason Mr. Adams has not felt himself able to take any point on this matter.

The point in fact was taken by the court. I am prepared to take the responsibility for the point, whether or not the parties take it, because I think that it cuts at the root, not merely of a finding in the court below, but of our finding here, which may be of the greatest importance to the parties. Let it be remembered that by the Matrimonial Causes Rules, 1937, r. 67 (6), reproducing the rules relating to appeals to this division A which previously prevailed :

"The court shall have power to draw all inferences of fact which might have been drawn in the court below and to give any judgment and make any order which ought to have been made. No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the court substantial wrong or miscarriage has been thereby occasioned in the court below. B

This is not merely a question of misreception or rejection of evidence, so that last sentence does not apply. As I have said, this matter cuts much deeper than that. We are asked to give our own judgment in this matter, but in this case, as in every other case where the court below has heard the witnesses and we have not, and, naturally, as any Court of Appeal C does, we feel ourselves bound to pay the very greatest possible attention to findings of justices based expressly upon their view of the credibility of a particular witness whom they have seen. In this case, it is impossible to put that aspect of the matter before us. We are being asked to uphold the findings of these justices, which were based expressly upon their view D of the credibility of Mrs. Blenkhorn, when we know from the record that one of the two justices who was sitting never in fact heard half the cross-examination of this particular witness. In those circumstances, although I think that the procedure adopted was very strongly to be deprecated, I think that it is open to the criticism, *mutatis mutandis*, which was E directed to the corresponding procedure in *Coleshill v. Manchester Corpn.* (1). Having said that I think the procedure was objectionable, and ought not to have been followed, I do not feel called upon to say as a matter of law that this court is bound to set aside the decision of the justices merely because some little part of some witness's evidence has F been dealt with in this particular way. I am not laying down any such rule. I do say that in this particular case, having regard to the obvious importance of that particular witness, this procedure ought not to have been followed in the court below, but I am not sending this case back on that ground as a matter of law. What I am saying is that I, sitting in G this court, am not prepared to decide this case on the basis of the finding of justices that a particular witness was not credible when I know that that particular witness's cross-examination was not fully heard by one of the two members of the court. For that reason, I think that this case must be remitted to the justices for a further hearing. I have no doubt H that the Bury Justices will think it proper that it should be dealt with before a fresh panel of justices.

I meant to add that I am guided to some extent in what I have said about the decision of this court, as distinct from the decision of the justices, by some observations which I made, sitting

in the Divisional Court, in *Knott v. Knott* (2), at pp. 165, 166. I pointed out there that this court is not bound or estopped in any way by findings of justices one way or the other on the question of adultery if the matter comes up for hearing in this court. Although the finding of the justices has, of course, the very greatest evidential value, the finding of a Divisional Court upholding the finding of the justices may put the party asserting the contrary of that which a Divisional Court has held, upholding the justices, in a very much more difficult position when he comes to assert the contrary of that finding before a single judge of this Division. I do not intend to carry the matter now any farther than it was left in *Knott v. Knott* (2). I merely mention that decision to show how important it is that we ourselves should be satisfied in this case that the right decision has been arrived at on the right grounds before allowing ourselves to be swayed merely by the fact that the justices had seen witnesses and arrived at their decision on their view of the credibility of such witnesses.

As this matter is going back to the justices, it is undesirable that we should say very much about the evidence. There is a very full note of the examination and cross-examination of the various witnesses, and from that one or two things have emerged to which I think it is worth while to refer. In addition to the oral evidence in this case, there was a good deal of written evidence. Some of it was obviously of very great importance, and I am inclined to think that this was not fully realised by the justices at the hearing. For example, there is a document on a piece of paper torn out of a notebook which is admittedly in the wife's handwriting and was found by the husband in the wireless set in the matrimonial home. If it bears any relation to, or has any connection with, her relations with the man Ainsworth, it is of a highly compromising character. Unfortunately, at the hearing below, except that this document was produced on the one side, and admitted on the other side to be in her writing, no question appears to have been directed to the wife to elucidate whether or not it was in fact addressed to the man with whom she was alleged to have committed adultery, and, if so, what was the explanation of it, or what was the explanation of its not having been sent, and of its having been found in the wireless. Nor, indeed, was any question asked with a view to fixing, even approximately, the date at which it had been written, or even the date at which it had been found. The most cursory reading of the letter shows that it appears to contain a number of allusions to times and places and meetings which obviously ought to have been the subject of further investigation, if the letter relates to Ainsworth at all.

Another matter which I think has received somewhat less attention than it appears to deserve is the nature of certain threats which the wife appears to have directed in writing to Mrs. Blenkhorn if she gave evidence against her. There seems to be some ground for supposing that, one way or another, investigations of the matters alluded to in the

letters containing those threats may have a direct bearing on the truth or falsity of Mrs. Blenkhorn's evidence with regard to the evening of Aug. 7.

Finally there is the letter referred to in the cross-examination of Mrs. Blenkhorn, said to be written by herself. It was in the part of the cross-examination which was not heard by the absent justice, and Mr. Latey A has invited us to direct the attention to the justices who hear the case at the next hearing to the contents of this letter, which is in no way identified, and does not appear to be with the papers now, and which we have not seen. I have said enough, I think, to show that this is by no means a case in which I am satisfied that full consideration has been B given to those important matters, but everything will be open to both parties on the rehearing, and it will not be necessary for me to say any more about it at the moment. The case must go back to the Bury Justices for a rehearing.

HODSON, J.: In this case, the husband, the appellant, made an application to the Bury Justices for the discharge of the maintenance order made against him, on the ground of his wife's adultery committed before the date of the order. He supported his application, in the main, on the evidence of a witness whom he had obtained after the date of the making of the order. The justices dismissed the application, and put in the forefront of their reasons, not that they believed the evidence of the wife who had been charged with adultery, and therefore dismissed the application, but that they could not accept the evidence of the witness Mrs. Blenkhorn. Mrs. Blenkhorn was the witness on whose evidence reliance was principally placed by the husband, and that evidence had been obtained after the making of the order. It appears that, during the course of Mrs. Blenkhorn's evidence, one of the justices who signed the order went out of court in the middle of the cross-examination, and remained absent the whole of the remainder of that day. In those circumstances, it seems impossible to me to place on that reason for the decision the same reliance as one would do in the ordinary way. It is obvious that an appellate court will not lightly interfere with a finding of fact on the ground that the justices have had the opportunity of seeing the witnesses, which the appellate court has not had. Here, that does not apply, and, therefore, I think, for myself, that it is quite plain, having regard to the nature of that evidence, and to the number of other matters to which SIR BOYD MERRIMAN, P., has referred in this case which appear to indicate that further inquiry is necessary, that the case must go back for rehearing.

Case remitted to the justices for a rehearing.

Solicitors: Gregory, Rowcliffe & Co., agents for Frederick Howarth, Son & Maitland, Bury (for the appellant); Sharpe, Pritchard & Co., agents for Pickstone & King, Radcliffe, Lancs. (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

Re THOMAS.

[CHANCERY DIVISION (Bennett, J.), February 2, 1939.]

Settlements—Settled land—Persons entitled in undivided shares on death of tenant for life—Right of trustee of the settlement to call for legal estate—Personal representative of testator as trustee of settlement—Settled Land Act, 1925 (c. 18), ss. 30 (3), 36 (1).

Under a settlement created by a will which came into force before Jan. 1, 1926, land was to be held in trust for a tenant for life, and, subject thereto, for the children of the tenant for life in equal shares. The tenant for life died intestate on Nov. 21, 1931, and a grant of letters of administration was taken out by one of the children, the respondent to the present summons. Later, a grant of administration with the will annexed to the testator's estate was made to the applicant:—

HELD: following the decision in *Re Cugny's Will Trusts, Smith v. Freeman* (1), the provisions of the Settled Land Act, 1925, s. 36 (1), were applicable to the position which had arisen under the settlement, and the applicant being, by reason of the Settled Land Act, 1925, s. 30 (3), the trustee for the purposes of the Settled Land Act, 1925, he was entitled to call for the legal estate in the settled property.

[EDITORIAL NOTE. In *Re Cugny's Will Trusts, Smith v. Freeman* (1), property on the death of the tenant for life was to be held as to both capital and income in trust for the two children of the tenant for life, the share of one, a daughter, being settled. In those circumstances, it was held that it was the duty of the personal representative of the tenant for life to vest the property in the trustees of the settlement. The limitations in the present case are similar, and the cases are also alike in the fact that in each case the testator died before the coming into operation of the New Legislation.

AS TO SETTLED LAND HELD IN TRUST FOR PERSONS IN UNDIVIDED SHARES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 547, 548, para. 801; and FOR CASES, see DIGEST, Supp., Settlements, Nos. 3143d-3143j.]

Case referred to:

(1) *Re Cugny's Will Trusts, Smith v. Freeman*, [1931] 1 Ch. 305; Digest Supp.; 100 L.J.Ch. 145; 144 L.T. 525.

ADJOURNED SUMMONS for an order calling upon the respondent to execute an assent to certain land vesting in the applicant upon the trusts of the testator's settlement.

Alan Walmsley for the applicant.

E. M. Winterbotham for the respondent.

Walmsley: Although land has ceased to be settled land and becomes subject to a trust for sale, yet, for the purpose of carrying out the statutory trust for sale under the Settled Land Act, 1925, s. 36 (1), the settlement notionally continues, and the Act both imposes on the trustees of the settlement the duty of carrying out the statutory trusts and confers on them the right to have the legal estate vested in them.

Winterbotham: Once the land has ceased to be settled land, there cannot be any Settled Land Act trustees, and, therefore, the respondent is under no obligation to give an assent.

BENNETT, J.: This is a summons taken out in the matter of the Settled Land Act, 1925, by the personal representative of a testator

named John Thomas. The respondent to the summons is a lady named Eleanor Roberts, a daughter of the testator, and the legal personal representative of the testator's wife. The applicant asks for an order that the property

. . . being property formerly subject to the settlement created by the [testator's will] but now held in trust for the children of [the testator] who are entitled in possession in undivided shares may be vested in the applicant the trustee of the said settlement for the purposes of the abovementioned Act in its entirety for the estate therein now vested in the said Eleanor Roberts to be held by the said applicant upon the statutory trusts upon which the same ought to be held pursuant to the said Act.

The testator made his will on Aug. 25, 1913. He appointed his wife Ann Thomas to be his executor. He gave and bequeathed to his wife all his real and personal estate for her sole use and benefit during her life, and after her death to be equally divided between his surviving children so long as they should do right by their mother, excepting the household furniture and effects, which, after her mother's death, he left to his daughter Mary Emma, if still unmarried. He died on Dec. 3, 1915, and probate was granted to his widow, Ann Thomas, on Mar. 9, 1916. Two dwelling-houses in Wales were part of his residuary estate. His widow died on Nov. 21, 1931. On Apr. 18, 1932, the widow having died intestate, letters of administration of her estate were granted to the respondent, her daughter and the daughter of the testator, Mrs. Eleanor Roberts. On Oct. 14, 1938, letters of administration with the will annexed were granted to the applicant as the lawful attorney of a Mrs. Caldwell for her use and benefit until she should apply for, and obtain, letters of administration. That she has not done.

The case for the applicant is of the simplest possible character. He says that he is the legal personal representative of the settlor. It is common ground between the parties that, on the coming into operation of the Law of Property Act, 1925, on the settlor's death the land vested in the testator's widow as tenant for life, and on the widow's death it vested in the respondent, her legal personal representative. It is also common ground between the parties that, upon the death of the testator's widow, the settlement came to an end, the land then becoming subject to a trust for sale. The way the applicant puts his case is on sect. 30 (3), in the first instance. That is the first step. Sect. 30 (3) provides as follows :

Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy, and apart from this subsection there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly.

He says: Here was a settlement created by will. But for this subsection, there would be no trustees, for the purposes of this Act, of such settlement. I am the personal representative of the deceased, the

settlor, who made the will, and, therefore, until other trustees are appointed, I am trustee of the settlement, by virtue of this Act. I cannot act, because, before I can do so, I must appoint an additional trustee. Nevertheless, by virtue of sect. 30 (3), that is my position. That being my position, the next statutory provision upon which I rely
A as entitling me to the order for which I ask is sect. 36 (1), which provides as follows :

If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, the trustees of the settlement (if the settled land is not already vested in them)
B may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his rights and powers for purposes of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees.

What the applicant says with regard to that subsection is that the
C land is at the moment held in trust for persons entitled in possession under a trust instrument in undivided shares, and, notionally, although subject to those trusts, it is still for the purposes of the Act—of this part of the Act, the machinery which this and the next subsection establish—to be regarded as settled land. The estate owner is the respondent,
D and, in those circumstances, subject to her rights as personal representative in regard to various matters connected with the estate of tenant for life, as administratrix, the applicant says : I am entitled to call upon her to convey the land to me, or to assent to the land vesting in me.

The only question—and I think it is the foundation of Mr. Winter-
E botham's attack upon the applicant's argument—is whether, having regard to the limitations of the will and the events which have happened, one can say that the land, the two dwelling-houses in question, is still settled land, it being at the moment subject to a trust for sale. The answer to that, I think, is to be found in the decision of MAUGHAM, J.,
F as he then was, in *Re Cugny's Will Trusts, Smith v. Freeman* (1). I think that he put upon sect. 36 (1) the interpretation which Mr. Walmsley asks me to put upon it. If that be the interpretation which ought to be put upon it, then it seems to me that there is vested in the applicant, as the personal representative of the settlor, the right to call upon the
G estate owner to assent to the settled land vesting in him.

Order made as asked. Vesting order vesting the land in the applicant as the trustee of the settlement. Costs of both parties to be taxed as between solicitor and client, and to be paid out of the proceeds of sale of the settled property.

H Solicitors : *William Charles Crocker*, agents for *Wood, Lord & Co.*, Manchester (for the applicant, *J. L. Axon*) ; *T. D. Jones & Co.*, agents for *J. S. Laurie & Co.*, Llangefni (for the respondent, *Mrs. Eleanor Roberts*).

Re WESTER WEMYSS, TILLEY *v.* WESTER WEMYSS.

[CHANCERY DIVISION (Crossman, J.), January 25, 26, February 2, 1939.]

Executors—Right of retainer—Against costs of administration action—Discretion of court—Administration of Estates Act, 1925 (c. 23), s. 34—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50. **A**

In 1934, the plaintiff by originating summons commenced an action against the testator's personal representative, the defendant in the present action, in respect of a debt due to him from the testator. The estate of the testator having been found to be insolvent, the question arose whether the defendant's right of retainer in respect of a debt due to her from the testator prevailed against the plaintiff's claim to his costs of the action commenced in 1934. The plaintiff contended that this was a question for the discretion of the court, and relied on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, and the Administration of Estates Act, 1925, s. 34. The defendant contended that, on the authorities, the judge had no discretionary power, and that neither of these two Acts affected the defendant's right of retainer :— **B**

HELD : the defendant's right of retainer prevailed against the plaintiff's right to the costs of the action, and the statutory provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, and the Administration of Estates Act, 1925, did not affect that position. **C**

[EDITORIAL NOTE.] The personal representative's right of retainer is founded upon his disability to bring an action against himself in respect of a debt due from the estate to him in his personal capacity. The present case is exceptional, in that the claim, which would be defeated by the retainer, was one for the costs of an administration action, and, it being a claim for costs, it was alleged to be one wholly within the discretion of the court. After a consideration of the cases dating back to the early part of last century, it has been decided that the right of retainer is paramount to the right to the costs, and the relevance of the earlier cases is that in a court of equity the right to costs was always in the discretion of the court. **D**

AS TO RIGHT OF RETAINER, see HALSBURY, Hailsham Edn., Vol. 14, pp. 332-337, paras. 617-628 ; and FOR CASES, see DIGEST, Vol. 23, pp. 370-384, Nos. 4392-4545.] **E**

Cases referred to :

- (1) *Chissum v. Dewes* (1828), 5 Russ. 29 ; 23 Digest 373, 4426. **F**
- (2) *Tipping v. Power* (1842), 1 Hare, 405 ; 23 Digest 373, 4427 ; 11 L.J.Ch. 257.
- (3) *Richmond v. White* (1879), 12 Ch.D. 361 ; 23 Digest 373, 4428 ; 48 L.J.Ch. 798 ; 41 L.T. 570.
- (4) *Re Roby, Shubrook v. Taylor*, [1916] W.N. 37 ; 24 Digest 837, 3692.
- (5) *A.-G. v. Jackson*, [1932] A.C. 365 ; Digest Supp. ; *sub nom. Re Cockell, A.-G. v. Jackson*, 101 L.J.Ch. 186 ; *sub nom. Re Cockell, Jackson v. A.-G.*, 146 L.T. 450 ; 16 Tax Cas. 681. **G**

FURTHER CONSIDERATION of an administration action to determine the question whether or not the right of retainer of a personal representative prevailed against the claim of a creditor to be paid his costs of an action against the personal representative in respect of debts due to him from the testator. The facts are fully set out in the judgment. **H**

G. E. Timins for the plaintiff.

R. O. Wilberforce for the defendant.

CROSSMAN, J. : The testator died on May 24, 1933, and his will was proved on Mar. 7, 1934, by his widow. On May 9, 1934, the plaintiff,

who is a creditor of the testator for £1,000, commenced this action by originating summons, and on May 31, 1934, the usual order for the administration of the testator's estate was made, the order being prefaced by the defendant's admission that the estate was insolvent. On Mar. 25, 1935, the defendant filed an affidavit in support of her claim to be a creditor for a sum of £6,049 15s. On Jan. 3, 1936, the defendant filed another affidavit in which she claimed the right to retain the assets, subject to any claims having priority, in and towards the satisfaction of the debt to her. On July 30, 1938, the master made his certificate, finding the debts of the testator, including a debt of £2,049 15s. 8d. due to the defendant, and he reserved the question whether the defendant had established her right of retainer in respect of such debt for the decision of the court on the further consideration of the action. Mr. Timins, for the plaintiff, in performance of his duty to protect the creditors generally, contended that the defendant had no right to retain her debt. He admitted that the defendant had originally this right, but contended that she had waived it. I have already decided that the defendant has not lost her right of retainer, which prevailed against the rights of all the creditors except the Inland Revenue Commissioners in respect of a sum of £793 3s. 8d., part of a sum due to them. As the available assets after the payment of the sum of £793 3s. 8d. to the Inland Revenue Commissioners will not be sufficient to discharge the debt of £2,049 15s. 8d. due to the defendant, the question arises whether the defendant's right of retainer prevails against the plaintiff's right to be paid the costs of the action. The defendant contends that it does, but she offers to pay the plaintiff's costs as between solicitor and client down to Jan. 3, 1936, the date of the filing of the affidavit of the defendant in which she claimed her right of retainer. The plaintiff refuses to accept this offer, and he contends that the question is a matter in the discretion of the court, and that he ought to be given his costs of the action before the defendant is paid her debt.

Mr. Wilberforce, for the defendant, contends that the question is covered by authority. He relies on *Chissum v. Dewes* (1) and *Tipping v. Power* (2), and also *Richmond v. White* (3). In *Chissum v. Dewes* (1), SIR JOHN LEECH, M.R., in 1828 held that the plaintiff in a creditor's administration action was not entitled to have his costs satisfied out of a fund to which the personal representative's right of retainer extended. It is true that in that case the report states that afterwards the administrator consented that the plaintiff should have his costs out of the fund in court. In *Tipping v. Power* (2), which was decided in 1842, SIR JAMES WIGRAM, V.-C., said, at p. 411 :

When the court has determined that there is no creditor of a higher degree than the executor, he must be remitted to his original position, to which the right of retainer was incident ; and he is entitled to retain his debt in preference to the costs of administering the fund, for to that extent he is in the same situation as a creditor whose debt was paid before the suit, and who cannot therefore be afterwards affected by the costs of administration. *Chissum v. Dewes* (1) decided this very point, and I shall follow that authority.

In *Richmond v. White* (3), HALL, V.-C., on the further consideration of an administration action, refused to allow the claim of the executor, who was a creditor, to retain his own debt out of a fund paid into court by an insurance company, in priority to the costs of the action and the debts of the other creditors. On appeal, the Court of Appeal, consisting of JAMES, BRETT and COTTON, L.JJ., reversed the decision of HALL, V.-C., and held A that the executor was entitled to a right of retainer out of the fund. Unfortunately, nothing was said in the judgment of the Court of Appeal as to the costs of the action, but, in the absence of any reference to the costs in the argument, I think it must be assumed that the Court of Appeal allowed the claim of the executor, as stated in the report. The B textbooks seem to have followed these authorities. In WILLIAMS ON EXECUTORS, 12th Edn., which was published in 1930, the following passage occurs, at p. 657 :

Where a fund in court is insufficient to discharge the debt of the personal representative, his right of retainer prevails against the plaintiff's right to have the costs of the action satisfied. C

Then the three cases to which I have referred are there referred to. In DANIELL'S CHANCERY PRACTICE, 8th Edn., published in 1914, it is stated, at p. 1068 :

The right of a creditor who institutes an administration action to be paid his costs out of the fund in court does not affect the personal representative's right of retainer for satisfaction of a debt due to himself ; and even where part of the personal estate had been paid into court by an administrator, and another part of it remained in his hands, but there was a debt due to him from the intestate greater than the amount of both funds, and no other assets to satisfy the general body of creditors, or even to pay the costs of the plaintiff, the court was of opinion that the administrator's right of retainer was not affected by the circumstance of his having paid the money into court, and that the plaintiff was not entitled to have his costs satisfied out of a fund to which the right of retainer extended. D E

The matter is treated in the same way in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 14, p. 334, para. 618 :

The right [of retainer] has priority over the costs of an action to administer the fund. F

Reference is then made to *Chissum v. Dewes* (1) and *Tipping v. Power* (2) as authorities for that.

Mr. Timins, for the plaintiff, argued before me that the decisions in *Chissum v. Dewes* (1) and *Tipping v. Power* (2), so far as they affected the plaintiff's costs of an administration action, were overridden by the Judicature Act, 1890, s. 5, which has now been re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1), which gives statutory effect to R.S.C., Ord. 65, r. 1, and provides as follows : G

Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid. H

In my judgment, this section does not affect *Chissum v. Dewes* (1) and *Tipping v. Power* (2), so far as they deal with the personal representative's

right of retainer. As stated in DANIELL'S CHANCERY PRACTICE, at p. 1021, under the practice of the Court of Chancery, the giving of costs was entirely discretionary, although, in the exercise of that discretion, the court was governed by certain definite principles, and this was the case when *Chissum v. Dewes* (1) and *Tipping v. Power* (2) were decided. In

- A my judgment, the ground of those decisions is contained in the passage which I have quoted from the judgment of WIGRAM, V.-C., in *Tipping v. Power* (2). I do not think that *Re Robey* (4) affects the question. As these decisions which I am relying on do not involve the making of any order depriving the plaintiff of his costs, although the result of the decision
- B may be that there is in fact no fund out of which the plaintiff's costs can be satisfied, I do not think that the Administration of Estates Act, 1925, s. 34, affects the question, and I would refer to the observations of LORD TOMLIN dealing with that section in *A.-G. v. Jackson* (5), at pp. 384, 385. I hold, therefore, on the whole, that the defendant is entitled to retain
- C her debt in priority to the plaintiff's costs of the action.

Defendant entitled to retain her debt in priority to creditor's claim to costs.

Solicitors: *Attenboroughs* (for the plaintiff); *Bridges, Sawtell & Co.* (for the defendant).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

WATKINS v. O'SHAUGHNESSY.

- E [COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), February 3, 1939.]

Insurance—Motor insurance—Duty to insure—Causing or permitting the user of an uninsured car—Breach of statutory duty—Road Traffic Act, 1930 (c. 43), s. 35 (1).

- F At a public auction held by the second defendants, the first defendant bought a motor car. He drove it away, although, to the knowledge of the servants of the second defendants, the car was uninsured and unlicensed. In fact, the servants of the second defendant lent the first defendant the company's trade number plates for the purpose, and supplied him with a slip, referring to a different car but altered by them to appear to refer to the car in question, and assured him that such a proceeding was quite in order. The plaintiff was injured by the alleged
- G negligent driving of the first defendant, but, as a judgment against him would be useless, the plaintiff did not ask for judgment against him, but did ask for judgment against the second defendants, alleging that they had caused or permitted the first defendant to use a motor vehicle in respect of which there was not in existence a policy of insurance in accordance with the Road Traffic Act, 1930, s. 35 :—

- H HELD : as the sale had been completed before the driving of the car by the first defendant, the second defendants had no control over him, and could not, therefore, be said to have "caused or permitted" him, to drive, and, in any event, the acts of the servants of the second defendants were quite unauthorised by them.

[EDITORIAL NOTE.] The lack of means of the first defendant in the present case caused the plaintiff to seek a remedy against the second defendants. Whether or not that remedy was available to the plaintiff depended upon the construction to

be put upon the words "cause" and "permit" in the Road Traffic Act, 1930, s. 35, and the Court of Appeal have taken the view that the acts of the servants of the auctioneers were quite outside the scope of their authority. The county court judge also laid stress on the fact that the auctioneers had ceased to have any control, dominance or compulsion over the driver or the car.

AS TO INSURANCE OF THIRD-PARTY RISKS, see HALSBURY, *Hailsham Edn.*, Vol. 18, pp. 561, 562, paras. 908, 909; and FOR CASES, see DIGEST, Supp., Insurance, A Nos. 3217x-3217 cc.]

Cases referred to:

- (1) *Monk v. Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.
- (2) *Richards v. Port of Manchester Insurance Co., Ltd.* (1934), 152 L.T. 261; B Digest Supp.; *affd.*, 152 L.T. 413.

APPEAL by the plaintiff from an order of His Honour JUDGE LONGSON in the Derby and Long Eaton County Court, dated Sept. 28, 1938. There was an appeal by each of the two plaintiffs in the county court, but the second appeal followed the decision on the first. The judgment of the county court judge, in which the facts are fully set out, was as follows:

In form, these are ordinary running-down actions. On Nov. 16, 1936, the defendant O'Shaughnessy attended an auction sale of cars at Sheffield held by the defendants Kennings on the instructions of a Miss Hossack to purchase a car for her and to bring it to her, complete with licence and insurance, out of the £37 she gave him. O'Shaughnessy bought a car, and, proceeding home, had the misfortune to knock down these two ladies. Liability on the part of O'Shaughnessy is not denied by him, and, on the evidence before me, I come to the conclusion that the plaintiff Watkins is entitled to recover £50 and the plaintiff Hall is entitled to recover £27 10s. The real question here is one of some novelty—namely, are Kennings rightly joined as defendants to share this liability with O'Shaughnessy?

The plaintiffs claim that they are, on two grounds. The first ground is that O'Shaughnessy was the agent of Kennings. The evidence fails entirely to support this suggestion. The defendant O'Shaughnessy attended this sale to purchase a car from Kennings. He paid for the car, completed the purchase, and was well away from the sale when the accident occurred, and under no obligation to, or in no contractual relation with, Kennings. There is no case of agency here. Alternatively, it is claimed ingeniously that Kennings should be held liable under the provisions of the Road Traffic Act, 1930, s. 35 (1).

The argument is that Kennings caused or permitted O'Shaughnessy to be on the road without the requisite insurance policy. The question involved—as to the application of this subsection—is a mixed one of law and of fact. It has been held by the Court of Appeal that, where the person using the inadequately licensed car has brought himself within the provisions of the section, and has rendered himself liable to the penalty, consequent on a conviction, he may still be liable in damages in civil proceedings in respect of the accident that led to those proceedings. Further, it has been held that, if the man using the car is a man of no substance, he, or the person causing or permitting, may be joined as a defendant in the same civil proceedings.

The authorities for that are *Monk v. Warbey* (1) and *Richards v. Port of Manchester Insurance Co., Ltd.* (2). I am satisfied here, on the evidence as to O'Shaughnessy's resources, that, for those proceedings, and for the purpose of securing proper protection of the injured plaintiffs, there was no available recompense to be had from him, and that any person causing or permitting him to use the car while it was inadequately licensed could properly be joined in these proceedings. Are Messrs. Kennings properly so joined? The answer, as I have indicated, is in part law and in part fact. As to the law, I have to address myself to the question of what the Act means by its use of the words "cause" and "permit." For A to cause B to do anything, it seems to me that A must have some control of B's movements. Taking a simple instance, if B, who has an unlicensed car, asks A, who has no material interest in the car and no control over B's movements, which of two roads he can take without police risk, and A advises him to take one in which he is eventually caught by the police, it can hardly be suggested that A caused B to take that road. B was free either to take that road or to abstain

from taking it. There must, in my view, be something involving control, dominance or compulsion of B's movements by A to "cause." Thus, for A to permit B to do anything, the relation between A and B must be such that it is not open for B lawfully to do the thing in question without such permission. It must be open for A to withhold that permission without which B cannot lawfully do the thing in question. Permission to do that thing must be necessary for the thing's performance.

- A** As to the facts here, I find them to be as follow. On the instructions of a Miss Hossack, O'Shaughnessy attended an auction sale conducted by an auctioneer and held on Kennings' premises at Sheffield. In pursuance of those instructions, he purchased a car for £30, and paid for it. The ownership of the car, which up till then had been Kennings', passed to Miss Hossack. It was open to O'Shaughnessy to remove the car, and, under the conditions of the auction, he was under an obligation to Kennings to remove it within a stated time. It was not sold with a current licence or with a current insurance, and it had neither. I gather that it was part
- B** of O'Shaughnessy's instructions to obtain both for it. Incidentally, no log book was handed over to him, but he was told that that would be forwarded to him by post from Burton. I pause at this point to say that, if I am right on the point of construction, Kennings had thus ceased to have any control, dominance or compulsion over either O'Shaughnessy or the car. He was at complete liberty to remove it and take it on to the public road. It was no concern of Kennings that he removed it unlicensed or uninsured. Nevertheless, alive to the risks he ran, O'Shaughnessy consulted Kennings' servants as to the removal and reduction of those risks, and
- C** it was suggested that the car should carry some limited trade licence number plates which Kennings were entitled to use. There was some conflict of evidence as to whether the suggestion came from Kennings or from O'Shaughnessy himself. The suggestion was adopted, and, though to me it seems immaterial whence it came, I may say on this point that I accept the testimony of O'Shaughnessy—whom I found a thoroughly sound and truthful witness—that it came from Kennings' servants. With the plates, there was also given him a slip, being an "extract from
- D** regulations recording the use of limited trade licences." From this slip it appeared that Kennings were licensees. It was not a slip freshly issued to O'Shaughnessy, but was one originally issued to one of Kennings' drivers, and adapted for the occasion by one of Kennings' servants at the auction by erasing the driver's name and substituting O'Shaughnessy's. Thus, for police and tax purposes, it would serve as a licence for the particular car named in it—the man adapting it for O'Shaughnessy had incidentally not altered the original description of the car, "Rover saloon," which O'Shaughnessy's purchase was not—and would no doubt
- E** be covered by any insurance policy taken out by Kennings for what I may call trade cars. For all that, it was no protection for O'Shaughnessy, or for his principal, Miss Hossack, within the requirements of the Road Traffic Act. Armed with these plates and this slip, O'Shaughnessy took the road, and met with this accident. That is to say, he took the road without the requisite and adequate insurance. I have already said that, in my view, Kennings had ceased to have such control of the car as is necessary for me to find that they are responsible for causing
- F** O'Shaughnessy so to take the road, and there is nothing in any later happening that I have narrated to suggest that they had in any way resumed control. I am satisfied, in short, that Kennings did not cause O'Shaughnessy to take the road inadequately insured.

- As to permission—as I understand it—I ask myself whether or not it was necessary for O'Shaughnessy to have Kennings' permission to take the road without adequate insurance. Clearly, it was not. Even without the trade name plates and slip, O'Shaughnessy could have taken the road if he had chosen to do so. That is
- G** to say, Kennings could not have stopped him and could not have objected to his so doing. It had been suggested that he should have the trade name plates and the slip, but, if the suggestion had not been made, or had not been accepted, Kennings could not have stopped him. Thus, if he had gone without them, could it possibly be said that Kennings, knowing—as indeed, for possible contingencies, I find in fact that they did know—that the car was inadequately licensed, had permitted him so to do? They could not have stopped him, for the simple reason that in either
- H** event this permission was irrelevant and unnecessary. In the result, I find that Kennings neither caused nor permitted him, within the meaning of the section, to be on the road inadequately licensed. Unfortunate as indeed it is for these two ladies, the claim fails as against Kennings, and, as I understood from Mr. Smallwood that, as against O'Shaughnessy, the plaintiffs did not ask for judgment, the action will be dismissed with costs.

L. B. Schapiro for the appellant, the plaintiff.

A. J. Flint for the respondents, Kennings, Ltd.

SCOTT, L.J. : This appeal has been well argued by Mr. Schapiro, for the appellant, but in our opinion the issue upon which the case turned before the county court judge was an issue of fact as to whether or not the respondent firm could be said, on the facts in evidence before him, to have caused a particular motor car, which was subsequently in collision on the road, to have been on the road in circumstances involving a breach of the Road Traffic Act, 1930, s. 35 (1). A

The plaintiffs in the county court action were persons injured by a collision with that car in circumstances in which the car has been negligently driven. On the appeal, there was no question as to damages or liability for negligence. The question was whether or not the plaintiffs could recover against persons other than the actual driver of the car, on the ground that those persons had a liability imposed on them by sect. 35 (1). Messrs. Kennings, the persons in question, were auctioneers, who had an auction mart where cars were bought and sold. A lady who wanted to buy a car had one bought for her at the auction by an agent acting for her for the purpose of a purchase. The car having been bought, it was her business to take delivery of the car at the auction mart, and to take it away. Messrs. Kennings had nothing to do with the delivery of the car, or with supplying any equipment for the car, or still less with supplying a driver. The driver in question who was found by her was faced with the position that the requirements of the Road Traffic Act for a car upon the road had not been complied with. In particular, there was no policy in force as required by sect. 35. The car, in fact, was taken away by the purchaser's driver in circumstances in which there was no policy in force, and, therefore, the provision of sect. 35 (1) was not satisfied in regard to that fundamental question. B
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The section provides as follows :

(1) Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act. F

The contravention of that section is made punishable by a serious fine or imprisonment. There being no such policy in force in respect of this car, the appellants sought to prove at the trial before the county court judge facts showing that the firm of auctioneers had caused the driver to use the motor vehicle on the road without the policy within the meaning of the section. That issue was an issue of pure fact as to whether or not they had so caused the vehicle to be used. I say pure fact, but there was one question partly of law involved in it, because the evidence tendered in proof of such an act of causing was that the driver had been supplied with certain trade plates, as they were called, for this car, and a slip, purporting to be given under another section of the Act, which had been made out for a totally different kind of car, and had nothing whatever to do with this car, which persons G
H

in the employ of the auctioneers on the spot altered in such a way that it might appear to be a slip applicable to this car, except for the fact that the description of the car in the slip was left unaltered. He said (and the judge accepted his view) that an assurance was given to him by the servants of the auctioneers that, so equipped,

A he would be protected by some policy of insurance which the firm had. These are the only facts proved which, it was submitted, constituted *prima facie* proof that the auctioneers' servants had caused the car to be on the road in breach of the section. The servants were not parties to the litigation. It was their employers, the auctioneers,

B who were made parties. The driver was also made a party, and undoubtedly had been guilty of negligence, but it was found as a fact by the judge that he had no means, and, that being so, under the Act it was submitted that the plaintiffs had a right to succeed against the person who had caused the car to be on the road without a policy, and a right

C to recover in such an action, on the ground that the auctioneers had caused it to be on the road, and that, therefore, they would incur a liability in damages for the injuries caused by the motor accident. In order to succeed on that issue, however, it was essential for the plaintiffs to give *prima facie* evidence that these apparently unauthorised, and

D obviously improper, acts by the servants of the auctioneers were acts for which the auctioneers as principals, masters of the servants, might properly be held responsible in law. I can see no ground whatever for the submission that that question is a question of law which can properly be brought before this court. The judge tried the case fully, and he

E gave a careful, written judgment, after reserving it. The whole of the judgment has been considered by this court, and I would like to say that, in my opinion, he dealt with every issue, either of fact or of law, with great clearness, with perfect correctness as regards the law, and with ample evidence, thus making it quite impossible for us to interfere with

F his decision on any issue of fact. He held that there was no evidence to show that Messrs. Kennings either caused or permitted the driver to be on the road without the requisite insurance policy, and, unless there is some error of law in that finding, since there was evidence upon which he could arrive at that finding, the appeal must necessarily stand

G dismissed.

The strongest point made for the appellant was that the suggestion for the use of these improper means for putting the car upon the road came from the servants of Kennings, and that the driver was in fact assured by those servants that, in those circumstances, the insurance

H would be all right, or words to that effect. The judge found that the driver gave his evidence honestly, and he accepted his evidence. Nevertheless, the fact that the servants did volunteer those suggestions raises no presumption whatever as to the scope of their authority. I can conceive no legal ground at all for assuming that auctioneers, who had nothing to do with the delivery of cars bought at their auction mart,

had given servants at the auction mart any authority whatever in respect of the matter of the taking away of cars from the auction mart. There is, therefore, no ground for submitting, as was submitted by counsel for the appellant, that there was a general authority of these servants which would make the actual authority to do the particular act a question that did not affect the legal liability of their principals. **A** In my view, what they did was wholly outside the scope of their general authority. No evidence was given that their act was in any way expressly authorised by the auctioneers, and, therefore, I entirely fail to see any ground whatever for complaining of the judge's judgment, which, if I may respectfully say so, seems to me wholly correct, for the reasons **B** he himself gave. The appeal must be dismissed, with costs.

CLAUSON, L.J. : I agree. In saying that, I need say no more on the point as to whether or not the servants of Kennings had any authority to do what they did. I wish to add only that, had I been persuaded **C** that they had such authority, I should still not have been prepared, in the circumstances of this case, to differ from the view which the judge took, which he expresses in these words :

... in my view, Kennings had ceased to have such control of the car as is necessary for me to find that Kennings are responsible for causing O'Shaughnessy so to take the road, and there is nothing in any later happening that I have narrated to suggest that they had in any way resumed control. I am satisfied, in short, that Kennings did not cause O'Shaughnessy to take the road inadequately insured. **D**

FINLAY, L.J. : Agreeing, as I do, with SCOTT and CLAUSON, L.JJ., and, I may add, with the admirable judgment of the county court judge, **E** I do not myself desire to add anything, except to express my entire concurrence.

Appeal dismissed with costs.

Solicitors : *Crossman, Block & Co.*, agents for *Alfred E. H. Sevier*, Derby (for the appellant); *Pattinson & Brewer*, agents for *Flint*, **F** *Marsden & Bishop*, Derby (for the respondents, Kennings, Ltd.)

[*Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.*]

POLIAKOFF v. NEWS CHRONICLE, LTD. **G**

[COURT OF APPEAL (MacKinnon and Goddard, L.JJ., and Lewis, J.),
January 31, 1939.]

Practice and Procedure—New trial—When ordered—Verdict clearly given for wrong party—Payment in—No miscarriage of justice—R.S.C., Ord. 39, r. 6. **H**

The defendants had published in their newspaper what was in effect a translation of a paragraph which had appeared in a newspaper of which the plaintiff was the proprietor. It was substantially agreed that the words were defamatory, and that they referred to the plaintiff. In an action for libel, the jury found a verdict for the defendants. On appeal, it was contended by the plaintiff that he must have been entitled to a

verdict, even though the damages might have been only nominal. It appeared that there had been a payment into court of more than the jury could have reasonably awarded as damages :—

HELD : if a new trial were ordered, it could only result in a verdict for nominal damages. Having regard to the payment into court, there had, therefore, been no substantial wrong or miscarriage of justice, even though there had been misdirection to the jury, and the court was entitled, applying the provisions of R.S.C., Ord. 39, r. 6, to refuse to order a new trial.

[EDITORIAL NOTE.] Upon this appeal, it was clear that the jury in the court below had given an impossible verdict. Generally speaking a party who secures the verdict of a jury is entitled to have judgment entered for him with costs. Therefore, in an ordinary case, if the Court of Appeal should, so to speak, reverse the verdict of the jury, a difficult question of costs would arise. It appeared here, however, that there had been a payment into court of a sum greater than the amount of any damages which the jury could have awarded, and, therefore, the party paying in would have been entitled to an order for costs from the date of payment in. In the circumstances, therefore, there had been no miscarriage of justice, and the Court of Appeal found it possible to avoid putting the parties to the expense of a new trial.

AS TO ORDERING A NEW TRIAL, see HALSBURY, Hailsham Edn., Vol. 26, pp. 124-128, paras. 245-252; and FOR CASES, see DIGEST, Practice, pp. 590-605, Nos. 2314-2464. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 687-695.]

D Cases referred to :

- (1) *Levi v. Milne* (1827), 4 Bing. 195; 32 Digest 10, 4; 5 L.J.O.S.C.P. 153.
- (2) *Jones v. Jones*, [1916] 2 A.C. 481; 32 Digest 28, 177; 85 L.J.K.B. 1519; 115 L.T. 432.
- (3) *Farmer v. Hyde*, [1937] 1 K.B. 728; [1937] 1 All E.R. 773; Digest Supp.; 106 L.J.K.B. 292; 156 L.T. 403.
- (4) *Hobbs v. Tinkling*, *Hobbs v. Nottingham Journal*, [1929] 2 K.B. 1; Digest Supp.; 98 L.J.K.B. 421; 141 L.T. 121.
- (5) *Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency*, [1919] A.C. 304; 32 Digest 113, 1453; 88 L.J.K.B. 194; 120 L.T. 289.

F APPEAL by the plaintiff from a verdict and judgment at a trial before LORD HEWART, L.C.J., and a special jury, dated July 22, 1938. The facts of the case are fully set out in the judgment of MACKINNON, L.J.

D. N. Pritt, K.C., and *C. H. Duveen* for the appellant.

Norman Birkett, K.C., and *Valentine Holmes* for the respondent.

Pritt, K.C. : Defamation is always actionable when damage is proved :
G *Jones v. Jones* (2), at p. 500. The matter complained of here was clearly defamatory, and therefore there must have been some damage, however small, caused to the plaintiff. He was entitled to a verdict, and the case should be retried. [Counsel referred to *Farmer v. Hyde* (3).]

Birkett, K.C. : The statement complained of was a quotation from the
H plaintiff's own newspaper. It was said that he made a certain statement, and he in fact did make it. More than a year elapsed before he issued his writ. During that time, he was doing nothing except trying to make money out of this matter. The verdict should stand. This action should never have been brought, and the jury can say so. There is no authority that a jury may find that there has been defamation, and may yet find

for the defendant. [Counsel referred to *Hobbs v. Tirling*, *Hobbs v. Nottingham Journal* (4).] A jury has that power. *Farmer v. Hyde* (3) has no application to this case. The jury have assessed the damages. They have assessed them at nothing. This is a case where the court should apply the provisions of R.S.C., Ord. 36, r. 9. There has been no substantial wrong, and no miscarriage of justice. A

Holmes : If the words were defamatory, and the jury found a verdict for the defendants, then it was the duty of the judge to enter judgment for the plaintiff for nominal damages. This court can put that right without a new trial. [Counsel referred to *Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency* (5).] B

Pritt, in reply, referred to GATLEY ON THE LAW OF LIBEL AND SLANDER, 2nd Edn., p. 800, and *Levi v. Milne* (1).

MACKINNON, L.J. : In this case, the plaintiff, who is a Russian, was the proprietor of the PARISER TAGEBLATT, a newspaper published in Paris in German. In the issue of June 11, 1936, in the centre of the front page, under a large heading, there was a paragraph of which we have had a translation : C

We are obliged to make known the following facts to our readers and to the public : The proprietor of the PARISER TAGEBLATT, Vladimir Poliakov [the plaintiff], about ten days ago conducted negotiations with Dr. Schmolz, the chief of the Press and propaganda department of the German Embassy in Paris and the special Nazi representative for the supervision of German refugees in France. As a result, the Editor-in-Chief of the PARISER TAGEBLATT, Georg Bernhard, who is at present attending a congress in America, has been dismissed. The managing director of the paper has also been dismissed by Poliakov . . . D

Then, whoever inserted the statement said that they were going to start a new paper called the PARISER TAGESZEITUNG, and E

. . . prevent this Hitler propaganda coup and expose the shameless treachery of the proprietor.

On June 12, the next day, in the issue of the defendants' paper, the NEWS CHRONICLE, there appeared at the bottom of one of the columns this paragraph : F

Hitler's Deal in Paris.
Anti-Nazi Journal Purchased.
From our own Correspondent.

Paris, Thursday. G

The PARISER TAGEBLATT, the organ of anti-Nazi German refugees in France, edited by Professor Georg Bernhard, has been bought by Hitler. The newspaper announced today that M. Wladimir Poljakof, its proprietor, had negotiated the sale with Dr. Schmolz, head of the Press services at the German Embassy here. The entire staff has resigned and will start a new anti-Nazi paper.

In effect, this was a reproduction in a much shortened form of the announcement which appeared in the plaintiff's own paper the day before. That was on June 12, 1936. The defendants heard nothing about it until July 6, 1937—that is, more than a year later—when a letter was written by the plaintiff's solicitors to the defendants complaining of that publication as a libel on him, followed by the issue of a writ on H

July 12, 1937, in which the plaintiff sets out that paragraph and alleges as follows :

A By the said words the defendants meant and were understood to mean that the plaintiff had sold the organ of the German refugees to their oppressors, that he had betrayed his race, his friends and his associates, that he had done these things for the purposes of gain and he had thereby shown himself to be a base and despicable individual.

The defendants denied the innuendo, and said that the words were incapable of bearing the alleged meaning.

B The case came on for hearing before LORD HEWART, L.C.J., and a special jury a year later still, on July 22, 1938. The only evidence called was that of the plaintiff. He was chiefly cross-examined from the point of view of showing that he had suffered very little damage by this alleged libel, and that, to the extent to which he had suffered any damage, he had already been compensated for it elsewhere. He had recovered frs.10,000 in the courts of France, and he had sued another English paper and recovered £400 damages by their submission by way of compromise. He was also cross-examined on the fact that for over a year he had done nothing in regard to the defendants' publication. From the course of that cross-examination, and from the summing up, although at the end of the plaintiff's case Mr. Birkett did make a submission to the judge that the words were incapable of a defamatory meaning, which submission was overruled, it is apparent to me that the real test in the court was as regards the measure of damages. That probability is increased by the fact that, as we perhaps not very properly know, but cannot fail to know, because it appears in the shorthand note, the defendants had made a payment into court of a substantial amount of money. LORD HEWART, L.C.J., summed up to the jury, and that summing up is open to the criticism that little or no guidance was given to them as to what amounts to defamation and as to the matters that they ought to consider in deciding, as it was for them to decide, whether or not this statement was in fact defamatory, LORD HEWART, L.C.J., having ruled that, in his view, it was capable of being treated as defamatory. Most of the summing up, in accordance with what I have said that I infer to have been the real contest in the court and in counsel's speeches, was directed to the question of damages, and the final words of LORD HEWART, L.C.J., were as follow :

G Do you or do you not think that the plaintiff's counsel was perfectly right when he said : " This is a small case " ? If you think it is a small case, you will have an opportunity of showing that state of mind by the verdict you return. Will you kindly consider your verdict.

H The jury, having retired, returned into court, and said that they were all agreed, and that they found a verdict for the defendants. On LORD HEWART, L.C.J., making some sort of invitation to them, they added that, in their view, the action should never have been brought. Motion is made here for a new trial on the ground that the words were obviously capable of being defamatory, and that, the jury never having been properly

directed on the question as to whether or not the words were defamatory, there was no evidence on which the jury could find a verdict for the defendants, and that they must have found a verdict for the plaintiff for some amount of damages. I think that that is true. The real objection that can be made to the proceedings is that, when the jury said that they found for the defendants, I think that, to be in order, LORD HEWART, A L.C.J., ought to have said to the jury: "You cannot find for the defendants, but you must find something for the plaintiff." Thereupon the jury, I have not the slightest doubt, would have said: "Very well. If we must find something, we will find $\frac{1}{4}d.$ or 40s." If that had taken place, no objection to the result of the trial could have been taken. B Unfortunately, that did not take place. Mr. Birkett, for his own safeguarding, did not say, "Well, perhaps the jury had better return a nominal verdict for some damages," and ask that it should be reconsidered by them in that light. Mr. Pritt, who had this matter in mind, perhaps for other reasons, did not make a similar suggestion, because in asking C for a stay of execution he said: "The action being, as an action, completely undefended, if the jury had returned a verdict for the plaintiff for a small sum of money, it would have been very different. When they return a verdict for the defendants, however, there is something obviously wrong, and I should like to consider it." He has considered it, and his client has D brought this motion for a new trial on the ground that there was misdirection, and that, if properly directed, the jury must have found a verdict for some sum in his favour. If we sat here as umpires to preside over the game of litigation as pleaded by counsel for the parties, it might be that, upon all those facts, we should say: "The rules were not strictly E observed and there must be a new trial." In the old days, in a case which was cited to us, *Levi v. Milne* (1) in 1827, BEST, C.J., said, at p. 198:

It is one of the most beautiful parts of our constitution, that when any thing occurs in one tribunal which appears to be wrong, it may be afterwards corrected by another. . .

In those days, this would have appeared to be wrong, and we should have had to correct it in that way. Nowadays, however, we do not act with such nice application of the rules of litigation, and it is wisely provided as follows by R.S.C., Ord. 39, r. 6: F

A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned. . . G

I am quite satisfied that, although I think there was misdirection in this case, it only resulted in the jury saying "Verdict for the defendants" instead of "Verdict for the plaintiff for $\frac{1}{4}d.$ " or, at the outside, perhaps, "40s. damages," and, as we are apprised, whether rightly or H wrongly, I cannot get it out of my head that there was a payment into court, of which we have also heard, of £100. Whatever criticism may be made as to the conduct of the trial below, and whatever suggestion of misdirection may be urged upon a critical examination of the summing up, it is manifest that no substantial wrong or miscarriage was thereby

occasioned. That being so, I am satisfied that we ought not to order a new trial, and I arrive at that result because it is manifest to me that, if we did order a new trial, it would only cause the waste of a good deal of money in costs, when, upon the whole of the facts of the case, no other result could possibly be arrived at except that which, as I have said, was

A practically the result of the present case—namely, a verdict for the plaintiff for a nominal sum, although in form the verdict was incorrect in that it said : “ Verdict for the defendants.” The result of this is, I think, that the appeal fails, and must be dismissed.

- B GODDARD, L.J. : I agree. When one is considering a case of misdirection, and considering whether any substantial wrong or miscarriage has been done, the question to ask oneself is what would have happened if this jury—not some other jury at a subsequent time—had been properly directed. It is quite obvious, I think, from the cross-examination
- C and conduct that we have seen of the trial that has taken place, as MAC-KINNON, L.J., has said, that this case was not substantially fought below on the ground that the words were not a libel. The substance of the dispute at the trial was the damages that the plaintiff was to have. Was he to have in substance nothing, or was he to have so small a sum as
- D would amount to nothing, or was he to have substantial damages ? LORD HEWART, L.C.J., I think, quite clearly told the jury, as appears in his summing up, that this was a libel. He referred to it over and over again as a libel, and he said that the plaintiff had been defamed, and so forth. I think that it was quite clear that the case had been fought,
- E and was left to the jury, on the basis that this was a libel. It was said, however : “ This is a mere money-making action. You have had an ample opportunity to clear your character. It has been cleared by a statement in court in another action. You have received very generous compensation in that action, considering the circumstances of the case, and
- F it was your own paper that really had made the statement of which you complain.” Consequently, it was said : “ You ought really to have nothing at all—that is to say, a mere nominal sum.” Although there was not as clear a direction as one might have wished, the jury came back and said that they found a verdict for the defendants. Thereupon,
- G I think, a direction ought to have been given to them below : “ You must find a verdict for the plaintiff for such damages as you think right.” I think that the fact that that was not said to the jury at the time amounts to a misdirection, but, when one has this jury, who ought to have been thus directed, saying, “ In our opinion, this action ought never to have
- H been brought,” it is inconceivable that, if that direction had been given to them, they would have given anything but nominal damages. What rather troubled me during the argument was whether or not we should say that the jury ought to have been asked to find specific damages, because they might have given a farthing, they might have given 40s., or they might have given £5, but it is inconceivable that, when a jury

say that they find for the defendants because they think that the action ought not to have been brought, if they had been told that they were bound to find a verdict for the plaintiff, they would have given anything like the sum which had been paid into court. Therefore, it seems to me that no substantial wrong or miscarriage has been done, and it would certainly be a great disaster if this court felt bound, in the circumstances, to send the case down for a new trial. It seems to me that what we have to consider is whether or not the judgment which was entered was right, and whether or not the money that was paid into court would have amply compensated the plaintiff, whatever the jury had given, bearing in mind that they could not have given more, in view of their express statement. It is clear that the judge had ample power to direct that the plaintiff should pay the costs of the action. Therefore, I think that we need not order a new trial, but we can say that this is one of the cases which is saved by R.S.C., Ord. 39, r. 6, and that no substantial wrong or miscarriage has been done.

LEWIS, J. : I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Windybank, Samuëll & Lawrence* (for the appellant); *Lewis & Lewis* (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

PAKALA NARAYANA SWAMI v. KING-EMPEROR.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter and Sir George Rankin), **December 12, 13, 15, 16, 19, 1938, January 20, 1939.**]

Privy Council—India—Criminal law—Murder—Statement made to police by accused while in custody—Admissibility in evidence—Code of Criminal Procedure, s. 162 (1)—Code of Criminal Procedure Amendment Act (India), 1923, s. 34.

The appellant was convicted of the murder of Kurree Nukaraju, and was sentenced to death. On Mar. 23, 1937, the body of the deceased man was found in a steel trunk at Puri, the terminus of a branch line on the Bengal Nagpur railway, where the trunk has been left unclaimed. The medical evidence left no doubt that the man had been murdered. Some days later the accused was examined by the police at his house, and, it was alleged, made a statement to the effect that the deceased had come to his house on the evening of Mar. 21, slept in one of the outhouse rooms for the night, and left on the evening of Mar. 22 by the passenger train, and this statement was admitted in evidence for the prosecution in the court below. It had been proved by other evidence of overwhelming strength that the deceased reached the accused's house at the critical time, that a trunk had been bought by order of the accused and taken to his house on Mar. 22, and that the same trunk containing the body of the deceased was placed on the train at Berhampur on Mar. 23, having been conveyed there in a vehicle ordered by the accused, in which he and the trunk travelled to the station. A statement had also been made by the widow of the deceased that he had

* told her that he was going to Berhampur, as the accused's wife had written and told him to go and receive payment of his dues :—

HELD : (i) the statement was not admissible in evidence, even when made by the person ultimately accused.

(ii) there was ample evidence of the presence of the deceased at the accused's house, the only fact which the statement sought to establish. In the circumstances, it was impossible to say that the proceedings had resulted in a failure of justice.

(iii) the statement of the widow of the deceased's was rightly admitted as a statement as to circumstances which resulted in the death of the deceased.

[EDITORIAL NOTE. It has been found necessary in India to make special provision by statute as to the reception in evidence of statements made by the accused. Upon the construction of these provisions different views have been expressed in the Indian courts, and the present appeal to the Privy Council is for the purpose of deciding between these conflicting views.

AS TO ADMISSION OF STATEMENTS BY ACCUSED, see HALSBURY, Hailsham Edn., Vol. 9, pp. 203-207, paras. 291, 292 ; and FOR CASES, see DIGEST, Vol. 14, pp. 414-417, Nos. 4318-4357.]

Cases referred to :

- (1) *King-Emperor v. Azimuddy* (1926), I.L.R., 54 Cal. 237.
- (2) *King-Emperor v. Syamo* (1932), I.L.R., 55 Mad. 903.
- (3) *Grey v. Pearson* (1857), 6 H.L. Cas. 61 ; 42 Digest 626, 277 ; 26 L.J.Ch. 473 ; 29 L.T.O.S. 67 ; *affg. S.C. sub nom. Pearson v. Rutter* (1853), 3 De G.M. & G. 398.
- (4) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531 ; 42 Digest 649, 563 ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53 ; *affg. S.C. sub nom. R. v. Income Tax Comrs.* (1888), 22 Q.B.D. 296.
- (5) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85 ; 42 Digest 650, 569 ; 3 L.T.O.S. 277.
- (6) *Stowel v. Zouch* (Lord) (1569), 1 Plowd. 353 ; 42 Digest 635, 378.
- (7) *Kanhaiyalal v. Baijnath* I.L.R., 29 Nagpur 201.
- (8) *Ameen Sharif v. Emperor* (1934), I.L.R., 61 Cal. 607.
- (9) *Jogendranath Gorai v. Emperor* (1935), I.L.R., 63 Cal. 419.
- (10) *Imperatrix v. Pandharinath* (1881), I.L.R., 6 Bombay 34.
- (11) *Queen-Empress v. Nana* (1889), I.L.R., 14 Bombay 260.
- (12) *R. v. Kangal Mall* (1905), I.L.R., 41 Cal. 601 ; 14 Digest 404, case 4245 v.
- (13) *Vaithinatha Pillai v. King-Emperor* (1913), 40 1 A. 193.
- (14) *King-Emperor v. Maung Tha Din* (1926), 4 Rangoon 72.
- (15) *King-Emperor v. Haji Sher Mahomed* (1921), I.L.R., 46 Bombay 961.

APPEAL by special leave from a judgment of the High Court of Judicature at Patna (SIR COURTNEY TERREL, C.J., and MANOHER LALL, J.), dated Nov. 9, 1937, dismissing an appeal by the appellant from a verdict and sentence of death passed on him by the sessions judge (J. A. BYERS, I.C.S.) of the Ganjam-Puri Division, in the province of Orissa, dated Sept. 15, 1937. The facts of the case are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

D. N. Pritt, K.C., and H. W. Williams, for the appellant, referred to *Kanhaiyalal v. Baijnath* (7), *Ameen Sharif v. Emperor* (8), *Jogendranath Gorai v. Emperor* (9), *Imperatrix v. Pandharinath* (10), *Queen-Empress v. Nana* (11), *R. v. Kangal Mall* (12) and *Vaithinatha Pillai v. King-Emperor* (13).

G. D. Roberts, K.C., W. Wallach, and J. Megaw, for the respondent, referred to : King-Emperor v. Syamo (2), King-Emperor v. Maung Tha Din (14) and King-Emperor v. Haji Sher Mahomed (15).

LORD ATKIN : This is an appeal by special leave from a judgment of the High Court of Patna, who affirmed the decision of the sessions judge at Berhampur who had convicted the appellant of the murder of one Kur-ree Nukaraju and sentenced him to death. The accused, his wife, his wife's brother, and his clerk living at his house were charged with the murder before the subdivisional magistrate, Chatrapur, in May and June, 1937. After hearing the evidence, the examining magistrate discharged all the accused, holding that there was no sufficient evidence to support the charge. Thereupon the sessions judge at Berhampur, exercising his powers under the code of Criminal Procedure, called upon the accused to show cause why they should not be committed for trial, and in July, 1937, ordered the present accused and his wife to be committed to the Court of Sessions to stand their trial for offences under the Criminal Code, sects. 120 B (conspiring to murder), 302 (murder), and 201 (causing evidence of an offence to disappear). At the trial, the sessions judge acquitted the appellant's wife of all the charges, but convicted the appellant of murder, and sentenced him to death. The appeal is based upon the admission of certain evidence said to be made inadmissible by provisions of the Code of Criminal Procedure and the Evidence Act, and is further maintained upon the contention that, whether the disputed evidence be admitted or not, and certainly if it ought to have been rejected, there is no evidence sufficient to support this conviction.

On Tuesday, Mar. 23, 1937, at about noon, the body of the deceased man was found in a steel trunk in a third-class compartment at Puri, the terminus of a branch line on the Bengal Nagpur railway, where the trunk had been left unclaimed. The body had been cut into seven portions, and the medical evidence left no doubt that the man had been murdered. A few days elapsed before identification, but eventually the body of the deceased was identified by his widow. He was a man of about 40, and had been married about 22 years. He had been a peon in the service of the Dewan of Pithapur, one of whose daughters was the wife of the accused. It was suggested by the prosecution that before her marriage, and about 19 years before the events in question, the wife of the accused, then a girl of about 13, had had an intrigue with the deceased. Four letters were produced by the deceased's widow purporting to be signed by the girl, bearing date 1918, supporting this suggestion. The judge was not satisfied with the evidence of handwriting, there was no other evidence worth considering in support, and this suggested motive must be definitely rejected. The fact, however, remains that the deceased was in possession of these four documents purporting to be signed by the wife of the accused. About 1919, the accused and his wife were married. They went to live at Berhampur, about 250 miles from Pithapur. About

1933, they returned to Pithapur, where they appear to have stayed with her father. They seem at that time to have been in need of money, and during 1936 the accused's wife borrowed from the deceased man at various times, and in relatively small sums, an amount of Rs.3,000, at interest at the rate of 18 per cent. per annum. About 50 letters and
A notes proving these transactions, signed by the accused's wife, were found in the deceased man's house at Pithapur after his death. On Saturday, Mar. 20, 1937, the deceased man received a letter the contents of which were not accurately proved, but which, it was reasonably clear, invited him to come that day or next day to Berhampur. It was unsigned.
B The widow said that on that day her husband showed her a letter and said that he was going to Berhampur, as the appellant's wife had written to him and told him to go and receive payment of his due. This evidence was objected to. It was admitted as falling under the provisions of the Indian Evidence Act, 1872, s. 32 (1). The admission of this evidence
C is one of the grounds of the appeal, and will be discussed later. The deceased left his house on Sunday, Mar. 21, in time to catch the train for Berhampur. On Tuesday, Mar. 23, his body was found in a trunk in the train at Puri, as already stated.

Police suspicion does not appear to have been directed against the
D accused and his household until Apr. 4, on which date the police visited the house, examined the inhabitants, and obtained a statement from the accused the admissibility of which is one of the principal grounds of the appeal. They searched the premises, as is said, for incriminating documents only, and in the afternoon arrested the four persons already
E mentioned. In addition to evidence of the facts above stated, the prosecution adduced the evidence of two employees in a shop at Berhampur where trunks were made and sold, who gave evidence that on Monday, Mar. 22, in the afternoon, the dhobie, or washerman, of the accused called at the shop and ordered a trunk, and that a trunk was
F taken to the accused's house and shown to him and his wife. It was rejected as being too large, and a smaller one, of the size of the trunk in question, was then delivered to the dhobie at the shop, and he took it away. The transaction was entered in the rough day-book and in the fair-copy book of the shop as of the day in question, and, though the trial
G judge thought that the entry had been tampered with so as to insert the height of the trunk, the trial judge and the High Court, both of whom inspected the entries, were satisfied that they genuinely established the sale of such a trunk on that day. The witnesses identified the trunk in which the body was found as being the trunk of their manufacture
H which was sold in the circumstances stated on the Monday afternoon. The dhobie was called, and proved the purchase of a trunk after the rejection by the accused of the first one brought from the shop. He, however, placed the date as being on a Saturday. The judge thought that his evidence was unreliable, and said that he ignored it. He found, however, that the sale of the particular trunk was proved to have taken

place, as stated by the witnesses, on Monday, Mar. 22. The prosecution then sought to prove that the accused took the trunk to the train in which it was found on Tuesday, Mar. 23. Evidence was given by a jetka driver, who lived near the accused, that, early in the morning, some four months before the trial, the accused had come to his house and said he wanted a jetka, that he drove to the accused's house, where a trunk A which was like the trunk in question was loaded on the jetka, and that he drove the accused with the trunk to the station, where the trunk was unloaded and taken into the station. The evidence was corroborated by a man who ran alongside the jetka in charge of the horse, which was fresh. The defence relied strongly on statements made by both these B witnesses on cross-examination that they remembered that the occasion was a Saturday as it was a *shandy* (fair) day at Berhampur. Both courts accepted the evidence as relating to the carriage of this trunk on Mar. 23. They thought that the difference as to date was an inaccuracy due to a *bona fide* mistake. A witness of repute spoke to seeing the C accused at the station on the morning of Mar. 23, when the train on which the trunk was found arrived. He could not say that he saw the accused enter the train. When the accused was examined by the police at his house on Apr. 4, it is alleged that he made the statement which the defence sought to have rejected, and which must be further discussed. D The alleged statement was that the deceased had come to his house on the evening of Mar. 21, slept in one of the outhouse rooms for the night, and left on the evening of Mar. 22 by the passenger train, that on the morning of Mar. 23 the accused went to the station with Gangulu (the jetka driver) on his jetka, and went off by the passenger train to Chatrapur E on some private business with one Delhi Chiranjivirao, and, hearing at the Chatrapur station that this man was away, he returned by the Vizagapatam passenger train as far as Jagannadhpur, whence he went to Narendrapur to see one Juria Naiko. He, too, was absent, so the accused returned to Berhampur by jetka. This statement was obviously impor- F tant, for it admitted that the murdered man arrived at the accused's house on Mar. 21. Both courts admitted it. Their Lordships are of opinion that it should have been rejected, for reasons that will be given later. The accused and the other three members of his household were arrested on Apr. 4, and the house remained unoccupied. On Apr. 7, G a further search of the premises was made by the police, and a bundle of rags which apparently had been washed but contained bloodstains was found buried at a depth of about 18 ins. in the compound. Some rags, also bloodstained, but still damp, were found in a box in the bathroom. The trial judge accepted this evidence. On appeal, both of the judges H thought that the articles found were not on the premises when the police searched on Apr. 4. MANOHER LALL, J., thought that the discovery was made in highly suspicious circumstances, and that no inference should be drawn against the accused in respect of it. In this state of the case, their Lordships think that it would be unsafe to rely upon the

discoveries on Apr. 7. Before the examining magistrate, the accused's statement was that he was not guilty. He had come to Berhampur on Mar. 17 in connection with a lawsuit, of which he gave some particulars. He neither purchased the trunk through the washerman nor took it to any place in any jetka. The deceased never came to his house at any time in March, 1938. He did not know the deceased. At the trial, he said that the statement he had made in the lower court was correct. When asked by the judge whether he could suggest any reason why so many witnesses should come and give evidence against him, he said : "The witnesses are mistaken, and the police are suffering from excessive zeal."

The first question with which their Lordships propose to deal is whether the statement of the widow—that on Mar. 20 the deceased had told her that he was going to Berhampur, as the accused's wife had written and told him to go and receive payment of his dues—was admissible under the Indian Evidence Act, 1872, s. 32 (1). That section provides as follows :

Statements written or verbal of relevant facts made by a person who is dead . . . are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.

A variety of questions as to the effect of this section has been mooted in the Indian courts. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, and that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to expect to be killed. The circumstances must be circumstances of the transaction. General expressions indicating fear or suspicion, whether of a particular individual or otherwise, and not directly related to the occasion of the death, will not be admissible. However, statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence," which includes evidence of all relevant facts. It is, on the other hand, narrower than *res gestae*. Circumstances

must have some proximate relation to the actual occurrence, though—as, for instance, in a case of prolonged poisoning—they may be related to dates at a considerable distance from the date of the actual fatal dose.

It will be observed that “the circumstances” are those of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that “the cause of [the declarant’s] death comes into question.” In the present case, the cause of the deceased’s death comes into question. The transaction is one in which the deceased was murdered on Mar. 21 or Mar. 22, and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on Mar. 20 or Mar. 21—that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused’s house—appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.

It is now necessary to discuss the question whether the alleged statement of the accused to the police before arrest was protected by the Code of Criminal Procedure, s. 162 (1), which provides as follows :

No statement made by any person to a police officer in the course of an investigation under this chapter shall if reduced into writing be signed by the person making it : nor shall any such statement or any record thereof whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such trial was made.

This section, which, in its amended form, was substituted for the original section by the Code of Criminal Procedure Amendment Act, 1923, s. 34, has been the subject of repeated decisions in the High Courts of India, and has given rise to a distinct cleavage of opinion. The majority of the High Courts have held that it has no application to a statement made by a person who, at the time it is tendered in evidence, is an accused person. The minority have held that there is no such limitation. Their Lordships have been referred to at least twelve reported cases, all of which, with others, they have considered. The representative opinions on either side may be taken to be *King-Emperor v. Azimuddy* (1) in a judgment of RANKIN, J., (as he then was), admitting such a statement against the accused, and *King-Emperor v. Syamo* (2), in a judgment of REILLY, J., sitting in a full Bench of the High Court of Madras, rejecting the statement. The present Board have had the advantage of the presence of SIR GEORGE RANKIN in giving a full consideration to all the reported decisions, and they have come to the conclusion that the words of the section lead to the conclusion that the statement is not admissible, even when made by the person ultimately accused.

The reference in the section to “this chapter” is to the group of sections beginning with chapter XIV forming Part V of the code entitled “Information to the police and their powers to investigate.” After giving

powers to certain police officers to investigate certain crimes, the code proceeds in sect. 160 to give power to any police officer making an investigation by an order in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By sect. 161, any policeman making an investigation under the

A chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those the answers to which may tend to incriminate him. Then follows the section in question, which is drawn in the same general way relating to "any person." That

B the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often involves the examination of a number of persons none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement, if recorded, from being signed must apply to

C all the statements made at the time, and must, therefore, apply to a statement made by a person possibly not then even suspected, but eventually accused. "Any such statement" must, therefore, include such a case, and it would appear that, if the statement is to be admitted at all, it can only be by limiting the words "used for any purpose" by

D the addition of such words as "except as evidence for or against the person making it when accused of an offence." If such an exception were intended, one would expect to find it expressed, and their Lordships cannot find sufficient grounds for so departing from the plain words used. If one had to guess at the intention of the legislature in framing a section

E in the words used, one would suppose that they had it in mind to encourage the free disclosure of information, or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements, or both. In any case, the reasons would apply, as might be thought, *a fortiori* to an alleged statement made by a person ultimately

F accused. In truth, however, when the meaning of words is plain, it is not the duty of the courts to busy themselves with supposed intentions. As was said by LORD WENSLEYDALE in *Grey v. Pearson* (3), at p. 106 :

I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in

G construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

Words to the same effect were used by LORD HALSBURY, L.C., in

H *Income Tax Special Purposes Comrs. v. Pemsel* (4), at pp. 542, 543 :

My Lords, to quote from the language of TINDAL, C.J., when delivering the opinion of the judges in the *Sussex Peerage Case* (5), at p. 143 : "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held

a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to DYER, C.J. (*Stowel v. Zouch* (Lord) (6), at p. 369), is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress."

In this case, the words themselves declare the intention of the legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning, whether in the interests of A the prosecution or in those of the accused. It would appear that one of the difficulties that has been felt in some of the courts in India in giving the words their natural construction has been the supposed effect on the Indian Evidence Act, 1872, ss. 25, 26, 27. Sect. 25 provides that no confession made to a police officer shall be proved against an accused. B Sect. 26 provides that no confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. Sect. 27 is a proviso that, when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer, so much of such information, whether it C amounts to a confession or not, may be proved. It is said that to give sect. 162 of the code the construction contended for would be to repeal sect. 27 of the Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can, in some circumstances, stand together. Sect. 162 is confined to statements D made to a police officer in course of an investigation. Sect. 25 covers a confession made to a police officer before any investigation has begun, or otherwise not in the course of an investigation. Sect. 27 seems to be intended to be a proviso to sect. 26, which includes any statement made by a person whilst in custody of the police, and appears to apply to such E statements to whomsoever made—for example, to a fellow-prisoner, a doctor or a visitor. Such statements are not covered by sect. 162. Whether to give to sect. 162 the plain meaning of the words is to leave the statement still inadmissible, even though a discovery of fact is made, such as is contemplated by sect. 27, it does not seem necessary to decide. F In the present case, the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of sect. 162 are, in their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation, whether a discovery is made or not. They may, therefore, *pro tanto* G repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that sect. 27 of the Evidence Act is a "special law" within the meaning of the Code of Criminal Procedure, s. 1 (2), and that sect. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic, for, H whatever be the right view, it is necessary to give to sect. 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on sect. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under sect. 164.

In view of their Lordship's decision that the alleged statement was inadmissible by reason of sect. 162, the appellant's contention that it was inadmissible as a confession under sect. 25 of the Evidence Act becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian courts on the matter, it may be useful to state that, in their Lordships' view, no statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must admit in terms either the offence, or, at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession—for example, an admission that the accused is the owner of, and was in recent possession of, the knife or revolver which caused a death, with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, art. 22, which defines a confession as an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. If the surrounding articles are examined, it will be apparent that the author, after dealing with admissions generally, is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles—confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872, and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime.

The statement of the accused has now been held to have been wrongly admitted. What effect should that have on the appeal? Mr. Pritt, for the appellant, forcibly argued that the trial judge relied on the statement as sufficient evidence in itself to show that the deceased man arrived at the accused's house on the night of Mar. 21, and that, when that evidence failed, there was not sufficient evidence to support a conviction for murder. Their Lordships cannot take that view. For this purpose, they will be content to abide by the rule governing the Patna High Court expressed in the Code of Criminal Procedure, s. 537 :

No finding sentence or order passed by a court of competent jurisdiction shall be reversed . . . on appeal . . . on account of any error in the judgment or other proceedings during trial . . . unless such error has in fact occasioned a failure of justice.

They will for this case adopt this rule, though it probably is wider than the rules which this Board has laid down for the exercise of their powers in dealing with criminal appeals. It will be observed that the sole effect of the disputed statement was to supply the prosecution with

evidence of the material fact that the deceased reached the accused's house at the critical time. However, though this evidence be rejected, there is other evidence of overwhelming strength to the same effect. It must be taken to have been proved that a trunk was bought by order of the accused and taken to his house on the afternoon of Mar. 22. At about 6 a.m. on Mar. 23, that trunk, containing the body of the deceased, A was placed on the train at the station of Berhampur, having been conveyed there in a vehicle ordered by the accused, in which he and the trunk travelled to the station. The deceased had, on the day before, set out from his house for the express purpose of visiting the accused's house.

In these circumstances, there is ample evidence of the presence of the deceased at the accused's house—the fact which alone the statement sought to establish. Faced with this difficulty, Mr. Pritt sought to establish that in no case, whether the statement were rejected or admitted, was there sufficient evidence of his client's guilt. The facts were consistent, he said, with the accused being merely an accessory after the fact to a murder to which he was no party. Their Lordships are unable to say that there was not ample evidence upon which the judge of fact could properly convict of murder. The accused man was found to have been in possession of a trunk in which was the mutilated body of a man recently murdered, a trunk which he purchased a little more than 12 hours before it was placed in the train. He gave no explanation, and contented himself with a denial that he knew the man, or that the man had visited his house, or that he had seen the trunk. All these statements were untrue. In these circumstances, it is impossible to say that the proceedings which ended with a conviction for murder resulted in a failure of justice. For these reasons, the appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly. B C D E

Appeal dismissed.

Solicitors : *Hy. S. L. Polak & Co.* (for the appellant) ; *The Solicitor, India Office* (for the respondent). F

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

FOWLER v. YORKSHIRE ELECTRIC POWER CO., LTD.

[KING'S BENCH DIVISION (Lawrence, J.), January 20, 1939.]

Factories and Shops—Dangerous machinery—Unfenced travelling crane—Injury to subcontractor's workman—Liability in damages of factory owner—Breach of statutory duty—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c).

A

The plaintiff, in the employ of subcontractors to the defendants, was working in their power house. The work was at a considerable height from the ground and the plaintiff was standing upon a ladder and to support himself, rested his hand upon the track of a travelling crane. He was struck by the crane and suffered severe injury to his hand and other injuries. The jury found that the defendants were not, but that the subcontractors were, negligent, and they further found that the plaintiff was not guilty of any contributory negligence. The claim in negligence therefore failed, and the case rested solely on a claim of breach of statutory duty under the Factory and Workshop Act, 1901, s. 10 (1) (c), in that the crane was not fenced and not equally safe as it would have been if securely fenced:—

B

C

HELD: the effect of the provisions of the Factory and Workshop Act, 1901, s. 10 (1) (c), was that, where machinery cannot be fenced or made as safe as if it were fenced, it could not be lawfully used. There had been a breach of the statutory duty and the defendants were liable to the plaintiff in damages.

D

[EDITORIAL NOTE.] The statutory duty under the Factory and Workshop Act, 1901, s. 10 (1) (c), has been described as an absolute duty, and, if the machinery cannot be made safe for the workmen near it, then the provision amounts to a prohibition of the use of such machinery.

AS TO FENCING OF DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

E

Cases referred to:

- (1) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 24 Digest 908, 68; 88 L.J.K.B. 887; 121 L.T. 156.
- (2) *Atkinson v. London & North Eastern Ry. Co.*, [1926] 1 K.B. 313; Digest Supp.; 95 L.J.K.B. 266; 134 L.T. 217.
- (3) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

F

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H

ACTION for damages for personal injuries and for breach of statutory duty. The plaintiff was a plumber in the employ of Frank Newsome, Ltd., subcontractors to the defendants for work at their power station at Dewsbury. The plaintiff's work was the fitting of fallpipes at the power station, and while so engaged his hand was injured by being struck by a travelling crane. He was working at a considerable height, standing upon a ladder, and to steady himself he rested his hand upon the track of the travelling crane which was in no way fenced. The defendants stated in their defence that workmen working near the crane were required to have a "permit to work" card from the charge engineer, and that no such card had been applied for by or in respect of the plaintiff.

C. Paley Scott, K.C., and *G. H. B. Streatfeild, K.C.*, for the plaintiff.
Philip Vos, K.C., and *A. S. Wilson* for the defendants.

LAWRENCE, J. : This case was tried before me and a jury at Leeds Assizes. The plaintiff, who was a servant of a plumber named Newsome, a subcontractor of the defendants, was injured in the defendants' power house by a crane, which travelled on two tracks at a considerable height from the ground. At the time of the accident, the plaintiff was on a ladder propped against one of the pillars which supported the crane track. A He had his hand on the track, and, as the crane came along the track, it cut off his hand. Questions for the jury were agreed by counsel, but I was asked to reserve the question of the defendants' liability under the Factory and Workshop Act, 1901, and any questions of agency, none of which was then argued before me. B The questions and answers of the jury were as follow :

(1) Was the 100-ton crane and the track a danger to the plaintiff in relation to the work he had to do ?—Yes.

(2) Was that danger unknown to and not reasonably apparent to the plaintiff ?—Yes.

(3) Was that danger known to the defendants ?—Yes. C

(4) Was the plaintiff's accident caused by any negligent act or omission or breach of duty on the part of the Yorkshire Electric Power Co. ?—No.

(5) Was the plaintiff's accident caused by any negligent act or omission or breach of duty on the part of (a) the Mitchell Engineering Co., Ltd., (b) Frank Newsome, Ltd., or both ?—(a) No. (b) Yes, on the part of Frank Newsome, Ltd.

(6) Was the plaintiff guilty of any negligent act or omission which contributed to or caused the accident ?—No. D

(7) Damages.—£1,250.

The case was subsequently argued in London, and it was then contended on behalf of the plaintiff (i) that the defendants had not fulfilled their duty to the plaintiff as an invitee, because they had employed Newsome as their agent to warn the plaintiff of the danger of the crane track, and Newsome had not done so, and (ii) that the crane was dangerous machinery which had not been fenced, or rendered as safe as if it had been fenced, and that the defendants were therefore liable under the Factory and Workshop Act, 1901, s. 10 (1) (c). For the defendants, it was contended that there was no evidence to support the verdict of the jury on question 6. E F

In my opinion, the plaintiff is entitled to succeed under the Factory and Workshop Act. The jury have found, in answer to questions 1, 2 and 6, that the crane and track were a danger unknown to the plaintiff, and that he was not guilty of contributory negligence. The crane and track were not fenced in any way. It was argued that they could not be fenced. Possibly the actual crane track could not be fenced, but it is clear, I think, that the pillars supporting the crane track could have been fenced. Nevertheless, even if the whole apparatus could not be fenced, the statute enacts that dangerous machinery must be rendered as safe as if it had been fenced, and the result of the authorities is that, if this is impracticable, the machinery cannot lawfully be used. : *Davies v. Thomas Owen & Co.* (1) and *Atkinson v. London & North Eastern Ry. Co.* (2). G H

It is clear that the crane and track were not as safe as if they had been fenced, and it follows, in my opinion, that the plaintiff must succeed,

unless the jury's finding on question 6 is against the weight of the evidence. In my opinion, it is not. It is true that, on the undisputed facts, the plaintiff was about to undertake a climbing feat which, in my opinion, was dangerous, and that he could have obtained a ladder, which would have made his use of the crane track unnecessary. However, he was not

A injured in the course of the dangerous part of the climb, and there was nothing negligent in what he was actually doing at the moment of the accident. It is true that, if he had got a longer ladder, and had climbed up it to the scaffolding, he would not have had his hand upon the crane track, and therefore his conduct was a *causa sine qua non* of the accident, B but that does not disentitle him to succeed : BEVEN ON NEGLIGENCE, 4th Edn., p. 173. The risky part of his climb had not been reached, and he was doing something which appeared to him (as the jury have, in my opinion, rightly found) to involve no danger. I therefore hold that the risky act which he was about to perform did not contribute to the accident.

C On the question of the agency of Newsome for the defendants, I am of opinion that the defendants are right. The question is whether the owner of property is bound to bring home to the mind of every invitee a warning of unusual dangers which are not apparent, or is bound merely to take reasonable care to prevent damage to invitees. In my opinion, D the latter is the extent of his obligation, and, in my opinion, on the facts—which, owing to the adjournment of this point, I must decide—the defendants did take reasonable care to prevent damage to the plaintiff by warning his employer Newsome that the permit-to-work card system must be carried out. I do not think that *Wilson & Clyde Coal Co., Ltd.*

E v. *English* (3) is applicable. That was a case of master and servant, and the decision was that a master cannot get rid of his duty of taking due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty, because the duty is in the peculiar province of the master. In the result, the plaintiff F is entitled to succeed. There will be judgment for him for the amount found by the jury. I regret the result, as, in my opinion, as in that of the jury, Newsome's negligence was the real cause of the accident, but I am constrained by the Factory and Workshop Act, 1901, and the decisions thereon, to decide in favour of the plaintiff against the defendants.

G *Judgment for the plaintiff for £1,250 and costs.*

Solicitors : *W. H. Thompson* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

CANADIAN CELANESE, LTD. v. B.V.D. CO., LTD.

[PRIVY COUNCIL (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **December 2, 5, 6, 8, 1938, January 23, 1939.**]

Privy Council—Canada—Patent—Validity—Patent declared invalid—Disclaimer subsequently filed limiting scope of claims—Discretion of Supreme Court to refuse a re-hearing—Whether Privy Council will consider patent as amended—Canadian Patent Act, 1935 (c. 32), s. 50. A

The appellants, assignees of Canadian letters patent, alleged that the respondents had infringed their letters patent. The respondents instituted an action against the appellants for, *inter alia*, a declaration (a) that their goods did not constitute an infringement of the patent, and (b) that any claims of the patent which defined any exclusive right or privilege which would be infringed by the manufacture of the plaintiffs' goods were invalid and void. The Exchequer Court of Canada held that the patent was valid and had been infringed, but, on appeal, the Supreme Court of Canada varied that judgment by a declaration that the patent was invalid, on the grounds that the claims were too broad and embraced more than one alleged invention in the specification, and had been anticipated by certain earlier patents. After the Supreme Court's judgment had been pronounced, but before the formal order thereon had been settled, the appellants filed a disclaimer under the Canadian Patent Act, 1935, s. 50, restricting in terms the scope of the claims and expressly excluding therefrom that which the Supreme Court had held to be too wide. The appellants, in order to avoid the invalidating of the patent, presented an application alleging the filing of their disclaimer, and praying for a re-hearing, so that, in the formal judgment of the court, the disclaimer might be provided for. This application was dismissed, on the grounds of justice and convenience. On an appeal from both orders of the Supreme Court:— B C D

HELD: (i) the question whether or not the Supreme Court should permit the re-argument of an appeal already decided by its reasoned judgment was a matter which that court was entitled to refuse in the exercise of its discretion. E

(ii) the patent had been anticipated by earlier patents, with the result that, if there had been no disclaimer, the patent would be invalid and void. F

(iii) the appellants, having filed a disclaimer, must be taken to have finally accepted the construction which the Supreme Court had declared to be the true construction of the original claims. G

(iv) as soon as the disclaimer was filed and recorded in the office of the commissioner, it was made part of the patent, and the only existing claims were the claims as amended by virtue of the disclaimer. The relief which the appellants sought under the Patent Act, 1935, s. 50 (3), could be of no assistance to them, as upon the proper construction of that subsection the person who disclaimed could obtain no advantage in the action from his disclaimer. H

(v) the patent as it now existed was a patent protecting the invention which was described in the specification as amended by the disclaimer. In order to obviate any risk of the patent as it now existed being avoided as a result of the litigation, the order of the Supreme Court, which had declared the whole patent to be invalid, should be varied by substituting for the reference to the patent in question in the appeal the words "the claims to the patent made by the patentee in the specification as originally filed."

Decisions of the Supreme Court ([1937] S.C.R., 221, 441), reversing a decision of the Exchequer Court ([1936] Ex. C.R. 139), affirmed.

[EDITORIAL NOTE.] The recent amendments of the law relating to patents have provided that a patentee, whose claims are attacked as being too wide, may, subject to certain safeguards, amend his specification by way of disclaimer. In the present case the patentees have found themselves in a very awkward position as the patent was not declared invalid until the proceedings had reached a court of appeal. Immediately the views of the court of appeal were announced, they amended the specification so as to make it accord with the view expressed by that court, and then, in order to save delay and expense, attempted to have the validity of the patent as amended tested in the present proceedings. This the Supreme Court of Canada and the Privy Council on appeal therefrom have refused to do, stating that for that purpose the patentees must commence proceedings *de novo*.

AS TO AMENDMENT OF PATENTS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 708-713, paras. 1320-1328; and **FOR CASES,** see DIGEST, Vol. 36, pp. 644-656, Nos. 1169-1337.]

Cases referred to :

- (1) *Paterson Engineering Co., Ltd. v. Candy Filter Co., Ltd.* (1932), 50 R.P.C. 1; Digest Supp.
- (2) *British Thomson-Houston Co., Ltd. v. Corona Lamp Works, Ltd.* (1922), 39 R.P.C. 49.
- (3) *Electric & Musical Industries, Ltd. v. Lissen, Ltd.*, [1938] 4 All E.R. 221; Digest Supp.
- (4) *Sessions v. Ramadka* (1892), 145 S.C.R. 29.
- (5) *Inster v. Ascher (Simon)* (1930), 282 U.S.Rep. 445.

D APPEAL by special leave from two judgments of the Supreme Court of Canada, (i) a judgment of SIR LYMAN POORE DUFF, C.J., RINFRET, CROCKET, DAVIS and KERWIN, JJ., dated Mar. 19, 1937, allowing an appeal by the respondents from a judgment of the Exchequer Court (MACLEAN, J.), dated Mar. 26, 1936, and (ii) a judgment of SIR LYMAN POORE DUFF, C.J., RINFRET, DAVIS, KERWIN and HUDSON, JJ., dated June 1, 1937, dismissing an application for a re-hearing following upon the filing of a disclaimer in respect of the letters patent. The facts are fully set out in the judgment of their Lordships delivered by LORD RUSSELL OF KILLOWEN.

F *Sir Walter Monckton, K.C., E. J. C. Neep and C. G. Bonard* for the appellants.

Russell S. Smart, K.C., and C. Robinson for the respondents.

G *Monckton, K.C.* : The claims of the letters patent No. 265960 of 1926 are confined to the use of derivatives of cellulose in the form of yarns or threads woven into one of the fabrics to be united. The novelty of our invention lies in the fact that we are making a fabric which has in it elements of a potentially adhesive quality, and this is an inventive step. We are the first to use an adhesive fabric for the purpose of uniting other fabrics. The appellants' disclaimer has been lawfully made under the Canadian Patent Act, 1935, s. 50. The decision of the trial judge should be restored, and, if I am wrong in this submission, then effect should be given to the disclaimer and the action reconstituted as dealing only with an amended patent. [Counsel referred to *Paterson Engineering Co., Ltd. v. Candy Filter Co., Ltd.* (1), *British Thomson-Houston Co., Ltd. v. Corona Lamp Works, Ltd.* (No. 2) (2), *Electric & Musical Industries,*

Ltd. v. Lissen, Ltd. (3), *Sessions v. Romadka* (4) and *Inster v. Ascher (Simon)* (5).]

Their Lordships intimated that they desired to hear respondents on the amended patent only.

Smart, K.C.: The invention was anticipated, even if defined by claims modified by the disclaimer. [Counsel referred to *Electrical & Musical Industries, Ltd. v. Lissen, Ltd.* (3).]

LORD RUSSELL OF KILLOWEN: It is advisable to state at the outset the relevant facts which have led up to the prosecution of this appeal. The appellants are assignees of Canadian letters patent No. 265,960, granted on Nov. 16, 1926, to one Camille Dreyfus, concerning an alleged invention of "improvements relating to fabrics and sheet metals and the manufacture thereof." It is not necessary to discuss the specification in detail. It is sufficient to say that it contains 25 claims, of which the first 24 are process claims, and the twenty-fifth covers the product. The first claim may be taken as a sample for all, for, in respect of their excessive breadth (to which reference will later be made), the claims are all identical. It runs thus:

A process for the manufacture of composite sheet material which comprises subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose, to heat and pressure, thereby softening said derivative and uniting said fabrics.

The respondents carry on business in Montreal as shirt dealers, selling collars, and shirts with attached collars, which the appellants alleged to be infringements of their letters patent. The respondents (acting under the Patent Act, 1935, s. 60), commenced an action against the appellants claiming (a) a declaration that their said goods "do not constitute an infringement of any exclusive property or privilege defined by patents Nos. 265,960 and 311,185 or either of them," and (b) a declaration:

that any claims of either of the said patents which define any exclusive right or privilege which would be infringed by the manufacture by the plaintiff of the collars or shirts with attached collars are invalid and void.

The grounds of invalidity, alleged by the respondents included anticipation, excessive claims, want of subject-matter and ambiguity. Upon the trial of the action in the Exchequer Court, the letters patent No. 311,185 were declared invalid, and they disappear from the case, but the letters patent No. 265,960 were declared valid and to have been infringed, and the action was dismissed.

The respondents appealed, and by order of the Supreme Court dated Mar. 19, 1937, it was ordered and adjudged that the judgment of the Exchequer Court be varied by declaring the patent No. 265,960 to be invalid and by directing the present appellants to pay to the present respondents their costs of the action. From the reasons for judgment stated by DAVIS, J., and concurred in by SIR LYMAN POORE DUFF, C.J.,

and RINFRET, CROCKET and KERWIN, JJ., it appears that the letters patent No. 265,960 were declared to be invalid on the ground that the claims upon their true construction were too broad, and embraced more than the alleged invention disclosed in the body of the specification, and had been anticipated by certain earlier patents. What the exact point of construction was will appear from the disclaimer hereinafter referred to, but it may be shortly stated (in regard to claim one as an example) as being that the present appellants claimed that the "thermoplastic derivative of cellulose" therein mentioned must be confined to a thermoplastic derivative of cellulose in the form of yarns, filaments or fibres.

After the judgment of the Supreme Court had been pronounced, but before the formal order thereon had been settled, the appellants filed a disclaimer under the Patent Act, 1935, s. 50. That section provides as follows :

50.—(1) Whenever, by any mistake, accident or inadvertence, and without and wilful intent to defraud or mislead the public, a patentee has (a) made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor or (b) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented of which he was not the first inventor, and to which he had no lawful right, he may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof. (2) Such disclaimer shall be in writing, and in duplicate, and shall be attested by one or more witnesses. One copy thereof shall be filed and recorded in the office of the commissioner. The other shall be attached to the patent and made a part thereof by reference. The disclaimer shall thereafter be deemed to be part of the original specification. (3) No disclaimer shall affect any action pending at the time when it is made, except as to unreasonable neglect or delay in making it. (4) In case of the death of the original patentee or of his having assigned the patent a like right to disclaim shall vest in his legal representatives, any of whom may exercise it. (5) The patent shall, after disclaimer as in this section provided, be deemed to be valid for such material and substantial part of the invention, definitely distinguished from other parts thereof claimed without right, as is not disclaimed and is truly the invention of the disclaimant, and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly.

The disclaimer is dated Mar. 31, 1937, and runs thus :

Whereas, the undersigned Canadian Celanese, Ltd., a body politic and corporate, having its head office and principal place of business in the city of Montreal, in the province of Quebec, Canada, is the owner of Canadian letters patent No. 265,960 granted on Nov. 16, 1926, for an invention entitled "Fabrics and Sheet Materials and the manufacture thereof."

And whereas, through mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, the specification has been made too broad, asserting a claim to more than that of which Camille Dreyfus was the inventor.

Now, therefore, the undersigned disclaims from the scope of claims 1 to 6 inclusive, and 25 the use of a fabric or fabrics containing a thermoplastic derivative of cellulose except where such thermoplastic derivative of cellulose is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 7 to 12 inclusive, the use of a fabric or fabrics containing an organic derivative of cellulose except where such organic derivative of cellulose is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 13 to 18 inclusive, the use of a fabric or fabrics containing a cellulose ester except where such cellulose ester is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 19 to 24 inclusive, the use of a fabric or fabrics containing cellulose acetate except where such cellulose acetate is in the form of yarns, filaments or fibres.

The Supreme Court, holding the patent to have been anticipated, had not deemed it necessary to deal with the other issues in the action which on that view did not arise, but the appellants, having filed their disclaimer on or about Apr. 3, 1937, presented a petition (dated Apr. 8, 1937), praying the Supreme Court

to order the re-hearing of the present appeal in order to meet the new conditions that have arisen since the delivery of the judgment. A

This application was by order of June 1, 1937, dismissed with costs. The Supreme Court was of opinion that the application should fail on the grounds of both justice and convenience. The concluding sentences of their judgment may properly be cited : B

The respondents [the present appellants] nevertheless insisted on maintaining the judgment of the trial judge, declaring these claims, as framed, to be valid claims. Now, having lost on that issue of validity and judgment having been pronounced against them, the respondents seek a re-hearing in order to take up a new position never before even suggested by them, with all the attendant delay and inconvenience already indicated. C

We think that by their conduct they have definitely elected against taking the position which they are now endeavouring to take ; and, however that may be, we are satisfied that, on grounds both of justice and convenience, the application should fail.

We do not think it necessary to express an opinion upon the construction and effect of sect. 50 (3). We decide nothing, moreover, as to the relation between the procedure authorised by sect. 60 and that contemplated by sect. 53. We have assumed (for the purposes of this judgment only) that a defendant in an action under sect. 60 can, by a proper and timely proceeding, obtain relief under sect. 53 (2) and, if there is a valid disclaimer, that the court can in such an action take cognizance of that disclaimer ; but we decide none of these points. The application is dismissed with costs. D

The appellants have now appealed to His Majesty in Council from both orders of the Supreme Court. They ask that both orders should be reversed, and that it should be declared that the letters patent are valid and have been infringed, the declaration of validity being made either upon the footing that the limited construction of the unamended claims, which was adopted by the trial judge, was correct, or upon the footing that effect should be given to the disclaimer. Their Lordships have thought it right to state fully what has happened, in order that the exact position may be defined, and, upon consideration of it, they are of opinion that the appeal must fail. E

As regards the order of June 1, 1937, their Lordships appreciate the natural reluctance of the Supreme Court to re-open for re-argument a matter which had been thrashed out before them during four days, wholly and solely upon the footing that the specification stood as drawn, and without any hint that resort would or might be had to the statutory power of disclaimer. The question whether or not the Supreme Court should permit the re-argument of an appeal already decided by its reasoned judgment was a matter which the court was entitled to refuse in the exercise of its discretion, and their Lordships (without in any way suggesting that the discretion was otherwise than properly exercised) must decline to advise any interference with that discretion. F G H

As regards the order of Mar. 19, 1937, their Lordships agree with the construction placed upon the claims by the Supreme Court, and they also agree with the Supreme Court that, upon the footing of that construction, the patent has been anticipated by earlier patents, with the result that, if there had been no disclaimer, the patent would be invalid

A and void.

There remains, however, for consideration the fact of the disclaimer, and its effect upon the rights of the parties in the litigation, and on the present appeal. The disclaimer is an unconditional disclaimer. It must necessarily be unconditional. The statute does not contemplate or

B authorise a contingent disclaimer. As soon as the disclaimer was filed and recorded in the office of the commissioner, it was made part of the patent. The only existing claims are the claims as amended by virtue of the disclaimer, and the only invention protected by the letters patent is the invention a description whereof is contained in the specification

C as so amended. In these circumstances, the present appellants, having filed a disclaimer for the purpose of changing the construction which the Supreme Court had declared to be the true construction of the original claims, must be taken to have finally accepted that construction as being the true construction of those claims, and it is not open to them

D to appeal successfully against the court's declaration of that construction. The appellants, however, sought to pray in aid the provisions of the Patent Act, 1935, s. 50(3), and claimed that in some way that subsection enabled them to obtain in the respondents' action the same measure of relief or success as they would have obtained if the claims

E had been originally confined to the narrower limits which result from the disclaimer. The Supreme Court did not find it necessary to express an opinion on the construction of subsect. (3). In this, they were undoubtedly fortunate, for the subsection, more particularly in regard to its words of exception, appears to their Lordships difficult to construe

F with confidence. It cannot, they think, mean that a disclaimer shall only affect a pending action when there has been unreasonable neglect or delay in making it, or that the affecting shall in those circumstances operate for the benefit of the person disclaiming. Their Lordships, however, do feel able to attribute a meaning to the words "no disclaimer

G shall affect any action pending at the time when it is made." These words, they think, must at least have this effect—namely, that the rights and liabilities of the parties to a pending action are to be ascertained and declared on the footing that the person who disclaims obtains no advantage in the action from his disclaimer. Upon this view, the subsection can be of no assistance to the appellants, who in effect ask that the pending action shall be affected (and to their advantage) by the disclaimer.

There remains, however, a point of importance to be considered. The order of Mar. 19, 1937, declared in terms the patent No. 265,960 to be invalid. A certificate of that order may, under the Patent Act, 1935,

s. 62, be entered on the margin of the enrolment of the patent in the Patent Office, in which case, as the section provides :

... the patent or such part thereof as is so voided shall thereupon be and be held to have been void and of no effect, unless the judgment is reversed on appeal.

In its present form, the order declares the whole patent avoided, but the patent as it now exists is a patent protecting the invention which is described in the specification as amended by virtue of the disclaimer. It is obvious that no risk should be run of the patent, as it now exists, being avoided as a result of the present litigation. For the purpose of avoiding any such risk, their Lordships proposed a course to which the respondents assented—namely, that the order of Mar. 19, 1937, should be varied by substituting therein for the words “the respondent’s patent No. 265,960 in question in this appeal” the words “the claims in patent No. 265,960 as made by the patentee in the specification as originally filed.”

Counsel for the respondents invited their Lordships to determine, on the hearing of this appeal, the rights and liabilities of the parties under the patent in its new form in regard to anticipation, infringement, and all the other issues which had been raised in the action. That action, however, was ended by the order of Mar. 19, 1937, and these various issues can now only be raised and decided if and when the parties think fit to indulge in further litigation. Their Lordships have already expressed their agreement with the views of the Supreme Court upon the issue of anticipation with which that court had to deal. Upon that issue under the patent as it now stands, and upon all other issues, they express no opinion of any kind. In the result, their Lordships are of opinion that the order of Mar. 19, 1937, should be varied in form as above indicated, and they will humbly advise His Majesty accordingly. The appeal having failed in all material respects, the appellants must pay the respondents’ costs of this appeal.

Appeal dismissed with costs.

Solicitors : *Faithfull, Owen & Fraser* (for the appellants) ; *Lawrence Jones & Co.* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

R. v. HEMMINGS.

[COURT OF CRIMINAL APPEAL (Charles, Atkinson and Singleton, JJ.),
January 30, 1939.]

Criminal Law—Incest—Stepdaughter—Suggested adultery during lifetime of mother's first husband—Necessity for evidence of non-access.

A A married woman during the lifetime of her husband had a daughter born to her and registered as the child of her husband. Some years later the husband died, and the woman married the appellant. The appellant was accused of incest, and the only evidence given was that he had spoken of the girl as his daughter :—

B HELD : in order to prove the charge made against the appellant, it was necessary to prove non-access by the husband at the time of conception in addition to intercourse between the appellant and the woman at that time. In this case, there was no evidence whatever to go to the jury.

[EDITORIAL NOTE. The presumption of legitimacy prevails throughout the law of England, and the rules of proof consequent thereon must be observed even in cases where the question of legitimacy does not directly arise. The law does not permit an inquiry whether some man other than the husband is more likely to be the father of the child, unless proper evidence of non-access is first given.

As to INCEST, see HALSBURY, Hailsham Edn., Vol. 9, pp. 484-486, paras. 830-836; and FOR CASES, see DIGEST, Vol. 15, pp. 852, 853, Nos. 9352-9362.]

APPEAL from a conviction at the Manchester Assizes on a charge of incest, on the ground that there was no evidence to go to the jury. The facts are fully set out in the judgment.

P. H. M. Oppenheimer and R. N. Bibby-Trevor for the appellant.

T. A. Cunliffe for the Crown.

ATKINSON, J. [delivering the judgment of the court] : This appellant, John Joseph Hemmings, was convicted at the Manchester Assizes of incest, and was sentenced to 5 years' penal servitude. He now appeals against his conviction on the ground that there was no evidence to go to the jury. The girl was born in July, 1919, and the mother's name at that time was Manley. She was beyond question married to a man named Manley, and the child was registered as a daughter of the man Manley. Some years later, the man Manley died and the woman Manley married the appellant. There was no evidence before the jury at all except that the appellant had spoken of the girl as his daughter. What the prosecution had to prove was that she was the daughter of the prisoner, and the law applicable to that is clearly stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 2, p. 560, para. 768 :

The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men.

In this case, there was not a particle of evidence that the mother had committed adultery with the prisoner.

The law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved, before

the child can be bastardised, that the husband did not have sexual intercourse with his wife at the time when it was conceived.

It would not be enough to say that the prisoner had had intercourse with the woman. The necessary evidence is that the husband did not have intercourse with his wife when she conceived. In this case, there was no evidence given that the appellant had had sexual intercourse A with the woman when the child was conceived, and no evidence was given that the girl was his daughter. We think that, in the present case, the case ought to have been stopped, and that the judge ought to have ruled that there was no evidence to go to the jury. The appeal is allowed, and the conviction quashed. B

Appeal allowed and conviction quashed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;
Director of Public Prosecutions (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*] C

Re SOUTH SHIELDS (D'ARCY STREET) COMPULSORY PURCHASE ORDER, 1937. APPLICATION OF BAINBRIDGE.[KING'S BENCH DIVISION (Charles, J.), **February 7, 1939.**]

Public Health—Clearance area—Compulsory purchase—"House"—Premises consisting of shops with living rooms over—Housing Act, 1936 (c. 51), s. 25.

Certain properties consisting of shops on the ground floor and of living rooms on the upper floor, which had been found unfit for human habitation, were made the subject of a compulsory purchase order. At the time of the making of the order, the rooms had ceased to be used as living rooms, and the owner was prepared to enter into an undertaking that they should not in future be used as such. The owner contended that these houses were not houses within the meaning of that word as used in the Housing Act, 1936, s. 25:—

HELD: the premises were houses within the meaning of that word as used in the Housing Act, 1936, s. 25, and the order was rightly made.

[EDITORIAL NOTE. The difficulty in the present case was that the owner would receive in respect of the business property demolished only what is known as site value. If the premises had been included in the order under the description of "other buildings," compensation would have been payable on a much higher scale, and this appears to have been the real contention upon the application. At the time when the making of the order was considered, an attempt was made, by reconstructing the rooms so that they could not be used for human habitation, and by entering into a restrictive covenant not to use them for that purpose, to persuade the local authority not to make the order.

AS TO COMPULSORY PURCHASE ORDERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 540, 541, paras. 1144, 1145; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502g-502v.]

Cases referred to:

- (1) *Re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936*, [1938] 2 K.B. 210; Digest Supp.; *sub nom. Re Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, Application of Butler*, [1938] 2 All E.R. 279.
- (2) *Re Liverpool (Portland Street No. 2) Housing Confirmation Order, 1935, Application of Morris, Unreported.*

APPLICATION by Joseph Huntington Bainbridge for an order quashing the order confirming the South Shields (D'Arcy Street) Housing Confirmation Order, 1938. The applicant complained that, if the order were proceeded with, he would be deprived against his will of the properties included in the order, and would only be compensated on the basis of the value of the land as a site cleared of buildings under the Housing Act, 1936, s. 40 (2). The applicant contended that, disregarding the rooms previously used as living rooms, the property comprised two valuable blocks of business premises, which, if the order were carried out, would be demolished at considerable financial loss and hardship to the applicant, and that the requirements of public health had been met by closing the rooms previously used for habitation. Between the date of the making of the compulsory purchase order and that of the holding of the local inquiry, the living rooms had been vacated and structural alterations had been carried out, which made it impossible

for these rooms to be used for human habitation. Against these contentions, it was urged on behalf of the local authority that the applicant's properties were, both at the date of the making of the order and at the date of the inquiry, houses, and that the same were, by reason of disrepair or sanitary defects, unfit for human habitation.

H. A. Hill for the applicant. A

The Solicitor-General (Sir Terence O'Connor, K.C.) and Valentine Holmes for the Minister of Health.

Cecil Havers for the South Shields Corporation.

CHARLES, J.: On Oct. 30, 1937, the South Shields Corporation, in pursuance of their undoubted authority under the Housing Act, 1936, made a compulsory purchase order covering the two premises in question which I am now considering. That order, of course, was subject to confirmation by the Minister of Health. Before any confirmation takes place, again in accordance with the statutory rule, there has to be a public inquiry by an inspector appointed by the Minister of Health, who makes an inquiry on the spot, sees the premises, and makes a report to the Minister. B
C

On Mar. 11, the Minister did cause a public local inquiry to be held, and the inspector went down and visited the premises and considered the whole matter, in regard to which he was an expert. He was a Member of the Institute of British Architects, a Mr. Bridgman. Having considered that, and having taken all the evidence, and having heard the evidence given by the present appellant, the inspector reported to the Minister, and he reported that in his view a compulsory purchase order should be made, for that, again in his view, the premises, which are the subject of this appeal, were in fact houses. D
E

The Minister is by no means bound, of course, to accept in its entirety, or at all, the report made by his inspector. He then had the report before him and did consider it, and, having considered it, he also came to the conclusion that these premises were houses, and that they were houses unfit for human habitation, and came within the ambit of the Housing Act, 1936, s. 25, which provides as follows: F

(1) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district (a) that the houses in that area are by reason of disrepair or sanitary defects unfit for human habitation. . . . G

Then it is provided that it is within their competence to say that the most satisfactory way of dealing with the conditions in the area is by demolition of all the buildings in that area. The Minister confirmed this compulsory purchase order. It is now contended before me by Mr. Hill, on behalf of the applicant, that these are not houses at all, and that although the upper floor might be regarded as houses, yet, the ground floor being shops, and used as shops now, it is within the category of other buildings, and not within the category of houses, the difference H

being that, if they are houses, he gets only site value, but, if they are other buildings, he gets compensation more satisfactory to the owner. *Re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 (1)*, is strongly prayed in aid as showing that houses of this character, such as I am now considering, ought to be treated as the mews was treated

- A in the *Camberwell* case (1), and should be regarded as one structure imposed upon another structure, which would have to be treated independently and in different ways, one floor being treated as a house, a superimposed portion, and the lower portion of the structure being treated as another building. I am bound to say that a close consideration of that case discloses a great many differences between that case and the present case. The present case approximates much more nearly to the case which was considered by SWIFT, J., to which I will presently refer. It is said that the fact that the Minister has found that these are houses is a question of law, or one of mixed law and fact, and not
- C one of fact alone, and that, therefore, by the ordinary rules of law, I ought to be able to disturb that finding and reverse it. If it is a question of fact—as, indeed, I find that it is—it can only be disturbed if the Minister had no material upon which he could found his decision that these were houses in fact, and it becomes necessary, therefore, to look shortly at
- D what he had before him. As I said during the course of the argument, if I found that the Minister had said a bird-cage was a house, I should have said it was obviously wrong, that this matter had not been considered in the light of evidence which was applicable to houses at all, and that therefore that finding so made would be the subject of reversal by
- E this court. Let us see what he did have before him. To begin with, he had the order of the local authority itself. Having examined the whole position, the local authority came to the conclusion that these were houses, and treated them as houses. Then the inspector, a skilled man, went down and examined the whole matter and saw the houses,
- F and he came to the conclusion that they were houses, and so reported. Photographs were submitted to the Minister for his inspection which had been seen by the inspector, and, I suppose, were embodied in, or accompanied, his report. The inspector submits to the Minister not only his report, but also the evidence upon which he founded his report,
- G and an examination of that evidence shows quite clearly not only that the first floor, until recently, had been used as dwellings, but also that the ground floor had rooms which were adapted as living rooms, although in fact they were then being used as shops. If he read the evidence closely, he would see that that was made perfectly clear in the evidence.
- H There is no dispute at all that the first floor, which was separated from the ground floor, save in one case where there was communication between the ground floor and the first floor, was insanitary and unfit for human habitation. There is no doubt about that, and therefore a demolition order would very properly attach to the first floor. Mr. Hill says: “Yes, but if you follow the decision of DU PARCQ, J., in the *Camberwell Mews*

case (1), you must sweep away the top floor and leave the bottom, or treat it as another building, and pay me compensation, because they are valuable blocks of business property to me." I cannot help coming to the conclusion without any hesitation at all, that the Minister had ample evidence on which to find that these were houses.

Let me now turn to another case, which was cited to me, a decision A of SWIFT, J., *Re Liverpool (Portland Street No. 2) Housing Confirmation Order, 1935, Application of Morris* (2). It really is a case almost exactly the same as this case, and SWIFT, J., there discusses—the point being taken, exactly as in this case, that they were not dwelling-houses— B whether or not (and he says that the appeal depends upon it, as I say in this case) there was material before the Minister of Health which enabled him to determine whether the buildings in question were in truth dwelling-houses. In that case, the Minister decided that they were, and confirmed the scheme, and SWIFT, J., said that the attitude he had taken was a perfectly proper one, and he did not consider that he had any power to interfere C with the decision so arrived at. I entirely agree with SWIFT, J., in that matter. In this case, the Minister, if anything, had more evidence than he had in the *Liverpool* case (2) upon which to found his determination as to whether or not these were houses. Referring to the case which he had before him, SWIFT, J., said : D

In this case it is contended by the owner of the premises in question and by the mortgagees of the premises in question that the case of this property does not come within sect. 1 of the Act at all, because it is said that they are clearly not "other buildings" which are dangerous or injurious to the health of the inhabitants because of the narrowness of the streets or the bad arrangement of the streets, or of the buildings themselves, and it is said : "It is not suggested that they come within that category" and therefore no clearance order can be made in respect of them. They cannot be the subject of any command to pull down or demolish unless they come within the earlier part of sect. 1 (1) : "that the dwelling-houses . . . are by reason of disrepair or sanitary defects unfit for human habitation." E

That is the same as in this case. SWIFT, J., continues :

There was ample evidence before the inspector here that these buildings were unfit for human habitation, and that point has not been discussed before me. F

Here it is admitted that the upper floor, which had been inhabited, was no longer inhabited, because it had no sanitary conveniences at all, and the upper rooms were patently unfit for human habitation. Then SWIFT, J., continues :

What is said here is that these two lots of premises, 89 and 91, Limekiln Lane, are not dwelling-houses, and therefore they are outside sect. 1 (1) of the Act of 1930. G

That is the submission here in this case.

They are outside the category of "other buildings" because they are not dangerous for any reason [as is the case here], and they are outside the category of dwelling-houses unfit for human habitation because they are not dwelling-houses, H and the whole point in this case is whether or not these two pieces of property, 89 and 91, Limekiln Lane, were dwelling-houses within the meaning of the Housing Act, 1930, s. 1.

If one applies those words to this case, one has the position exactly and meticulously described. That is what I have to consider. The judge goes on to lament that there is no definition at all in the Act of a dwelling-

house or of a house. That is to say, there is no definition which would be applicable to a consideration of sect. 25 of the Act of 1936. He continues :

- A Whether or not it is a dwelling-house seems to me to be entirely a question of fact, and a question of fact upon which this court cannot interfere, but there is always a question of law looming behind that question of fact—namely, whether there is any evidence upon which one can find the facts necessary to establish that it is a dwelling-house—and so here it is said that, as a matter of law, there is no material upon which the inspector or the Minister, or the local authority—or, for the matter of that, anybody else, including this court, which has got to determine whether or not there is a dwelling-house constituted by the premises 89 and 91, Limekiln Lane—can say that it is dwelling-house.
- B Applying those words to this case, one has exactly the position which I have to consider here. I do not think that it is necessary to go further in this case than to say that there was ample evidence—a great deal more evidence than was given in the *Liverpool* case (2)—before the authority, ample evidence before the inspector, and ample evidence
- C before the Minister, when he came to make his confirmation. It is found that these premises were houses. That finding was based on ample evidence, and should not, therefore, be disturbed by this court, being a pure question of fact. I may add that, were I in the same position as the Minister, in my view, I could not, as a sensible person,
- D come to any other conclusion. The appeal will be dismissed.

Appeal dismissed, with costs.

- Solicitors: *Allen & Overy*, agents for *Hannay & Hannay*, South Shields (for the appellant); *The Solicitor, Ministry of Health* (for the Minister of Health); *Speechly, Mumford & Craig*, agents for *Harold Ayrey*, Town Clerk, South Shields (for the South Shields Corporation).
- E

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

F UNITED TOWNS ELECTRIC CO., LTD. *v.* ATTORNEY-GENERAL FOR NEWFOUNDLAND.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Porter), **November 21, 22, 1938, January 27, 1939.**]

- G *Privy Council—Newfoundland—Statutes—Statutory exemption from taxation except water rates—Subsequent imposition of income tax in Newfoundland—Whether company liable—Ejusdem generis rule—United Towns Electrical Company Act, 1902 (c. 8), s. 30.*

- H The appellant company was incorporated in 1902, under a public Act for the purpose of supplying electricity in certain towns in Newfoundland. By sect. 30 of the Act, the company was made liable for water rates on all lands and buildings owned by it in these towns, but otherwise was exempted from taxation. The company subsequently extended its operations as a company supplying electricity, under further Acts of the legislature, which also conferred exemption from taxation as above. During 1917-1924 and from 1929 onwards, income tax was, and has been, levied in Newfoundland. In 1936, the company was assessed to income tax for 1929-1934 inclusive in respect of all its under-

takings. The appellant company claimed exemption from income tax by virtue of the exemptions from taxation granted to it under the above Act. The respondent maintained that the term "taxation," as used in the Acts, necessarily referred to local taxation only, and could not include income tax:—

HELD: (i) the term "taxation" was not limited to taxes *ejusdem generis* with water rates, which were excepted under the Act of 1902, since the mention of a single species—in this case water rates—did not constitute a *genus*. A

(ii) there was no adequate ground for limiting the general and ordinary meaning of the term "taxation," which includes national taxation. The exemption here had been granted by the national taxing authority, and there was no reason, apart from any qualifying context, to restrict the meaning of the term "taxation" to taxes then existing. B

Associated Newspapers, Ltd. v. City of London Corpn (1) followed.

[EDITORIAL NOTE.] An exemption from taxation must, of course, be construed primarily with reference to the terms of the exemption itself, but it is proper also to consider the nature and the extent of the power of the body granting the exemption. An exemption by a local authority obviously cannot extend beyond the taxing powers of that authority, but, on the other hand, there is a *prima facie* presumption that a general exemption by the national legislature is an exemption from all taxation, and, apart from special provisions, such a general exemption will not be cut down. C

AS TO EXEMPTION FROM TAXATION, see HALSBURY, *Hailsham Edn.*, Vol. 31, pp. 542, 543, paras. 718-720; and FOR CASES, see DIGEST, Vol. 42, pp. 734-737, Nos. 1566-1612.] D

Cases referred to:

(1) *Associated Newspapers, Ltd. v. London Corpn.*, [1916] 2 A.C. 429; 38 Digest 475, 350; 85 L.J.K.B. 1786; 115 L.T. 419.

(2) *Pole-Carew v. Craddock*, [1920] 3 K.B. 109; 28 Digest 92, 543; 89 L.J.K.B. 507; 123 L.T. 309; 7 Tax Cas. 488.

(3) *Argyll (Duke) v. Inland Revenue Comrs.* (1913), 109 L.T. 893; 28 Digest 92, 544; 7 Tax Cas. 225. E

(4) *Dunbar Magistrates v. Mackersy*, [1931] S.C. 180.

(5) *A.-G. v. Clarkson*, [1900] 1 Q.B. 156; 42 Digest 665, 751; 69 L.J.Q.B. 81; 81 L.T. 617.

(6) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 42 Digest 666, 765; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358. F

(7) *Ormond Investment Co. v. Betts*, [1928] A.C. 143; 42 Digest 735, 1584; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400.

(8) *Inland Revenue Comrs. v. Forrest* (1890), 15 App. Cas. 334; 42 Digest 662, 709; 60 L.J.Q.B. 281; 63 L.T. 36; 3 Tax Cas. 117; *affg.* S.C. *sub nom.* *Re Duty on Estate of Institution of Civil Engineers* (1888), 20 Q.B.D. 621. G

APPEAL by leave of the Supreme Court of Newfoundland from a judgment of that court (SIR WILLIAM HORWOOD, C.J., KENT and HIGGINS, J.J.), dated May 1, 1937, confirming assessments to income tax made on the appellant company. The facts of the case are set out in the judgment of their Lordships delivered by LORD THANKERTON. H

Cyril L. King, K.C., and *R. J. T. Gibson* for the appellant company.

Brian Dunfield, K.C., and *Colin H. Pearson* for the respondent.

King, K.C.: According to their natural and ordinary meaning, the words "taxes" and "taxation" mean or include government taxation, and there is no context to alter this meaning. The court here has construed

an earlier statute in the light of a later statute, which did not purport to affect the earlier statute. For 1917-1924, and from 1929 onwards, there was an income tax in force in Newfoundland, but the appellant company was not assessed until 1936, when these assessments were made. [Counsel referred to *Associated Newspapers, Ltd. v. City of London Corpn.* (1), *Pole-Carew v. Craddock* (2), *Argyll (Duke) v. Inland Revenue Comrs.* (3) and *Dunbar Magistrates v. Mackersy* (4).]

Gibson followed on the same side.

Dunfield, K.C. : The 1902 Act was designed to protect the company from local taxation in the exemption which it conferred, and the same may be said of the Acts of 1913 and 1929, respectively. The provisions of the Income Tax Act, 1929, upon their true construction, create a general liability to income tax, subject only to the particular exemptions. They override any exemptions which might otherwise be claimed under the sections of the Acts on which the appellant company bases its exemption.

Pearson : The companies liable to be taxed under this Act include all companies incorporated and carrying on business in Newfoundland, except such as are exempted from taxation by its express exempting provisions. [Counsel referred to *A.-G. v. Clarkson* (5), *Cape Brandy Syndicate v. Inland Revenue Comrs.* (6), *Ormond Investment Co. v. Betts* (7) and *Inland Revenue Comrs. v. Forrest* (8).]

King, K.C., in reply.

LORD THANKERTON : This is an appeal by leave of the Supreme Court of Newfoundland, from a judgment of that court dated May 1, 1937, which confirmed assessments to income tax made on the appellant for 1929-1934 inclusive in respect of all its undertakings. Notice of the assessments was given to the appellant by the Commission for Finance on Mar. 20, 1936, and on Mar. 27 the appellant gave notice of objection to the assessments under the Income Tax Act, 1929, s. 15, on the ground that the appellant was exempted by statute from the payment of income tax. The matter was thereupon referred by the Commissioner for Finance under sect. 15 of the Supreme Court for hearing and determination. Thereafter, by agreement between the respondent and the appellant, the facts were set out in the form of a special case for the opinion of the court, dated Feb. 3, 1937, and on Feb. 5, the court ordered that the matter be heard by way of special case. The only matter in issue is the appellant's liability to tax. No question arises as to the amount of the assessments.

The appellant company was incorporated in 1902 under a public Act entitled United Towns Electrical Company Act for the purpose of supplying electricity to the towns of Harbour Grace, Carbonear and Heart's Content. The Act contained the following exempting provision :

30. The company shall be liable for water rates on all lands and buildings owned by it in the aforesaid towns, but otherwise the company shall be exempt from taxation.

Under sect. 36, the Act was to be deemed a public Act, and admittedly the enterprise was one of public utility.

In 1913, the Conception Bay Electric Co. was incorporated under the Conception Bay Electric Company Act for the purpose of supplying electricity to the towns of Brigus, Cupids, Clarke's Beach, Port de Grave, Bay Roberts, Spaniard's Bay and other towns and villages near thereto. A
The Act of 1913 included the following exempting provisions :

20. All plant, machinery, rolling stock, implements, apparatus, tools, utensils and materials necessary for the original construction of the said lighting, heating, power, and tramways systems and extensions thereof shall be admitted into the colony free of duty.

21. The company shall be exempted from all rates, taxes and assessments for the period of 50 years from the date of the passage of this Act. B

The exclusive right and franchise conferred by the Act of 1913 was also limited to a period of 50 years.

On Mar. 11, 1914, two Acts were passed as the result of which the appellant, on June 30, 1914, acquired the whole undertaking of the Conception Bay Electric Co., and have since carried it on. The first of these Acts amended the Act of 1913 as follows : C

1. Sect. 9 of the Act 3 Geo. V, c. 4, is hereby amended by adding the following words at the end of the section : The company is also hereby authorised and empowered to sell, lease or dispose of the undertaking of the company or any part thereof, for such consideration as the company may think fit. D

The second of these Acts amended the Act of 1902 as follows :

1. Sect. 10 of the Act 2 Edw. VII, c. 8, is hereby amended by adding the following words at the end of said section : The said company shall also have power to acquire and undertake the whole or any part of the business, property, undertaking and liabilities of any person or company carrying on or formed to carry on any business which this company is authorised to carry on whether in the aforesaid towns or not. E

In Dec., 1920, the appellant company applied for registration under the Companies Act, Part V, and on Jan. 3, 1921, the company was registered under its present name of United Towns Electric Co., Ltd. Under the Companies Act as amended by the Companies Act, 1920, a company so registering remains the same legal entity as before, and under sect. 246 (as substituted by the Act of 1920) all property, franchises, privileges and exemptions vest in and continue to belong to the company as so registered to the same extent as they were vested in and enjoyed by the company prior to such registration. F

In 1924, under the United Towns Electric Company Limited Act, the appellant company was empowered to extend its operations to certain other districts of Newfoundland. It is unnecessary for their Lordships to deal separately with the provisions of this Act, as counsel for the respondent admitted, at the hearing of the appeal, that this undertaking should be treated as an extension of the appellants' undertaking under the Act of 1902, and would be ruled by the decision on the Act of 1902. G

In 1929 the appellant company was authorised by the Electric Power Service (Burin) Act to operate an electric light and power system and telephone system in the Burin Peninsula, which a previous company H

called People's Electric Co., Ltd., had been empowered to carry out, but had failed to do. The Act of 1929 contained the following exempting provisions :

A 10. The electric light and power system and the telephone system operated and carried on by the United Towns Electric Co., Ltd., under the provisions of this Act shall be exempted from all taxes including the annual tax on telephones for the period of 10 years from the date of the passing of this Act.

15. There shall be admitted into the colony free of duty and sales tax the following articles for the original construction of the company's electrical and telephone systems hereunder and for any extensions thereof, but nothing new in substitution for old, that is to say [then follows a list of articles]. . . . Provided that nothing herein shall exempt any article from duty if at the time of importation it shall be manufactured and available within this colony nor shall exempt hand-tools of any description.

B The assessments to income tax here in question cover the profits of the operations carried on by the appellant company under the Acts of 1902, 1924 and 1929, and of the undertaking acquired by the appellant company from the Conception Bay Co., whose powers rested on the C Act of 1913.

At the hearing before their Lordships, the appellant company claimed exemption from income tax by virtue of sect. 30 of the Act of 1902 in respect of the profits of all its undertakings except that part which was carried on under the powers conferred by the Act of 1929, in respect of D which the company claimed exemption by virtue of sect. 10 of the Act of 1929. As regards the Conception Bay undertaking, acquired from the Conception Bay Co., in 1914, the appellant company did not claim to have the benefit of sect. 21 of the Act of 1913, but maintained that, by virtue of the Act of 1902, as amended by the Act of 1914, the Con- E ception Bay undertaking, on its acquisition, became part of the appellant company's undertaking under the Act of 1902. As already stated, the respondent conceded that the undertaking authorised by the Act of 1924 fell to be regarded as part of the 1902 undertaking.

The respondent maintained that the decision of the Supreme Court F —that the term "taxation," as used in sect. 30 of the Act of 1902, and sect. 10 of the Act of 1929, necessarily referred to local taxation only, and could not include income tax—was correct. The Supreme Court appear to have based their decision on the terms of sect. 30 of the Act of 1902, which they held to show that the term "taxation" was limited G to taxes *ejusdem generis* with water rates, which are excepted in the earlier part of the sentence, and which are payable by statute to water companies and form no part of the revenue of the colony; that the Act of 1902 was local in its object, and the work it authorised, and the water rates referred to concerned a particular locality; and that, accordingly, the immunity was limited H to further taxation of a local character similar to the water rates specially named. As regards sect. 10 of the Act of 1929, they held that it must be similarly construed, as, if the appellant's construction of sect. 30 of the Act of 1902 were correct, there would have been no need for the special exemption for 10 years provided under the Act of 1929. Their Lordships regret that they are unable to agree with the reasoning of the

Supreme Court. In their opinion, there is no room for the application of the principle of *ejusdem generis* in the absence of any mention of a genus, since the mention of a single species—for example, water rates—does not constitute a *genus*, and, as regards the Act of 1929, sect. 10, if the appellant company's construction of it is accepted, would modify sect. 30 of the Act of 1902 by limiting the period of immunity in the case of the undertaking authorised by the Act of 1929. A

Apart from these reasons, which influenced the Supreme Court, but which do not commend themselves to their Lordships, their Lordships are unable to find any adequate ground for limiting the genreal and ordinary meaning of the term "taxation," which includes national taxation. It is true that there was no direct taxation in the colony until 1917, when a business profits tax was imposed, followed in 1918 by an income war tax, which was continued until 1925, its name being changed to income tax in 1922. After an interval of 4 years, the present Income Tax Act was passed in 1929, and it contains no provision which would operate to deprive the appellant of the benefit of its previous statutory exemptions. It is to be remembered that the Act of 1902 was declared to be a public Act, and the exemption was granted by the national taxing authority, and there is no reason, apart from any qualifying context, to restrict the meaning of the term taxation to taxes then existing, as was stated by VISCOUNT HALDANE in *Associated Newspapers, Ltd. v. City of London Corpn.* (1), at p. 442: B C D

I think that from the context and purpose with which it is introduced the expression "taxes" means local and not imperial taxes, and that the exemption is confined to these. But subject to this it appears to me that the words used by the legislature are not ambiguous. They occur in a public Act, and extend in terms to "all taxes and assessments whatsoever," and the natural meaning seems to me to include local taxes and assessments, whether then existing or thereafter to be imposed. No doubt the legislature could, by a subsequent Act, have repealed or altered the exemption. E

In the present case, there is, in their Lordships' opinion, nothing in the context or purpose of the Act which would confine the exemption to local taxes, but VISCOUNT HALDANE's statement of the natural meaning of the term is equally applicable: *Pole-Carew v. Craddock* (2), per LORD STERNDALÉ, M.R., at p. 123. Their Lordships, are, therefore, of opinion that the judgment of the Supreme Court should be set aside, that the first question in the special case should be answered in the negative as regards the assessments appealed against, and that these assessments should be disallowed. They will humbly advise His Majesty accordingly. The appellant company will have its costs in the Supreme Court and the costs of this appeal. F G

Appeal allowed with costs. H

Solicitors: *Maddison, Stirling, Humm & Willett* (for the appellant company); *Burn & Berridge* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

KILDUFF v. WILSON AND OTHERS.
COVENTRY v. WILSON AND OTHERS.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), **December 7, 8, 9, 1938.**]

A *Police—Dismissal—Confirmation by watch committee—Right of member dismissed—Policeman acting as fireman—Public authority—Public Authorities Protection Act, 1893 (c. 61), s. 1—Police Act, 1919 (c. 46), s. 4 (1)—Police Regulations, 1920 (S.R. & O., 1920, No. 1484), regs. 15, 16, 18, 94.*

K. was an acting-sergeant in the Liverpool city police force, and it was part of his duty as such to visit two constables on their respective beats and to record the fact of his having done so. It was alleged that he arranged with these men to be at a particular point at a certain time, so that he could visit them both at one and the same time, and that he made, and caused the constables to make, false entries in relation to these visits. It was also alleged that he had made false statements when questioned about these matters by his superior officers. In accordance with the regulations, K. was ordered to appear before the chief constable, and he made a personal explanation of these facts at the same time as the charges were gone into. The chief constable found some charges admitted and some proved, and dismissed K. from the force. K. appealed, as he had a right to do under the regulations, and, upon the appeal coming on for hearing before the watch committee, it appeared that, in consequence of a recent decision of the Court of Appeal, the procedure of the watch committee upon such appeals had to be reconsidered. While this question of procedure was being discussed, the chief constable was present in the room with the watch committee, but he was not so present when, at an adjourned hearing, the merits of K.'s appeal were gone into.

C. was a member of the same city police force, and he had been employed solely on fire brigade duty. By the Police Regulations, 1920, reg. 94, those regulations do not apply to those members of police forces who act exclusively as firemen. C. complained of an improper hearing by the watch committee, and, as against such claim by C., the defendants relied upon the Public Authorities Protection Act, 1893, s. 1:—

HELD: (i) there had been no irregularity in the proceedings of the watch committee in K.'s case.

(ii) the personal explanation given by K. to the chief constable was in accordance with the regulations, and, if the regulations required that the personal explanation should precede the inquiry by the chief constable, K. had waived his right to that.

(iii) the defendants were a public authority within the Public Authorities Protection Act, 1893, s. 1, and the act complained of was an act in the intended execution of their statutory duty.

(iv) the Police Regulations did not apply to C., because he had been employed solely on fire brigade duty.

[EDITORIAL NOTE. The present cases are concerned with the procedure upon dismissal of constables and officers of city police forces. The procedure was criticised in the judgments in the Court of Appeal in *Cooper v. Wilson* (2), and the present action was brought because it was alleged that the procedure was still defective. Since the plaintiffs have failed in this action, the procedure adopted by the watch committee in Kilduff's case would seem to be the correct one. The second case, in which Coventry is the plaintiff, deals with two points rather different from those dealt with in the first case. Coventry was in fact complaining of matters which were some 3 or 4 years old, and this fact made possible a defence based upon the Limitation Acts. This, in its turn, raised the usual two questions, (a) whether or not the defendants were a public authority, and (b) whether or not they were

acting in the intended execution of their statutory duty. Both these questions are answered in favour of the defendants. The question of the exclusion of firemen from the Police Regulations was argued, but this in fact seems clear upon the regulations themselves.

AS TO PROCEDURE IN DISCIPLINE CASES UNDER THE POLICE REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 338-341, paras. 560-564; and FOR CASES, see DIGEST, Vol. 37, p. 177 *et seq.*

Cases referred to:

- (1) *Adam v. Ward*, [1917] A.C. 309; 32 Digest 129, 1608; 86 L.J.K.B. 849; 117 L.T. 34; *affg.* (1915), 31 T.L.R. 299.
- (2) *Cooper v. Wilson*, [1937] 2 K.B. 309; [1937] 2 All E.R. 726; Digest Supp.; 106 L.J.K.B. 728; 15 L.T. 290.
- (3) *R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K.B. 475; Digest Supp.; 96 L.J.K.B. 530; 137 L.T. 455.
- (4) *R. v. London County Council, Ex p. Akkersdyk, Ex p. Fermentia*, [1892] 1 Q.B. 190; 33 Digest 103, 698; 61 L.J.M.C. 75; 66 L.T. 168.
- (5) *Hill v. Ladyshore Coal Co. (1930), Ltd.*, [1936] 3 All E.R. 299; Digest Supp.; 155 L.T. 567; 29 B.W.C.C. 255.
- (6) *McManus v. Bowes*, [1938] 1 K.B. 98; [1937] 3 All E.R. 227; Digest Supp.; 157 L.T. 385.
- (7) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (8) *Edwards v. Metropolitan Water Board*, [1922] 1 K.B. 291; 38 Digest 111, 795; 91 L.J.K.B. 210; 126 L.T. 300.
- (9) *Copper Export Asscn. Incorporated v. Mersey Docks & Harbour Board* (1932), 147 L.T. 320; Digest Supp.
- (10) *Brocklebank, Ltd. v. R.*, [1925] 1 K.B. 52; Digest Supp.; 94 L.J.K.B. 26; 132 L.T. 166.

APPEALS from two decisions of TUCKER, J., upon trials at the Liverpool Assizes with a special jury. The facts and pleadings are fully set out in the judgments of TUCKER, J., which are here reported with those of the Court of Appeal.

KILDUFF v. WILSON.

Edward Wooll and Allister Hamilton for the plaintiff.

D. P. Maxwell Fyfe, K.C., and *Hartley Shawcross* for the defendants.

TUCKER, J. : This is an action brought by Roderick Kilduff, as plaintiff, against Archibald Kennedy Wilson and a number of other defendants, who were at the material times members of the watch committee of the Liverpool Corporation, and who, or some of whom, were present at the meetings of the watch committee which form the subject of complaint in these proceedings.

The plaintiff by his statement of claim claims a declaration that the defendant Wilson, who is and was at all material times the chief constable of Liverpool, was not entitled in law to dismiss him; a declaration that the defendant's purported dismissal of the plaintiff is invalid; a declaration that the defendant Wilson was not entitled to suspend the plaintiff; a declaration that the hearing of the plaintiff's appeal by the watch committee was not legally valid; a declaration that the purported confirmation by the watch committee of the defendant Wilson's finding

and sentence was not legally valid ; a declaration that the plaintiff is still a member of the Liverpool police force ; a declaration that the defendant Wilson and/or the watch committee are not entitled to retain or convert the rateable deductions from the plaintiff's pay ; damages against the defendant Wilson and/or the defendant watch committee for
A their unlawful termination of the defendant's appointment as constable, and for the conversion of the plaintiff's rateable deductions ; damages against the defendant Wilson for his unlawful suspension of the plaintiff's employment, and for the libels set out in para. 17 of the statement of claim, and an injunction restraining him from a repetition of the same
B or similar libels ; an order for the rectification of certain police records ; and such further or other relief as to the court may seem just.

On May 15, 1937, the plaintiff was an acting-sergeant, and is alleged to have disobeyed orders in connection with his visits to other police constables in the neighbourhood of a road known as Lisburn Lane. A
C charge against him was that he improperly gave visits, as it is called, to two constables in one and the same spot, when he should have given them separate visits at spots some 172 yds. distant, and allowed them, or caused them, to record visits as if he had visited them in two separate places. Furthermore, he was charged with making false entries in the
D police records in connection therewith, and with making false statements to his superior officers when he was questioned about the matter. On those charges, he came before the chief constable on May 26, 1937, and, having heard the case, the chief constable informed him that it was his duty to pass a sentence of dismissal upon him. The chief constable duly made a
E note in what is called the margin of a misconduct form, a document which contains, *inter alia*, the charges against the man concerned. The chief constable wrote in the margin of that document these words, under date May 26, 1937 :

Charges 1 and 2 admitted.

F Those were charges relating to disobedience of orders, to which the plaintiff had pleaded guilty.

Charges 3, 4 and 5 proved. Dismissed from the force.

Subsequently, the plaintiff signed on that form a statement that he had read the chief constable's decision as given in the margin, and added
G these words :

. . . and I beg to report that I wish to appeal to the watch committee.

That is dated May 26, 1937. He did appeal to the watch committee, and eventually his case was heard and determined on July 27, 1937, when the watch committee purported to confirm the decision of the
H chief constable to dismiss the plaintiff.

Arising out of those matters, which I have indicated only in outline, numerous complaints and claims have been formulated against the chief constable and against the members of the watch committee who were present at some or more of the meetings of the watch committee between May 26 and July 27.

The following questions were left to the jury, who gave the answers appended :

1. Did the defendant Wilson discuss with the members of the watch committee the facts of the plaintiff's case or procedure only at the meetings on June 8 and July 20, 1937 ?—Procedure only.
2. Did any members, and, if so, which, of the watch committee show bias against the plaintiff at the above meetings ?—No.
3. (a) Were the words set out in para. 17 of the statement of claim defamatory of the plaintiff in their natural and ordinary meaning ?—Yes. A
 (b) Were the said words true in their natural and ordinary meaning ?—Yes.
 (c) Did the said words bear all or any, and, if so, which, of the meanings attributed to them in the statement of claim ?—No.
4. Did the defendant Wilson write and publish the said words :
 (a) in the *bona fide* performance of his duty ?—Yes.
 (b) in the honest belief that they were true ?—Yes. B
5. Was the defendant Wilson actuated by malice in writing and publishing the said words ?—No.
6. What damages for libel ?—£5.
7. If the defendant Wilson suspended the plaintiff unlawfully, what damages for invasion of his legal rights as a constable ?—40s.
8. If the defendant Wilson dismissed the plaintiff unlawfully, what damages for invasion of his legal rights as a constable ?—£250. C
9. If the watch committee dismissed the plaintiff unlawfully, what damages for invasion of his legal rights as a constable ?—£250.
10. If the watch committee and/or the defendant Wilson converted the plaintiff's rateable deductions, what damages ?—40s.

The libel which was referred to in No. 3 of those questions consisted of the words "Dismissed from the force" which appear in the margin of the misconduct form. The answers to questions Nos. 7 and 10—namely, the 40s.—were answers given in accordance with the admission of counsel for the plaintiff that, assuming he was entitled to damages under those heads, they would in fact be only nominal damages. D

Those answers disposed of a great many issues in this case, and, with regard to the jury's answers, it is necessary for me to deal now only with the answers which they gave to question No. 4. I have some doubt as to whether question No. 4 should have been left to the jury at all, but I left it as a matter of precaution, having regard to passages in *Adam v. Ward* (1) to which Mr. Wooll drew my attention, as to the desirability or necessity in some cases of the jury finding facts which might be in dispute as a basis for the judge's decision as to whether or not the occasion is a privileged one. However, the jury have given their answer in the affirmative to both parts of that question. Notwithstanding the jury's answers to that question, I think that it is my duty to apply my mind to this question of whether or not it was a privileged occasion, independently altogether of the answers which the jury have given to that question, and I proceed to do so. E

This misconduct form was a form in ordinary use in the police force, and the proper and appropriate form for dealing with cases where charges are brought against constables, and I am satisfied that it is the duty of the chief constable to record on that form any decision at which he arrives as a result of any inquiry that he has held with regard to a specific charge made against a constable serving in his force. F

This misconduct form was dealt with in the ordinary, normal way, and G

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it was seen by the persons whose names are set out in the further and better particulars of defence, which were delivered on Jan. 19, 1938. I am satisfied by the evidence that all the persons whose names are there set out were people to whom the form was properly communicated in the ordinary course of police duty. Either they were people who had
A an interest in, and a duty to see, the form, or they were subordinate people, such as the police typist, whose duty it was to make copies of such document, or to deal with it in an ordinary routine way, in order that it might reach their superior officers. There were two officers amongst that number, Inspector Millington and Constable Cunliffe, who saw the
B document only for the purpose of making copies of it for the benefit of the plaintiff, pursuant to his request for it. I am satisfied that the occasion of the publication of these words on this document was clearly a privileged occasion, and that the answer of the jury, at any rate, that the words were written and published by the defendant Wilson in the
C honest belief that they were true, disposes, in my view, of any doubt there might be about the matter at all.

So much for the jury's answers. Their answers as to damages, of course, become relevant only in the event of my deciding in favour of the plaintiff the part or parts of the case not left to the jury. I do not
D think it necessary for me to say any more about the jury's findings, and the issues that were left to them, but there remain certain questions for me to decide irrespective of the jury's findings. In order to deal with the questions which remain for me, however, I think that it is necessary for me to indicate the facts as I find them, beyond the facts as shown in
E the jury's answers. That is to say, there are or may be certain other facts which it is necessary to ascertain before I can give my judgment on the points of law which remain for me.

I am satisfied, after having heard the evidence, that the chief constable was from first to last desirous of giving full effect to the case which has
F been quoted so often in this court—*Cooper v. Wilson* (2). I am furthermore satisfied that at all times from the time when the Court of Appeal gave their decision in that case all the members of the Liverpool watch committee were also genuinely desirous of giving full effect to the judgment of the Court of Appeal in that case. I am, moreover, satisfied,
G in so far as it is a matter for me, that the chief constable, when he wrote the words "Dismissed the force" on the misconduct form on May 26, 1937, was genuinely doing something which he thought it was his duty to do, and which was in accordance with the decision in the *Cooper* case (2), coupled with the statutory regulations governing the police force, which
H are S.R. & O., 1920, No. 1484, as subsequently amended down to S.R. & O., 1933, No. 326, which have been called the statutory regulations during the hearing of this case.

What happened after the *Cooper* judgment (2) I am quite satisfied is this. The *Cooper* judgment (2) was given on Mar. 23, 1937. These matters arose out of incidents on May 15, 1937. On May 26, the chief

constable dealt with the case, and awarded this punishment. The plaintiff having intimated his desire to appeal to the watch committee, the case was put on the agenda for the watch committee for June 8, in the ordinary, normal course of affairs. I think that there was a number of other matters that came up for decision before the watch committee on June 8.

The full minutes of everything that happened at the watch committee of June 8, 1937, appear in evidence in this case, and from them it will appear that there was a large number of matters to be dealt with in the ordinary way at that meeting, some of which, or at any rate several of which, concerned the chief constable. As I said, however, amongst the matters which appeared on the agenda of that meeting, or amongst the matters that were going to be dealt with at that meeting, was the appeal of the plaintiff in this case, Kilduff.

Unfortunately, this being the first case which had occurred since the *Cooper* judgment (2), the chief constable and the watch committee were caught, I was going to say, before they had got their tackle in order for the purpose of giving effect to the *Cooper* judgment (2). I am quite satisfied from what I have heard from the witnesses—in fact, I go so far as to say that I am convinced—that both the chief constable, Mr. Bishop, and a number of members of the watch committee were keenly interested in the matter, and were desirous of getting the matter put in order, but they had not had a meeting to decide what their future procedure was going to be as a result of the *Cooper* judgment (2), and they were, so to speak, caught unawares when the case of Kilduff came up on June 8, 1937.

I am also quite satisfied that the chief constable attended that meeting determined that he was not going to conduct the case for the prosecution, or be present at the hearing of the case or at the deliberations of the watch committee. He was there in accordance with his duties as chief constable at the meeting of the watch committee, when there were a number of other matters to be dealt with.

When some formal matters had been dealt with, the committee clerk indicated that the next case was an appeal. I am quite satisfied, whatever were the exact words used, that it quite soon became apparent to the members of the committee that they were being called upon to adjudicate upon a question of an appeal by a dismissed police officer, and that, of course, at once raised the whole question as to how they were to proceed and what was to be the position of the chief constable. Alderman Hogan was the first gentleman to raise the question, and, after he had raised it, a discussion took place with regard to the appropriate procedure, and also with regard to a chief constable's powers of dismissing, or imposing a sentence of dismissal, all matters of some difficulty arising out of the *Cooper* judgment (2).

I am quite satisfied that the chief constable made no claim from first to last to be present at the hearing of the substantive appeal by Kilduff, the plaintiff. In fact, it was the last thing he intended to do. Never-

theless, the question of procedure having cropped up for discussion, he of course naturally took part in it. It had no specific reference to Kilduff, any more than to any other constable who might be dismissed in the future and desired to appeal, or have his case brought before the watch committee.

- A Unfortunately, at that stage, or very soon after the discussion arose, the plaintiff Kilduff, who was in attendance in the corridor outside, and who had been ordered to attend there in anticipation of his case coming on, together with Mr. Madden, who was the constable who had been assigned to him as an advocate to present his case, were shown into the
- B committee room, owing to some error or premature action by somebody. They were hardly in the room a minute before their presence was realised and they were requested to leave, which they did, but they remained in the precincts of the building while the committee discussed this matter for some appreciable time, eventually sending for the town clerk to
- C advise them. After the town clerk's arrival, eventually Kilduff was told that his further attendance there was not required, and the watch committee passed a resolution to the effect that they were to take counsel's opinion, and also to confer with the Home Office, as to the procedure to be adopted in cases of this kind. They resolved, with regard to Kilduff's
- D case

. . . that in the meantime consideration of the case of Constable 144C Kilduff be deferred.

- I am quite satisfied, and the jury have found, that at that meeting there was no discussion of the facts of Kilduff's case, but that the only matter
- E discussed was procedure. If it is necessary, I need add only that I am in entire agreement with the jury's answer to that question.

- As a result of the resolution of the watch committee on that occasion, the case was submitted to counsel for his opinion, and his instructions and the opinion that he wrote as a result thereof have been put in.
- F Accompanying his instructions were the misconduct form relating to Kilduff's case, which showed the charges against him, and so forth, and also a shorthand note of the proceedings which had taken place before the chief constable. It is clear from the instructions to counsel that he was asked to give advice generally with regard to procedure, and that no
- G question whatever was addressed to him with specific reference to the merits of Kilduff's case. When counsel are asked to give advice generally, however, it often assists them to know the facts of a particular case which have given rise to the general question which they are asked to advise upon. Nothing is more difficult than to advise in the abstract, without
- H knowing the facts which have given rise to the questions about which one is asked to advise. Consequently, the town clerk thought it desirable to include those documents in the instructions to counsel who was being asked to advise.

When it came to the communications to the Home Office, however, the town clerk was careful to send to the Home Office only the instructions

which he had sent to counsel, without the enclosure, and there was an accompanying letter setting out the difficult position in which the watch committee found themselves, and asking for advice with regard to a possible appeal from the *Cooper* judgment (2), and generally with regard to procedure.

Thereafter it appears that counsel instructed to advise on behalf of the watch committee did have some consultations with the legal advisers of the Home Office, as a result of which a code of procedure was drawn up which he advised should be used on future occasions at meetings of the watch committee. This code of procedure was submitted to the Home Office, and was eventually adopted by the Liverpool watch committee, with one slight modification. A
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The uncontradicted evidence before me is that, at the consultation between counsel and the Home Office advisers, the facts and merits of Kilduff's case were in no way touched upon or dealt with at all, and the advice that the watch committee received from counsel and from the Home Office had reference to general procedure only, and to the carrying out of the decision of the Court of Appeal. C

Of course, it is true that Kilduff's case was the immediate cause of getting this advice, but I am quite satisfied that the consultation with the Home Office and counsel, so far from being in any way wrong in this case, indicated the genuine desire of all to put their house in order, and to carry out the law properly. D

I cannot imagine a wiser or a better course for the watch committee and the chief constable to take than the course which they did in fact take. Of course it is true—it is easy to be wise after the event—that it would have been better if they had in fact done all this before Kilduff's case came up. The fact remains, however, that they had not, and, when the case did come up, they did what, in my view, was the sensible and wise and cautious thing to do. Having obtained the code of procedure and advice, they held a meeting on July 20. What took place appears from the minutes of that meeting. There is no contradiction as to what took place at that meeting. The town clerk submitted the opinion of counsel as to the procedure which should be followed by the committee in dealing with disciplinary appeals, together with a code of procedure for the guidance of the committee on appeals, a copy of which was forwarded to each member. E
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A letter was also read from Alderman Hogan, in which he stated that he had received counsel's opinion on procedure, that it confirmed the view which he had expressed, and would go a long way towards defining the functions of the committee without in any way impinging on the authority of the chief constable. He said that he reserved to himself the right to raise any points in connection with the matter at a subsequent meeting, and continued : H

If however the committee decide, as I assume they will, to adopt the procedure set out by counsel, I would suggest that the procedure be circulated through police

orders or in some other way, so that the members of the force will know their rights and duties in the matter.

It was then resolved :

A That the course of procedure to be followed by the committee, subject to the provisions of the police regulations, upon appeal from the decision of the chief constable under reg. 20 of these regulations, as recommended by counsel, be adopted subject to the deletion of the words "unless the committee in their absolute discretion otherwise order" in para. 5 thereof.

B Those words related to giving audience to counsel or solicitors at those hearings. Counsel in his draft had allowed a discretion to the committee to allow legal representation if they thought fit ; or, rather, he put it the other way—that there should not be any legal representation unless the committee in their discretion otherwise ordered. The committee deleted the words "unless the committee in their absolute discretion otherwise order," and therefore they decided, for better or worse, that police officers on appeal to them were not entitled to be represented legally. They resolved :

C That the chief constable shall not conduct the respondent's case before the committee.

I am quite satisfied that he never intended to do so. They also resolved :

That the chief constable shall not remain in the room with the committee whilst an appeal is being heard.

D That again was a mere putting on record of what the chief constable, for his part, had long before decided he was going to do. Having decided those matters of procedure—and the minutes dealing with that are headed "Disciplinary appeals"—they then proceeded to consider some correspondence which had been received from Bieber & Bieber, solicitors for E Kilduff, and in particular to consider a letter of July 5, in which a number of requests had been made by those solicitors on behalf of Kilduff. They had asked whether he would be allowed to be represented at the hearing by counsel, or by themselves, and whether they could inspect 11 documents, which are set out in that letter, and they had ended with a request F that the committee would pay Constable Kilduff's costs in full, including all costs incurred to date upon full solicitor and client basis. The committee resolved :

(a) That the committee are not prepared to allow Constable Kilduff to be represented by counsel or solicitor at the hearing of his appeal to the committee.

G (b) That as C. Kilduff has been allowed to inspect and make copies thereof, or has been supplied with copies of all documents to which he is entitled under the police regulations, the committee are not prepared to allow inspection or to furnish copies of any other documents.

(c) That the application for payment of C. Kilduff's costs be declined.

They further resolved that the town clerk be requested to inform Bieber & Bieber accordingly. Finally, they resolved :

H That a special meeting of the watch committee [not an adjournment of that meeting] be held on Tuesday, July 27, 1937, at 2.30 p.m. for the purpose of hearing the appeal in the case of Constable Kilduff.

Pursuant to that resolution, there was a special meeting of the watch committee on July 27, 1937, when it is conceded the case of C. Kilduff was heard in full accordance with the procedure which had been settled

by counsel and had been adopted by the watch committee. The chief constable was not present from first to last. He did not prosecute. A special officer from the prosecuting department of the police, I think, undertook the prosecution, and the only complaint that was made with regard to that hearing was of bias against one or other members of the watch committee, which complaint has been disposed of by the jury's answer. The committee on that occasion heard the case, heard the witnesses on either side, and finally decided that the sentence of the chief constable be confirmed. A

A point I have to decide on this part of the case is whether or not, although no actual bias was exhibited by anyone, and although procedure alone was discussed at the meeting of June 8 and at the meeting of July 20, none the less the circumstances are such that an ordinary, reasonable man in the position of Kilduff would be honestly and reasonably suspicious or apprehensive that justice had not been done. In other words, I have to decide whether what happened here was in conflict with what has been so often laid down—that justice must not only in fact be done, but must also manifestly be seen to have been done. The well-known authorities have been cited before me—*R. v. Essex JJ., Ex p. Perkins* (3) and *R. v. London County Council, Ex p. Akkersdyk, Ex p. Fermentia* (4), and, more expressly, the recent decision in the *Cooper* case (2), which was so interconnected with the present case. In that case, a police constable had sent in his notice of resignation, and, after his notice of resignation had run out, the watch committee purported to hear his case on appeal from the chief constable and to dismiss him. The main decision of that case was that the watch committee had no jurisdiction to deal with the case, because the plaintiff in that case had in fact resigned, and had ceased to be a constable at the time when the case came before the watch committee, and the decision of the watch committee did not date back to the prior, preliminary decision of the chief constable. In that case, however, the majority of the court, GREER and SCOTT, L.JJ., did further add an additional ground in support of their decisions—namely, that what had happened in that case was in conflict with the rule that justice must manifestly be seen to be done. B C D E F

What had happened in *Cooper's* case (2) is set out in the judgment of GREER, L.J., at pp. 322, 323 : G

When the plaintiff came into the presence of the watch committee to present his case in resisting confirmation of the chief constable's decision and asking for its reversal, he saw before him seated at the table opposite to where he would be giving his evidence, the deputy chairman, Mr. Alderman Eills, and seated next to him the chief constable, and next to the chief constable the deputy chief constable, and to any outsider who happened to come in with him it would seem as if the chief constable and the deputy chief constable were placed in a position where they would act with the committee as judges of the police application for dismissal and of the plaintiff's appeal against the findings of the chief constable. The proceedings were opened by a statement read by the chief constable. In the course of his opening statement the chief constable again repeated the mistake made by the police of treating the plaintiff's notice of resignation as an application to resign. I cannot read the chief constable's statement as other than an opening statement by an applicant for an order of dismissal and by a respondent to the H

A appeal, especially the passage referring to the third charge and the concluding paragraph. Both learned counsel who addressed the court on behalf of the respondents described the chief constable as a second respondent. This seems to me a not inaccurate description of the chief constable's position in relation to the plaintiff's appeal, and nothing could be said with regard to him if he had said: "I am interested in the result of this appeal inasmuch as my decision is being attacked, but I do not propose to take any part in the arguments before this tribunal except by stating what my decision was." I think he went beyond that and in so doing treated himself as one of the parties in the proceedings before the committee.

Then he went on to deal with other complaints made, and he added, at p. 323 :

B But I think he [the plaintiff] is fairly entitled to complain that the presence of one of the respondents to his appeal on the bench when they were deliberating as to whether they would or would not affirm his sentence was contrary to natural justice, and that it thereby invalidated the decision of the watch committee and entitled him to have a declaration to that effect.

Later he says, at p. 324 :

C I ask myself what would any one have thought who came into the room where the committee were sitting, after the plaintiff had gone out while they were considering their decision, and found sitting on the bench with the committee one of the respondents to the appeal who had opened the case, though he had left the calling of the witnesses to Superintendent Hughes. Such a person, if reasonable, would have been likely to say to himself: "There has been an opportunity here for one of the parties to influence the judgment of the committee, and it looks as if justice may seem not to have been done."

D With regard to this part of the case, SCOTT, L.J., also expressed his views emphatically, and of course it is my duty to follow the guidance which I gain from this case. Every case of this kind must depend upon its own particular facts, but, reading this case, it appears to me that the fundamental point which the Lords Justices had in mind, and had before them, was that a man was acting in a dual capacity. That is to say, he was to all intents and purposes the respondent to the appeal, and the respondent to the appeal who was conducting the case for the prosecution, and, being in that capacity, he was present with the members of the watch committee before the case came on and after the hearing had taken place, when the committee were deliberating on what their decision should be. That I regard as the basis of the whole decision.

G I find nothing in this case which compels me to hold, or which indicates to me that I ought to hold, that the mere fact that a chief constable, whose duty it is to attend a watch committee on many different matters, is in the room, or has been in the room, prior to an appeal coming on, is, alone and standing by itself, sufficient to invalidate the subsequent appeal, provided that at that subsequent appeal he has nothing to do with it, and that he does not either act as prosecutor or remain with the committee during their deliberations.

H However, I do feel impressed by the fact of the presence of the chief constable, who, I should have said in detailing the facts, was clearly to be seen sitting in the room with the other members of the watch committee when Kilduff was shown in on June 8 for that minute or two before he was sent out again. He was there sitting with the committee, and was in fact beginning to discuss the procedure

generally. I do feel that, if the case had stood there, and if the hearing of the appeal had been proceeded with there and then that day, the position in this case would have needed very serious consideration by me, having regard to the Court of Appeal judgment in the *Cooper* case (2).

However, the appeal was not heard that day. The appeal went off *sine die*, and eventually the watch committee, having taken every possible step to see that things were done in accordance with the *Cooper* judgment (2), appointed a special day for hearing, on July 27, six weeks later, when the watch committee was in fact in some respects differently constituted. There was a number of persons present who had been there on June 8, but there were some there who had not been there on that date. They had a special meeting then, and the chief constable was nowhere present, either prosecuting or even in the precincts of the building, and on that occasion everything was done that should have been done. I think I have got to judge this case in the light of what happened at the effective hearing on July 27.

Of course that body of men sitting on July 27 may have been, or it is said that they may have been, affected by what had happened on June 8, and by dealing with this application for documents and so forth on July 20. It is said that they had been, so to speak, tainted by what happened before, so that the plaintiff would not appear to be getting justice. I think, however, that I have got to consider it from the point of view of an ordinary, reasonable man, who had seen and been made aware of what was going on.

The plaintiff knew, at any rate, through his solicitors, that there had been some consideration with regard to the procedure to be adopted. He knew that his case had not been dealt with. He knew, at any rate, that his appeal had not been heard on June 8, and I think that, when a tribunal finds itself in a position where something might appear to be not quite in order, and does its best to put matters right, and does in fact put matters right, and sits again six weeks later, properly constituted, with nobody present who should not be present, even if a reasonable man might have had some cause for doubt or suspicion on June 8, any such doubt or suspicion should have been removed by July 27. I cannot say that I am satisfied that, when Kilduff's appeal was heard on July 27, there was any reason why he should have had any apprehension that his case was not going to be dealt with properly, and in a manner unbiased by any influence that might have become attached by the fact that the chief constable was in fact in the room at the earlier stages on June 8.

I say that all on the assumption that what took place on June 8 might, standing by itself, have invalidated the proceedings, if the appeal had been heard on that day. I am not satisfied that it would, for it is not necessary for me to decide that, but I think that, if there was anything wrong on June 8, the matter had been put right by July 27, and that that is the proper angle from which to approach the matter.

I am therefore satisfied, on this part of the case, that there is no ground

for saying that the proceedings before the watch committee are invalidated on the ground that justice had not been complied with, in the sense that justice had not been manifestly seen to have been done.

A Mr. Wooll advanced further arguments before me on other aspects of the case. He said that, under the statutory regulations, the watch committee had not jurisdiction to deal with the case, and he put his case in two ways with regard to that. First of all, he said that, under regs. 16, 18, the police officer was entitled to be given an opportunity of making a personal explanation to the chief constable prior to his being ordered to appear before the chief constable for the hearing of the case. I think B that Mr. Wooll is right with regard to his interpretation of the meaning of those two regulations. I think that, strictly speaking, a police officer who has intimated on the misconduct form that he desires to make a personal explanation to the chief constable should be given an opportunity of doing so, and that such opportunity should be given, strictly C speaking, prior to his being ordered to appear before the chief constable. In this particular case, although he was not actually given the opportunity, nor given any appointment, to make an explanation before he was brought before the chief constable, I am satisfied that, before the charge was investigated and the matter was heard, he did in fact make D an explanation to the chief constable, and that the chief constable considered that, notwithstanding the explanation he then made and the explanation that he had put in writing on the misconduct form, the case was one which had to be heard.

E The next complaint that is made—that of non-compliance with the regulations—is under reg. 15, which is as follows :

The written charge, which shall be entered on a form provided for the purpose (hereinafter referred to as the misconduct form) together with the report or complaint on which the charge is founded, and all reports thereon (whether confidential or otherwise) or copies thereof, shall be handed or sent as soon as practicable to the accused, who shall initial them to show that he has seen them . . .

F In this case, it appears that Sergeant Briscoe, one of the officers concerned in the incident of May 15 which was being investigated by the chief constable, had in his notebook a note of certain facts which were relevant to that inquiry. He was called as a witness for the purpose of corroborating another officer, and he had these notes in his notebook, G but he had not in fact made a report to any of his superior officers with regard to the matters which were the subject of the charge against Kilduff. It is argued before me that an entry in a police officer's notebook is the same thing as the report referred to in reg. 15. I do not think that it is. I think that an entry in a notebook is a current entry of something which the police officer has seen at the time, and that the words H "all reports thereon" in reg. 15 mean reports on the charge. There must be a charge and report thereon before reg. 15 strictly applies. So, in my view, I think that Mr. Wooll is wrong about reg. 15, though I think that he is right under regs. 16, 18.

However that may be, I do not think that non-compliance with such

matters as these can possibly be said to go to the root, to go to the foundation, of the jurisdiction of the tribunal. One of the cases relied upon before me was *Hill v. Ladyshore Coal Co. (1930), Ltd.* (5). That was a case under the Workmen's Compensation Act, and the headnote is as follows :

A collier was injured while working and a big toe was amputated in consequence. After paying full compensation for a time and then part compensation, the employers proceeded under the Workmen's Compensation Act, 1925, s. 12, and gave notice of termination of payments. A copy of the medical adviser's certificate as to the workman's condition supplied with the notice contained nothing that was not in the original certificate, but omitted various matters included therein. The medical referee certified the workman as fully recovered and payments were terminated. Renewed trouble appeared at the seat of the amputation, shortly afterwards, and the workman applied for and obtained an award of compensation from the county court. The employers appealed on the ground that the medical referee's decision was conclusive and binding, and the county court had no jurisdiction to inquire into the matter. A preliminary objection against the appeal was taken on the ground that the omissions in the copy medical certificate, served on the workman, were contrary to the express terms of sect. 12 (3), and that it and all subsequent proceedings based on it were a nullity :—Held : the omissions in the copy of the certificate of the employers' doctor were contrary to the express provisions of the Workmen's Compensation Act, 1925, s. 12 (3), and all subsequent proceedings based upon it were invalid and a nullity. The appeal must therefore be dismissed and the parties left to take such proceedings as they might be advised.

The basis of that decision was that the giving of a copy of the report was the very foundation of the jurisdiction of the medical referee. That appears from the judgment of SCOTT, L.J., where he shows the distinction between matters of this kind, which go to the root of the jurisdiction, and matters which are purely procedural, at pp. 309, 310 :

Upon that Mr. Cave said that that was a consent by the workman to the learned county court judge treating the medical referee's certificate as a valid instrument in accordance with sect. 12, and he argued that the case of a party waiving a condition in a matter of procedure imposed to his advantage will bar his objecting to the procedure thereafter, was applicable here. I do not think any question of procedure in that sense was involved in this matter which we are discussing. I think it was a question of rights, not a question of procedure—the right of the workman to have his weekly payment continued in accordance with the terms of the Act, unless it was brought to an end by due performance of the conditions laid down for its termination in sect. 12.

I think that the breaches of these regulations, or the non-compliance with these regulations, were mere procedural matters, which did not go to the root of the jurisdiction of the watch committee, and that it would be almost absurd to think that the slightest deviation in any one of these procedural matters could or should render void the substantive decision on the merits by the watch committee. Furthermore, with regard to the failure to give an opportunity for any explanation, I am satisfied that the plaintiff was fully aware of his rights in the matter and that he did not insist upon them, and that he appeared before the chief constable and took no point with regard to it and thereby waived any non-compliance with the regulation.

So much for Mr. Wooll's submission with regard to that part of the regulations. He makes the further point, however, that the watch committee had no jurisdiction, because they were proceeding by way of confirmation of a preliminary decision of the chief constable, which was a

decision that the chief constable had no right to make under the regulations. He puts it that way as a result of the decision in *Cooper's* case (2). He further argues, however, that, under the regulations, strictly construed, what the chief constable should have done was to return the matter to the watch committee for hearing, as distinct from
A confirmation. With regard to that, of course, that arises under regs. 20, 21, of these statutory regulations. These statutory regulations have been the subject of consideration by the Court of Appeal in the *Cooper* case (2), and I think it is sufficient for my purposes to refer to the judgment of GREER, L.J., where, having quoted the regulations, he says, at
B pp. 316, 317 :

If the proper construction of this clause involves that a power of dismissal is given to the chief constable it would be *ultra vires*. I do not think, however, that it is *ultra vires*. It is only a regulation as to the procedure to be adopted to bring the question of dismissal to a hearing before the watch committee. The power to make regulations as to the government of the police force seems to me to extend no farther than a power to make regulations with regard to the way in which the
C statutory authority in borough police forces shall exercise its powers, that is, in the case of petty offences the chief constable, and in the case of serious offences involving suspension or dismissal the watch committee. An application to the watch committee to discharge a constable by reason of the regulations takes the form of an application for confirmation of the chief constable's decision, but it is none the less an application to the watch committee to dismiss, and must be heard and determined by the watch committee acting judicially or quasi-judicially.
D Until the preliminary decision of the chief constable comes before the watch committee for confirmation it cannot have the effect of operating as a dismissal. It is only on confirmation by the statutory body, to whom alone is given the power to dismiss, that any dismissal can operate.

Naturally, I am bound to follow the interpretation that has been put upon those regulations by GREER, L.J., and I think that in that passage
E his view clearly appears to be that these regulations are procedural only, and that the regulation takes the form of an application for confirmation of the chief constable's decision.

In this case, the chief constable would have appeared to me to have come to a decision in accordance with that judgment. It appears to me
F that the matter went properly before the watch committee, and that it is quite immaterial whether it went to them for confirmation or by way of appeal, provided that in fact the watch committee did hear the case on its merits, and *de novo*, which in fact they did. I think that, following the interpretation of the regulations given by GREER, L.J., I must reject that
G argument of Mr. Wooll's.

I notice, in passing, another argument which he did not put forward, which I think is one which may merit a good deal of consideration in some other quarter, though I do not think that I ought to adopt it, in view of what has been said about these regulations in the Court of Appeal.
H What Mr. Wooll did say with regard to that is this. He said that reg. 20 (2) deals with a borough police force, whereas reg. 21 deals with a county police force as well as a borough police force, and he says that that is where the whole difficulty has arisen.

It is admitted that a county chief constable can dismiss, but a borough chief constable cannot, and Mr. Wooll says that, when one reads reg. 20 (2)

and realises that it applies to a borough police force only, whereas reg. 21 applies to a county police force also, the result is that the county chief constable has power in what I call a dismissal case, in a case which is fit for dismissal, and the chief constable of a borough has power only to remit the case to the watch committee for further hearing; and, taking the words in that regulation under subpara. (iii), "to award a punishment as provided in reg. 21," when one comes to apply that to a borough force, he says that that must clearly mean to apply punishments (2) to (7) inclusive, as shown in reg. 21. A

I say no more than that, except just to mention it and to say that I think that that interpretation of the regulation is a different one from that which was put upon it by GREER, L.J., in the *Cooper* case (2). I confess, however, that, were I not bound by the *Cooper* case (2), I should have desired to consider that argument of Mr. Wooll's with very much greater care and consideration than I have thought it was my duty to do in this case, having regard to what GREER, L.J., said in the *Cooper* case (2). B C

There remain one or two other small matters to be dealt with, I think, with regard to the findings of the jury concerning damages. They do not arise in view of my decision on the matters which have been left to me and in the view of the jury's answers to the questions, but perhaps I should say that, if I had been in Mr. Wooll's favour on the part of the case that has been left to me, and if it had become necessary for me then to consider the question of damages, as at present advised, I am far from satisfied that the suspension, if there was one, by the chief constable, or the purported dismissal, if there was one, by the chief constable, or the dismissal, which there was, by the watch committee, assuming it to have been a wrongful one, would give him in law a right to damages, always provided that he is going to be reinstated in the force, with all his back pay, and re-credited with all his statutory deductions. D E

I have not been satisfied by the authorities quoted by Mr. Wooll, or by his argument so far, that even if there had been these unlawful or invalid proceedings, provided the plaintiff is reinstated and given all the necessary declarations and back pay, he has still got an action for damages for what is called the infringement of his status as a constable. I am, further, far from satisfied—in fact, I am very dissatisfied—with regard to the claim for conversion of his statutory deductions. I do not think that there is any case of conversion made out on the facts of this case at all. There was no specific earmarked fund or money in a bag, and at most what was done here amounted to the payment by a debtor to the wrong person, with the result that he has got to pay again the right person. F G H

It is not necessary for me to go into any of these matters in detail, and I would have required to consider them at much greater length if the question of damages had arisen at all.

The only remaining thing I think I should say in passing is that I

- am also not satisfied that what in fact took place here between May 26 and July 27, or between May 26 and June 8, amounted to a suspension within the meaning of the Municipal Corporations Act. The plaintiff at all times was on full pay, and he was not called upon to surrender his uniform until after July 27, and, up to July 27, although put off duty,
- A he was on full pay, and, although he was suspended from duty, I do not think that the contract between the parties was suspended within the meaning of the Municipal Corporations Act. Therefore I should have held, if it had become necessary, and I do hold, if it is necessary for me so to hold, that there was no suspension of the plaintiff.
- B I think that that disposes of the whole of the matters which it is necessary for me to decide in this case. I add, in leaving it, merely that the nine days of this case have been taken up in greater part with matters which have been argued before the jury, charges against the chief constable and charges against many people, which have failed, and, in my view,
- C rightly failed, and which, I go so far as to say, were foredoomed to failure. If I had been in favour of the plaintiff on some one or more of the parts of the case that I have been discussing to-day (which are matters, in my view, very worthy of discussion, and giving rise to considerable difficulty), I should have awarded him only half the costs of the
- D present proceedings, in view of the failure of his other charges, and matters which were gone into at very considerable length, and which made the case extend over eight days, instead of two or three, as it probably otherwise would have done.

The result is that there must be judgment for the defendants, with

E costs.

The plaintiff appealed.

- SCOTT, L.J.: Kilduff's case is an appeal from a judgment of
- TUCKER, J., in an action, tried at Liverpool Assizes in Feb., 1938, before
- F a special jury, against the chief constable of the Liverpool city police force and the members of the watch committee who had acted in the matter in question. The appellant, who was plaintiff in the court below, was a police constable in the Liverpool city police force, and on May 15, 1937, he had the temporary rank of acting-sergeant. On that date he
- G committed certain offences against the discipline code scheduled to the Police Regulations made by the Secretary of State for the Home Department under the Police Act, 1919, s. 4 (1). Two of the offences were disobedience to certain positive directions or rules. Three were more serious—namely, the making of false entries or statements. He
- H was in due course charged in accordance with the procedure directed by the Police Acts and Regulations as applicable to borough police forces. On May 26, he was found guilty, and was sentenced to dismissal by the chief constable, both finding and sentence being, under the regulations, provisional, and subject to confirmation by the watch committee, which is, in the case of boroughs, the final police authority. On July 27, 1938,

after a complete rehearing of the case, the finding and sentence were confirmed by the watch committee, and the appellant was thereupon dismissed from the force.

It so happened that on Mar. 23, 1937, an appeal had been allowed by this court in *Cooper v. Wilson* (2), an action brought by another police sergeant of the Liverpool city police force, one Cooper, who also had been dismissed the force. In that case, GREER, L.J., and I held (MACNAGHTEN, J., who was sitting with us, dissenting) that that dismissal was a nullity on two grounds, (i) that the man had already resigned voluntarily from the force, and (ii) that the investigation of the charges had been conducted in disregard of the Police Acts and Regulations, and in a manner contrary to natural justice. The present action was, no doubt, induced by a belief in the minds of the appellant and his legal advisers that the facts of his case also fell within the second ground of the *Cooper* decision (2). Many issues were raised by the appellant's statement of claim. The case was tried for 8 days with meticulous care and sympathetic attention by the judge and a Liverpool special jury, and, as a result, the judge gave a closely reasoned and careful judgment, holding that both the chief constable and the watch committee had done nothing wrong, but, on the contrary, had taken the greatest possible pains loyally to carry out the principles laid down in the judgments of GREER, L.J., and myself in the *Cooper* case (2). With that judgment I entirely agree, and I adopt it as my own, subject to one point. It is unnecessary, therefore, to re-state either the facts as found or the reasons of the judge.

The point to which I have referred is the point that was argued at length by Mr. Wooll and Mr. Hamilton in regard to the proper interpretation of the Police Regulations, 1920, regs. 16, 18. Reg. 16 provides as follows :

The accused shall be directed to state in writing upon the misconduct form whether he admits or denies the charge and shall be allowed to give any explanation which he may wish to offer in writing. He shall also be allowed to state whether he desires to offer his explanation personally to the chief officer of police, and shall, if he desires it, be given an opportunity of so doing.

Reg. 18 (1) provides as follows :

If the accused denies the charge, he shall, unless the chief officer of police is satisfied with the explanation he has offered, be ordered to appear before the chief officer of police and shall have an opportunity of hearing the evidence against him and of cross-examining the witnesses and of calling witnesses in his defence

Counsel for the appellant argued that the provision in regard to a personal explanation contained in reg. 16 imposed a condition precedent on all subsequent proceedings, so that, even if all subsequent proceedings were absolutely regular—as, in my opinion, they were in this case—the omission of an opportunity to offer that explanation before the officer was summoned to appear before the chief officer of police was a condition precedent a failure to comply with which invalidated everything that followed. In my view, that was not the intention of reg. 16. In my view, that provision is a directory provision, which does not necessarily

and in all cases constitute a condition precedent to the whole of the subsequent proceedings. I think that the words added in the last line of reg. 16—"and shall, if he desires it, be given an opportunity of so doing"—show that it is intended that this opportunity shall be one entirely dependent on the wish of the officer who is charged. It is submitted by counsel for the appellant that it was a provision which could not be waived by the officer charged. In my view, that interpretation of the sentence is inconsistent with the stress laid upon the desire of the officer in question. It could, therefore, be waived if the officer chose.

In the present case, what happened was that, when the officer was informed that his case was going to be heard, and was directed to attend before the chief constable on May 26, 1937, he did not ask for any opportunity, before he attended in pursuance of that direction, of seeing the chief constable personally and making a further explanation. On the day when he appeared before the chief constable, as soon as the case was called on, what took place was this. The charges were read over, and, having been answered by the officer, the chief constable turned to Kilduff, the plaintiff, and said: "The charges you deny are the three charges of falsehood?" The plaintiff then said:

Yes, sir. Might I address you, sir? I have denied those charges because I think that in part they are not true. To describe them as being inaccurate would be more correct. I do not deny the accuracy of the wording, although I disagree with the distances. I would like to say that I was in Lisburn Lane and in view of the roads mentioned. In charge 5 I think I had no alternative but to tell him the visits which I actually gave the men, and when asked by Mr. Ritchie was I in those roads, I did not intend to imply that I was in them. I was near them. The visits did not really indicate that I was in the side roads, sir. That is the only aspect of them that I deny.

I have read that out, but the details to which the plaintiff there referred do not matter. The point is that that is the statement that he then made to the chief constable. He did not then ask for any further opportunity of explanation, he did not complain that he had not been given any opportunity of giving the explanation before, and, in my view, he there indicated that he was satisfied with that opportunity to make his personal statement then and there. I am not disposed to treat that statement as anything more than a voluntary statement, showing that he was not insisting upon the original request made on the back of the misconduct form, and that he had not expressed any further desire to be given an opportunity of making such a statement, and was satisfied with the opportunity that he then had. That conclusion is, of course, necessarily one which I draw in the light of the peculiar circumstances of the case, which was one where he was charged with serious offences of making false entries or false statements. The facts were perfectly simple, and I cannot help thinking that he realised that there was nothing further which he could explain on any private interview which he might have with the chief constable. He realised that he had to face his trial on the charges made against him, and I conclude as a fact, as the judge did, that he was not insisting on any separate right to make a personal

statement. With that one addition, I repeat that I regard the judgment of the judge as wholly right.

MACKINNON, L.J.: I agree. I think that this appeal fails, and in regard to it I would say nothing more than that I agree with every word of the most careful, accurate, and impeccable judgment of TUCKER, J., A who tried the case.

DU PARCQ, L.J.: I agree, and have nothing to add, except that I should like to say that I agree with what has already been said as to the judgment of TUCKER, J. B

Appeal dismissed with costs.

COVENTRY v. WILSON.

Edward Wooll and E. Heriot-Hill for the plaintiff.

D. P. Maxwell Fyfe, K.C., and Hartley Shawcross for the defendants. C

TUCKER, J.: This is an action brought by the plaintiff, John Sidney Coventry, against Archibald Kennedy Wilson, the chief constable of Liverpool, and certain other persons who were in July, 1933, members of the watch committee of the Liverpool Corporation, claiming certain declarations, and also the payment of arrears of pay alleged to be due to him from July 11, 1933, to the date of the writ, which was issued on Oct. 15, 1937. The facts, which were not really in dispute, are as follow. On Aug. 14, 1919, the plaintiff joined the Liverpool city police force. The conditions of his contract of service are contained in a document of that date. On the following day, the plaintiff was posted to the fire brigade, under the provisions of the Police Act, 1893, s. 2, and the Town Police Clauses Act, 1847, ss. 32, 33. Thereafter, throughout the whole of his period of service until his dismissal in July, 1933, he was employed solely on fire brigade duty, although he was, of course, F at all times a police officer. At the date of his dismissal, his pay was 98s. per week, subject to certain statutory deductions. Shortly after joining, he was given a book of instructions issued in 1911, which was subsequently, in 1926, superseded by a fresh edition, amending the previous issue. On July 7, 1933, there was a serious outbreak of fire G at the Philharmonic Hall in Liverpool, at which the plaintiff was present in his capacity as a member of the fire brigade. Certain incidents are alleged to have taken place on that occasion, with the result that three charges were formulated against the plaintiff. One was a charge of disobedience to orders, and the other two were charges of insubordinate H conduct. These charges were reduced to writing, and are contained in a document called a "misconduct form" dated July 7, 1933. This form was handed to the plaintiff on July 8. On July 11, the plaintiff appeared before the chief constable and asked for and obtained an adjournment of the inquiry into these charges. He was informed that

he would be suspended in the meantime. On July 14, the adjourned inquiry before the chief constable took place. Evidence was given in support of the charges, and the defendant himself gave evidence, and called a witness, P.C. Nicholson, in support of his case. At the conclusion of the inquiry, he left the room. Later he was re-called and

A was informed that the charges were found proved. Next day he signed the "misconduct form" showing that he had read the chief constable's decision given in the margin, which was in these words: "Charges found to be proved. Dismissed." The plaintiff inserted before his signature the words: "I beg to appeal to the watch committee."

B On July 18, the case came before a meeting of the watch committee, at which there were present all the persons who are now effective defendants in these proceedings. The plaintiff entered the room, in which were already assembled the members of the watch committee and the chief constable, who was seated in close proximity to the chairman.

C The chief constable read the charges and presented the case to the committee, reading from a type-written document. Witnesses were called, and the defendant also gave evidence. The proceedings lasted about a quarter-of-an-hour. The plaintiff then left the room. The chief constable remained with the members of the watch committee while they considered their decision. After a short interval, the plaintiff was recalled.

D He re-entered the room and found the chief constable still present. The chairman said: "We uphold the chief constable's decision and think you are not a fit and proper person to be a member of the force." Thereupon the plaintiff retired, leaving the chief constable with the members of the watch committee. The chief officer of the fire brigade was also present throughout the proceedings, including the deliberations of the committee, although no complaint is made in the statement of claim in this action with regard to his presence.

E On the same day, an entry was made on the "misconduct form" to the effect that the chief constable's decision was confirmed by the watch committee, and the plaintiff also signed an acknowledgment that he had read the decision of the watch committee as above. The decision of the chief constable and of the watch committee was also reported in the police daily report book and minutes of the watch committee. The plaintiff thereupon handed in his uniform and accoutrements, and was given a certificate showing the period of his service as from Aug. 14, 1919, until July 11, 1933, when he was stated to have been dismissed. Thereafter the plaintiff severed his connection with the force, and endeavoured to obtain other employment. Save for some peddling on his

H own behalf, he was without employment for four years, and since May 10, 1937, he has been employed as a fireman at a cinema at £2 per week. Before obtaining his present employment, he obtained from the chief officer of the fire brigade a certificate of experience, but not of character. No claim or complaint was made by the plaintiff in respect of the matters set out above until his solicitors wrote on his behalf on

Oct. 5, 1937. He was at all material times aware of his statutory right of appeal to the Secretary of State under the Police (Appeals) Act, 1927, but made no such appeal. He has at no time since his dismissal presented himself for service, nor, until his solicitors' letter of Oct. 5, 1937, has he made any claim to be a member of the police force, or to receive his pay as such member. The sum of £138 3s. 8d., being the amount of the statutory deductions from the plaintiff's pay, was paid to the plaintiff's wife on Aug. 29, 1933, to the knowledge of the plaintiff, and without protest by him. This payment purported to have been made under the provisions of the Police Pensions Act, 1921, s. 20. A

The control and discipline of the police force of the Liverpool Corporation is vested in the watch committee, who also constitute the police authority of the city of Liverpool for the purposes of the Police Pensions Act, 1921. Pursuant to his statutory powers, the Secretary of State has made, and has from time to time amended, certain regulations for the organisation, control and discipline of the various police forces of England, including Liverpool city police force. These regulations are contained in S.R. & O., 1920, No. 1484, as amended up to and including S.R. & O., 1933, No. 326. These regulations are hereinafter referred to as "the statutory regulations." The relevant regulations are regs. 12, 21, 45, 46, 94. B
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By the Municipal Corporations Act, 1882, s. 191 (4), the watch committee are given power to dismiss any constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same. The chief constable of a borough police force has no power by himself to dismiss a police officer. E

These being the facts, and the relevant statutory regulations and enactments, the plaintiff by his statement of claim claims that the decision of the watch committee was null and void and invalid in law, on the grounds that (a) the committee were not entitled to consider and/or adjudicate on the plaintiff's dismissal by the chief constable, and (b) the chief constable, who was in the position of prosecutor, remained with the committee while they considered their finding and sentence. A third ground, which appears in para. 10 (c), was abandoned at the trial. Ground (a) above is based on the contention that the watch committee alone have power to dismiss after an original trial, and that in this case they purported to confirm an original invalid sentence imposed by the chief constable. It was conceded that the chief constable had power to inquire into the charges and find them proved or not proved, but it was contended that he had no power either to impose or to recommend to the watch committee a sentence of dismissal, and that, as he had in fact in this case purported to impose such sentence, the decision of the watch committee was invalid and void. F
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Ground (b) is based upon the decision of the Court of Appeal in *Cooper v. Wilson* (2), which decision was given nearly four years after the matters complained of in this action. It was further contended, as an

alternative, that, if the statutory regulations, on their true interpretation, give a power of dismissal to the chief constable, subject to confirmation by the watch committee, they are *ultra vires*.

The defendants rely, amongst other defences, upon the Public Authorities Protection Act, 1893, and say that the act, neglect or default complained of occurred in July, 1933, whereas the writ in this action was issued on Oct. 15, 1937.

I proceed to consider this defence, first, on the assumption that the statutory regulations apply to the plaintiff. The defendants contended that what they did was an act in the intended execution by them of their statutory duties and powers under the Municipal Corporations Act, 1882, s. 191, and the Police Act, 1893, s. 2, and they rely on the cases of *McManus v. Bowes* (6), *Bradford Corpn. v. Myers* (7) and *Edwards v. Metropolitan Water Board* (8). In reply to these contentions, Mr. Wooll, for the plaintiff, argued that what was done by the defendants was merely the breach of a contract incidental to the performance of their duties, that it did not arise out of any public duty, but solely out of contract, and that, in any event, the plaintiff, never having been validly dismissed, continued at all material times to be a member of the police force, and that the failure to pay him his weekly wage since July, 1933, was a continuing injury and damage, and that, where there is a continuous duty, until it is discharged, time does not begin to run. In my view, the authorities show that neither the mere existence of a contract nor the fact that the act is done pursuant to a permissive provision of an Act of Parliament is sufficient to deprive such act of the protection of the statute. I think that the decision of the watch committee was an act done by them in the intended performance of their statutory duty under the Municipal Corporations Act, 1882, s. 191, and that they were carrying out a duty owed to the public. I also think that the chief constable's action was a step taken by him in the intended performance of his duty under the statutory regulations, or by virtue of the instructions issued by the watch committee in performance of their statutory duties. I also hold that there was no continuing injury or damage. The plaintiff elected to accept his dismissal and seek other employment, and his remedy, if any, is an action for damages founded on the wrongful act of July, 1933. Furthermore, in so far as he seeks a declaration founded upon the presence of the chief constable during the deliberations of the committee, he must base his claim on matters which took place more than four years before the issue of his writ. In my view, the court has to look at the substance of the matter, and not the form : *Copper Export Asscn. Incorporated v. Mersey Docks & Harbour Board* (9) and *Brocklebank, Ltd. v. R.* (10). It is a fallacy to say the plaintiff has always remained a member of the force because of the invalidity of his dismissal, when, in order to establish such invalidity, he must rely on acts done more than four years ago in the intended performance by a public authority of its statutory duty.

I therefore hold that the plaintiff's claim in this action is barred by the Public Authorities Protection Act. In any event, I feel great doubt as to whether he could recover arrears of pay in an action against certain individual members of the watch committee as constituted in 1933. I was informed that four of the present defendants are not now members of the watch committee, and, if there has been a continuous default by A non-payment of salary, such default has occurred week by week during a number of different rate periods, with differently constituted watch committees.

Furthermore, I have been referred to no authority for the proposition that the members of a watch committee are personally liable to the B members of a borough police force for the payment of their salaries. Such considerations as these, in my view, tend to show that, if ever the Public Authorities Protection Act is to apply, it should apply in a case such as this.

This is, of course, sufficient to dispose of this case, but, as I am told C that it is almost certain to be taken to the Court of Appeal, or further, I think it right to deal shortly with the other matters which have been argued before me. The first question for decision is whether the statutory regulations apply to the plaintiff. Reg. 94 is as follows :

These regulations shall apply to all police forces in England and Wales to which D the Police Act, 1919, applies, but shall not apply to any men belonging to those forces who act exclusively as firemen.

In this case, from Aug. 15 to the date of his dismissal the plaintiff was employed solely on fire brigade duty. I think that he was clearly within the words of reg. 94, and was at all material times a man belonging to E those forces acting exclusively as a fireman. No real argument was addressed to me to show why this regulation did not embrace the plaintiff, with the result that he is not entitled to complain of any non-compliance therewith. It follows, in my view, that the watch committee, when they F dismissed the plaintiff, were in a position somewhat similar to that of an ordinary employer, and were not acting as a quasi-judicial tribunal, under the statutory regulations or otherwise, and that their decision cannot be vitiated either on the ground that the chief constable was present at their deliberations or otherwise. Furthermore, so far as this G affects the application of the Public Authorities Protection Act, the committee were clearly acting under the Municipal Corporations Act, 1882, s. 191, and are accordingly entitled to the protection of the Public Authorities Protection Act. [His Lordship then dealt with the facts of the case.]

The plaintiff appealed. H

SCOTT, L.J. : Coventry's case, in which we have heard the appeal since hearing the appeal in Kilduff's case upon which the court has just delivered its judgment, was a case also of a writ issued in respect of an alleged wrongful dismissal of the plaintiff, who had been at one time a member of the Liverpool police force but was allocated to the exclusive

performance of fire brigade duties. That particular dismissal was of very old date, having been made in 1933. It was solely owing to the decision of the Court of Appeal in *Cooper's* case (2), in Mar., 1937, that Coventry thought that there was an opportunity for him to recover some money or some reputation by taking proceedings against the chief constable and the watch committee upon a writ issued on Oct. 15, 1937. The peculiarity of service in the fire brigade of a city police force is that the regulations made under the Police Act, 1919, by the Secretary of State for the government of police forces do not apply at all to police constables serving exclusively as firemen. Reg. 94 of those regulations provides as follows :

These regulations shall apply to all police forces in England and Wales to which the Police Act, 1919, applies, but shall not apply to any men belonging to those forces who act exclusively as firemen.

Therefore, those regulations have nothing to do with Coventry's case at all.

In addition to the issues raised by the statement of claim in Coventry's case, which were analogous to those raised in Kilduff's case except for the difference of the particular facts, the defendants pleaded the Public Authorities Protection Act, 1893, s. 1 (1), which provides as follows :

Where after the commencement of this Act any action, prosecution or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority . . . the following provisions shall have effect

Then there is to be 6 months' limitation to such actions. Thus, if the Act applies to the cause of action of the plaintiff in this action, it has been statute-barred for several years.

The judge in this case, as in the last case, gave a careful and considered judgment dismissing the plaintiff's claim on both grounds—namely, that he had no grievance under the Police Regulations upon which he relied, because reg. 94 prevented them from having any application, leaving the watch committee with its statutory power of dismissal in its discretion, with the result that there was no legal grievance of any kind against the watch committee. He further held that the action was within the Public Authorities Protection Act, 1893, s. 1, and was, therefore, statute-barred. I again say in this case also that I agree entirely with the whole of the judge's judgment. I adopt it as my own, and have nothing to add, except that the appeal will be dismissed with costs.

MACKINNON, L.J. : I agree.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Teff & Teff*, agents for *Alfred Bieber & Bieber*, Liverpool (for the plaintiff in both actions) ; *F. Venn & Co.*, agents for *W. H. Baines*, Town Clerk, Liverpool (for the defendants in both actions).

[*Reported by* M. D. CHORLTON and C. ST. J. NICHOLSON, ESQ., *Barristers-at-Law.*]

UNITED STEEL COMPANIES, LTD. v. CULLINGTON (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), January 24, 25, February 10, 1939.]

Income Tax—Deductions against profits—Wear and tear—Trading losses—Carrying forward deductions—Amalgamation of companies—Right of new company to accrued deductions of constituent companies—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, rr. 6, 11—Finance Act, 1926 (c. 22), ss. 32, 33—Companies Act, 1929 (c. 23), ss. 153, 154 (1).

The U.S. & B. Mills, Ltd., had been carrying on a business for a number of years before 1930, and had at no time made any profit. A large sum had accumulated in respect of allowances for wear and tear and trading losses, which had been carried forward from year to year. The U.S. Co. had similarly accumulated allowances in respect of wear and tear and trading allowances. On Aug. 22, 1930, these two companies were amalgamated into one company, but in fact the two businesses were carried on as branches of the one company:—

HELD: the new company was not entitled to carry forward the wear and tear allowances, nor those in respect of trading losses.

Decision of LAWRENCE, J. ([1938] 2 All E.R. 569) reversed as to wear and tear allowances.

[EDITORIAL NOTE.] A company formed by the amalgamation of two other companies is in law a legal entity distinct from the two constituent companies, and it is not, for the purposes of income tax, to be treated as a successor to the constituent companies. The Court of Appeal have held that the terms of r. 11 are clear, and cannot be read so as to bring in allowances for wear and tear to which a predecessor was entitled.

AS TO CARRYING FORWARD ALLOWANCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 169, para. 344; and FOR CASE, see DIGEST, Vol. 28, p. 42, case *m*.]

Cases referred to:

- (1) *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1912), 6 Tax Cas. 91; 28 Digest 42, case *m*.
- (2) *Bell v. National Provincial Bank of England*, [1904] 1 K.B. 149; 28 Digest 41, 211; 73 L.J.K.B. 142; 90 L.T. 2; 5 Tax Cas. 1.
- (3) *Ryhope Coal Co. v. Foyer* (1881), 7 Q.B.D. 485; 28 Digest, 40, 208; 45 L.T. 404; 1 Tax Cas. 343.
- (4) *Fry v. Burma Corpn.*, [1930] 1 K.B. 249; Digest Supp.; 98 L.J.K.B. 693; 141 L.T. 361; *affd.*, [1930] A.C. 321; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113.
- (5) *Trinidad Petroleum Development Co., Ltd. v. Inland Revenue Comrs.*, [1937] 1 K.B. 408; [1936] 3 All E.R. 801; Digest Supp.; 106 L.J.K.B. 635; 156 L.T. 90; 21 Tax Cas. 1.
- (6) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1939] 1 K.B. 70; [1938] 4 All E.R. 6; Digest Supp.

APPEAL AND CROSS-APPEAL from an order of LAWRENCE, J., dated Apr. 7, 1938, and reported [1938] 2 All E.R. 569. The facts are fully set out in the judgment of the court delivered by FINLAY, L.J.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the Crown.

Rt. Hon. Sir William Jowitt, K.C., Raymond W. Needham, K.C., W. Gordon Brown and J. S. Scrimgeour for the company.

The Solicitor-General: The respondent company says that, by reason

- of the order made by EVE, J., the rights which vested in it included the rights to the accumulated wear and tear allowances in respect of which the old companies had been unable to obtain relief. The Special Commissioners held that the respondent company succeeded, on Aug. 22, 1930, to the businesses carried on by the old companies, and that
- A the respondent company had to be assessed as though a new trade were being commenced on that date, and that the respondent company was not entitled to relief in respect of the wear and tear allowances claimed by the old companies. It was held by LAWRENCE, J., that the respondent company was entitled, as regards wear and tear allow-
- B ances, to the deduction to which the old companies would have been entitled if they had continued trading. *Aliter*, with regard to trading losses. The decision of the Special Commissioners should be confirmed. In *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1), it is said by LORD SALVESSEN, at p. 99, that, even in a taxing statute, it is legitimate
- C to consider which of two possible constructions is most in accordance with the spirit and intention of the Act. In 1926, the basis of assessment was changed from 3 years' average to the profits of the preceding year. If the law had been the same in 1912 as it is now, *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1) could not have been decided as
- D it was. On Aug. 22, 1930, by reason of the succession which then took place, and by operation of law, the rights and liabilities of the 1918 Steel Co. and of the Strip Co. were crystallised and determined as on that date. The liabilities of the respondent company began on that date as though it had commenced on that date the business which had been
- E carried on by its predecessors. The old practice has gone, having been replaced by Cases I and II, r. 11 (2). The whole basis has been fundamentally changed. The decision in *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1) depended upon the doctrine of continuity. There is no doubt that r. 11 (2) destroys continuity for some purposes. If it
- F does not destroy it for all purposes, where are the limiting words to be found? When limiting words are not found in a section, it is contrary to the rules of construction to invoke the aid of another section in order to enforce limiting words not to be found in the section being construed. The second part of the clause deals with the case where the old trade has
- G not been discontinued. Setting up and commencing a trade mean establishing a trade, and *Ryhope Coal Co. v. Foyer* (3) is useful as marking the contrast between a succession and the commencing of a new trade. It has in terms been conceded by counsel for the respondent company that, if the words in r. 11 (2) were the same as those
- H in r. 11 (1), he would have no case at all. There is no difference. It would be peculiar if Parliament had said that unexhausted wear and tear allowances could be bought up by people who could then set them off against the activities of their own trade. [Counsel referred to *Fry v. Burma Corpn.* (4) and *Trinidad Petroleum Development Co., Ltd. v. Inland Revenue Comrs.* (5).]

Jowitt, K.C. : The argument which found favour before LAWRENCE, J., had the merit of simplicity. In cases of this kind, it is necessary to remember that one is taxing a trade. One's mind is, therefore, addressed to the trade. For many years, if it was found that the trade was throughout the same trade, even though the actual persons in control of it might change from time to time, the trade was taxed as being a continuing trade. The change of the identity of the persons was disregarded. The fact that a person succeeds to a trade presupposes that it is the same trade both before and after his succession. Before the amount of income tax payable by an individual in respect of that trade can be arrived at, a rule whereby the profits of the trade can be measured must be in existence. Prior to 1926, the profits were ascertained by taking a 3-years' average. Since that time, the profits have been ascertained by taking the profits of the previous year. The profits must be computed, and deductions must be made for wear and tear, and those deductions are referable to the actual year of taxation, and to that year only. The old r. 11 has been replaced by the new r. 11. The new rule deals with the matter by means of dividing partnerships from non-partnerships, thus forming two classes. The wear and tear allowances have nothing to do with the 3-years' average. They relate to the actual year. Allowances never were computed with reference to any average. The new r. 11 covers precisely the same field as does the old r. 11. The old r. 11 had nothing to do with wear-and-tear allowances, and neither has the new rule anything to do with them. Rule 6 never had anything to do with an average or a measuring period other than the actual year in question, and could not come in until the profits had been computed. Dealing, as they did, with their different spheres and topics, the two rules have got on very happily together. Why is it that, because of the fact that r. 11 has been altered in certain cases, r. 6 has been altered? *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1) has been acted upon ever since it was decided, and the legislature must be taken to have known of that decision and the practice which has followed since. If the legislature had intended to alter that practice, surely there would have been clear and unambiguous language dealing with the matter. A man who enters into a trade for the first time starts a new business. In *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1), LORD DUNDAS said that the rule was expressed in general terms, and he contrasts that with the personal note in r. 11 (2). Before the Companies Act, 1929, came into operation, if two companies decided to amalgamate, they would be liquidated, and a new company would be formed. The old companies would be wound up. A novation *in invito* was impossible. The Companies Act, 1928, s. 54—now the Companies Act, 1929, s. 154—introduced a new procedure. By reason of this provision, two companies are enabled to amalgamate without any loss of continuity and without the necessity for the novation of any contracts. The new company can take advantage of a right which one of the old companies might have

given to it by the Finance Act, 1926, s. 33. In *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (6), an employee who had entered into a contract of service with a company broke that contract, and he was sued in respect of the breach by a new company. Sect. 154 gives power to the court to transfer all rights and all liabilities. If sect. 154 leaves

- A the new company liable for the income tax assessment, and does not also give that company the right to relief, the sooner the fact is known the better. Sect. 154 does not predicate that there shall be notice. A contract of service is of no less importance than is a debt. In *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (6), a servant found himself transferred without his knowledge. That is a stronger case than is one dealing with creditor and debtor. [Counsel referred to *Bell v. National Provincial Bank of England* (2).]
- B

Needham, K.C.: Quite apart from r. 11, a person who succeeds to, and carries on the business of, another is entitled under r. 6 to claim the benefit of unexhausted wear and tear allowances which accrued while that other was carrying on the business. The Customs and Inland Revenue Act, 1878, s. 12, introduced the allowance for wear and tear, and the allowance was to be made on the basis of the diminution of the value of machinery which occurred during the year of assessment. The

- D the old r. 11 was concerned with the average profits only. Wear and tear allowance had nothing to do with the average profits. In the present case, there has been a succession, notwithstanding that two businesses have been taken over. Having regard to *Bell v. National Provincial Bank of England* (2), the company is entitled to what it is claiming.

- E Where there has been a succession, and a new company is carrying on the business previously carried on by the old company, the new company has a right to take into account any wear-and-tear allowances of the old company and to blend them with the profits of the combined business. [Counsel referred to *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1).]
- F

The Solicitor-General, in reply: *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1) is not an authority for saying that a company can set off wear and tear allowances against profits made in a later year in cases where there has been an amalgamation. *Bell v. National Provincial Bank of England* (2) is not an authority for that proposition either.

G

- H FINLAY, L.J. [delivering the judgment of the court]: The United Steel Companies, Ltd., to which we shall refer as the amalgamated company, was incorporated on Aug. 22, 1930, to acquire and amalgamate the undertaking, properties, assets, rights, powers, debts, liabilities and duties of two then-existing companies, one of which was called the United Steel Companies, Ltd., and the other the United Strip and Bar Mills, Ltd. We shall refer to these two companies as the 1918 Steel company and the Strip company respectively. The amalgamation was carried out

under a scheme of arrangement and amalgamation dated June 20, 1930, which was sanctioned by an order of EVE, J., dated Aug. 16, 1930, and was made pursuant to the Companies Act, 1929, ss. 153, 154. The 1918 Steel company had been registered on Mar. 25, 1918. The Strip company had been registered on Feb. 14, 1920. Neither of these companies had been successful, and each company had continually made losses in respect of which it had been unable to obtain relief under the Income Tax Act, 1918, s. 34. The losses in respect of which relief could not be obtained amounted, in the case of the Strip company, to £44,091. and, in the case of the 1918 Steel company, to £90,729, making in all £134,820. Further, the Strip company had been unable to give effect to the deductions in respect of wear and tear to machinery which it was entitled to make under the provisions of the Income Tax Act, 1918, Sched. D, Cases I and II, r. 6. The deductions thus carried forward by the Strip company in the period prior to 1930, and now claimed by the amalgamated company, totalled £448,850.

The amalgamated company was assessed to income tax in respect of the year ending Apr. 5, 1937, in the sum of £690,000, less £175,000 for wear and tear. This assessment was made under Sched. D, Case I, and is in respect of the amalgamated company's profits as steel manufacturers.

The amalgamated company appealed to the special commissioners against this assessment, and claimed to deduct from the £690,000 profits, in addition to £175,000 for wear and tear of its own machinery, the aggregate sum which the 1918 Steel company and the Strip company would respectively have been entitled to deduct from profits if each had continued to carry on its trade separately in respect of losses—that is, the total sum of £134,820, and, further, the sum of £448,850 in respect of allowances for wear and tear to machinery of the Strip company. The commissioners found that the amalgamated company succeeded on Aug. 22, 1930, to the trades previously carried on by the 1918 Steel company and the Strip company, and fell to be assessed as if a new trade had been set up or commenced on that date. They held that the amalgamated company was not entitled to the wear-and-tear allowances or losses to which the 1918 Steel company and the Strip company were entitled at the date when the amalgamated company was incorporated—namely, Aug. 22, 1930. The amalgamated company required the commissioners to state a case for the opinion of the High Court under the Income Tax Act, 1918, s. 149. The case stated in compliance with this requirement came before LAWRENCE, J., who held that the commissioners were right in their refusal to allow any deduction in respect of losses made by the 1918 Steel company and the Strip company respectively which had not been deducted under sect. 34 before Aug. 22, 1930, but were wrong in their refusal to allow any deduction in respect of allowances for wear and tear not deducted by the Strip company before Aug. 22, 1930. The Crown has appealed from the decision of

LAWRENCE, J., with regard to the allowance for wear and tear, and the amalgamated company has given a notice of cross-appeal in respect of the decision as to losses.

The answer to the question whether the amalgamated company is entitled to deduct the allowances for wear and tear appears to us to depend upon the true construction of Sched. D, Cases I and II, r. 11. This rule was substituted by the Finance Act, 1926, s. 32, for the Income Tax Act, 1918, Sched. D, Cases I and II, r. 11. This latter rule had in turn been substituted for the Income Tax Act, 1842, Sched. D, Cases I and II, r. 4. I will read the rules. The Income Tax Act, 1842, s. 100, B Cases I and II, r. 4, provides as follows :

If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, C adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners or such person succeeding to such business as aforesaid shall prove, to the satisfaction of the respective commissioners, that the profits and gains of such business D have fallen short or will fall short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof.

The Income Tax Act, 1918, Sched. D, Cases I and II, r. 11, provides as follows :

If within the year of assessment or the period of average upon which the assessment is to be based a change occurs in a partnership of persons engaged in any trade or profession, by reason of death, or of dissolution of the partnership as to all or any of the partners, or by the admission of a new partner, or if any person succeeds to a trade or profession, the tax payable in respect of the partnership, or any of the partners, or of the person so succeeding shall be computed according to the profits or gains of the trade or profession during the respective periods prescribed by this Act, notwithstanding the change or succession, unless the partners or the person succeeding to the trade or profession prove to the satisfaction of the commissioners that the profits or gains have fallen or will fall short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof. F

Rule 11, as enacted by the Finance Act, 1926, s. 32, provides as follows :

(1) If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession, or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, H profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts: Provided that, where all the persons who were engaged in the trade, profession or vocation both immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within three months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been

discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly.

(2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership.

(3) In the case of the death of a person who, if he had not died, would, under the provisions of this rule, have become chargeable to income tax for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate.

It is convenient here to refer to Sched. D, Cases I and II, r. 6, in the Act of 1918, the rule which now governs allowances for wear and tear. Historically, provision for such allowances was first introduced into the income tax law by the Customs and Inland Revenue Act, 1878, s. 12, which was amended by the Finance Act, 1907, s. 26. Rule 6 provides as follows :

(1) In charging the profits or gains of a trade under this schedule, such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on . . .

(3) Where full effect cannot be given to any such deduction in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year, and deemed to be part of that deduction, or, if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years.

(4) Any claim in respect of the aforesaid deduction shall be included in the annual statement required to be delivered under this Act of the profits or gains of the trade for which the machinery or plant is used, and the additional commissioners, in assessing those profits or gains, shall make such allowance in respect thereof as they think just and reasonable.

In 1926, the method of computing profits on an average of 3 years, which ever since 1842 had been a feature of income tax law, was abolished, and the profits of the previous year were substituted as the measure. It is for this reason, doubtless, that the amended r. 11 was introduced into the Act of 1926.

In our opinion, this case turns entirely upon the proper construction of this r. 11. The rule is divided into two parts. The first part deals with a partnership where a change has occurred in the partnership, and provides that, where such a change has occurred, the tax payable by the person or persons carrying on the trade shall, notwithstanding the change, be computed by reference to the profits or gains of the trade during the period prescribed by the Income Tax Acts—namely, the preceding financial year. To this there is a proviso to the effect that, where notice is given on behalf of the person concerned, the tax payable shall be com-

- puted as if the trade had been discontinued at the date of the change and a new trade then set up or commenced. Sir William Jowitt did not raise any question as to the proper construction of this proviso. If the matter is to be treated as if a new trade had been set up at the crucial date, then it is clear that the old partners, and they alone, obtain the benefit
- A of any allowances or deductions available at that date. It is, however, on the second part of r. 11 that the present case depends. That deals, not with a change in partnership, but with a succession to a trade by a stranger. The language of the rule seems to us to negative any suggestion that the tax payable by the successor is to have any reference
- B to what happened when the predecessor was carrying on the trade. The material words are :
- . . . the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time [the date of succession]. .
- C The direction to compute the tax payable can only mean that the tax payable has to be ascertained after making all proper allowances on the basis that the trade was set up or commenced on the last-mentioned date. This must of necessity exclude any allowances to which the predecessor might be entitled in respect of the period antecedent to the acquisition
- D of the trade by the successor. LAWRENCE, J., accepted an argument to the effect that the legislature cannot be taken to have intended to eliminate what was called the doctrine of succession. We confess that we have some difficulty in understanding this phrase in the context in which it was used, and also in following the argument. It seems to us that, where
- E a trade is referred to as having been set up or commenced at a particular date, it necessarily follows that the trade must be deemed to be a new trade at the particular date, and it is immaterial whether it is referred to in terms as a "new trade" or as "the trade." The words "set up or commenced" seem quite inappropriate if it was intended to refer,
- F not to the setting up of a new trade, but to the continuation of an old one. We think that, on the true construction of r. 11 (2), for the purpose of ascertaining the tax, the trade is to be treated as a new trade set up or commenced at the date of its acquisition, and consequently there is no room for any application of r. 6. In our judgment, the intention of
- G the legislature has been expressed in plain words, and, if the rule is examined, it is apparent that the supposed contrast between the "new trade" in the proviso and "the trade" in r. 11 (2) is without foundation. Both counsel who argued the case for the appellant laid stress upon the fact that r. 6 is entirely distinct from r. 11. This is, of course,
- H perfectly correct. The two rules are diverse in their subject-matter and in their history, but we are unable to understand on what principle of construction it is to be said that the clear words of r. 11 are to be so read as to bring in allowances for wear and tear to which a predecessor was entitled. It is true, as has been pointed out earlier, that the computation of tax was, until 1926, based on the 3-years' average, and that since

1926 it has been based on the profits of the previous year, while ever since its introduction in 1878 depreciation has been allowed as a deduction from the profits of the actual year of assessment. Nevertheless, this does not seem to us to affect the matter.

Some reliance was placed on both sides on *Scottish Shire Line, Ltd. v. Lethem (Surveyor of Taxes)* (1). That case has, we think, little bearing A on the present. It was a decision of the Inner House of the Court of Session in Scotland, and had reference to the construction of Sched. D, Cases I and II, r. 4, of the Act of 1842, the Customs and Inland Revenue Act, 1878, s. 12, and the Finance Act, 1907, s. 26. What was there held was that the section in the Finance Act, 1907, upon which the matter B there turned did not, to use the words of LORD DUNDAS, "strike any personal note," and it was accordingly held that the Crown—treating the new company, the successor, as continuing the business of the old company by taking that old company's profits during the years of average as the basis of assessment—could not be permitted, in the matter of C wear and tear, to treat the new company as a new and different concern. This case, as we have said, has, we think, little bearing upon the present, but the stress which was laid by the Lords of Session there upon the necessity for treating the matter in the same way for depreciation as that in which it was treated for the computation of profits appears to D us to be rather in favour of the Crown's view in the present case.

Then reliance was placed, particularly by Mr. Needham, upon the decision in *Bell v. National Provincial Bank of England* (2). That was a case where a large bank, having many branches throughout the country, had purchased the business of one of the old county banks, the County E of Stafford Bank, carrying on business at Wolverhampton. It was held by the Court of Appeal, reversing a decision of RIDLEY, J., that, on the facts of that case, the National Provincial Bank of England had succeeded to the business of the County of Stafford Bank. We have been unable to see, either in the conclusion of the Court of Appeal or F in the reasoning on which that conclusion was based, anything which is of assistance in the present case. Out of respect for the elaborate arguments addressed to us, we have discussed the matter at some length, but we may repeat that, in our opinion, the case falls to be decided upon the plain construction of r. 11. G

It remains to deal with the amalgamated company's cross-appeal. This was dealt with by LAWRENCE, J., as follows, at p. 571:

The question of losses, whilst not being abandoned, was not pressed by Sir William Jowitt, and I formed the view that the claim of the appellant company could not be substantiated in that matter, turning, as it does, upon the Finance Act, 1926, s. 33, which does not relate in any way to a succession, and seems to confer merely H a personal right upon the person who is carrying on the trade.

It is apparent from this passage that the company, while not abandoning their contention with reference to losses, did not press it. Nevertheless, a cross-appeal has been brought with reference to this point, due, perhaps, to a feeling that the company, in affirming their right to deduction in

respect of wear and tear, but abandoning their right to deduction in respect of losses, might be in a position of some difficulty. Sect. 33 of the Act of 1926 provides as follows :

- A** (1) Where a person has in any trade, profession or vocation carried on by him, either solely or in partnership, sustained a loss (to be computed in like manner as profits or gains under the rules applicable to Sched. D Cases I and II) in respect of which relief has not been wholly given under the Income Tax Act, 1918, s. 34 (which relates to relief in respect of certain losses) or under Sched. D, Cases I and II, r. 13 (which provides for the setting-off of losses against profits or gains in a distinct trade) or under any other provision of the Income Tax Acts, he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Sched. D in respect of that trade, profession or vocation for the 6 following years of assessment. . .

- B** No argument was addressed to us by Sir William Jowitt with reference to this section. He admitted in effect that it conferred a merely personal right, and, in these circumstances, it is sufficient, without more, to say that we agree with what was said by LAWRENCE, J., in the passage quoted above. Sir William Jowitt did argue, however, that he was entitled to succeed in this claim as to losses, and also in his claim as to wear and tear, by virtue of the Companies Act, 1929, ss. 153, 154. This is a somewhat startling contention. Both wear and tear and losses are dealt with in appropriate sections in the income tax code. It would indeed be surprising if the legislature, in an Act relating entirely to companies and not at all to income tax, had superseded and rendered of no effect the provisions of the Income Tax Acts with regard to important questions of income tax law.

- D** In our opinion, when sect. 154 is examined, no such result is produced. The section provides as follows :

- E** (1) Where an application is made to the court . . . for the sanctioning of a compromise or arrangement . . . and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters : (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company . . .

- G** "Property" is defined in the section as including property, rights and powers of every description. The order of EVE, J., in the present case directed that the undertaking, properties, rights and powers of every description of the 1918 Steel company and of the Strip company should be transferred to, and vest in, the amalgamated company. The argument was that the rights of the 1918 Steel company and the Strip company which were transferred included a right to claim for wear and tear and losses. It seems to us to be clear that this argument must fail. The rights were, on the proper construction of the Income Tax Acts, rights personal to the 1918 Steel company and the Strip company. It is impossible to construe sect. 154, or the order of EVE, J., made under

it, as referring to rights of that character. The rights were rights of the two old companies to make deductions from their own profits in respect of losses and wear and tear. It is impossible to see how any transfer could transform rights to deduct from the profits of the old companies into a right to deduct from the profits of the new company. LAWRENCE, J., dealt concisely, but, we think, conclusively, with this argument, at p. 574 : A

I cannot accede to that argument, because I do not think that the general terms of the Companies Act, 1929, indicate any intention to vary the terms of the Income Tax Acts with reference to succession, and, although a company which amalgamates other companies under the Act of 1929, does amalgamate them, and therefore fuse them, it is still another legal *persona*, and does not, in my judgment, acquire thereby any rights greater than those of a successor of another type. B

In the result, we hold that the Crown's appeal succeeds, and that that part of the order of LAWRENCE, J., which states that the court is of opinion that the determination of the commissioners is erroneous so far as they held that the amalgamated company was not entitled to the wear-and-tear allowances set forth in para. 10 of the case should be struck out and a declaration in the opposite sense substituted for it. C The cross-appeal must be dismissed. The amalgamated company must pay the costs of both appeals to this court, and the order in its favour as to three-fourths of the costs in the court below must be reversed, and the amalgamated company ordered to pay to the appellant the whole of the costs in that court. D

Appeal allowed. Cross-appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Johnson, Weatherall, Sturt & Hardy* (for the company). E

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

APPLESON v. H. LITTLEWOOD, LTD. F

[COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), February 13, 1939.]

Contract—Express exclusion of legal liability—Football pool—Action in respect of alleged successful coupon.

The plaintiff brought an action to recover £4,335 alleged to have been due as the result of a football pool. The competition was subject to the usual rule, described as a basic condition, that the transaction should not be attended by, or give rise to, any legal relationship, rights, duties or consequences, or be legally enforceable or the subject of litigation. The statement of claim was delivered on Oct. 27, 1938, and the defence on Nov. 26. On Dec. 30, the defendants applied to have the statement of claim struck out as being frivolous and vexatious and an abuse of the process of the court, and as disclosing no reasonable cause of action :— G

HELD : the condition was not contrary to public policy, was binding according to its term, and no action could be brought in respect of the transaction. The action, therefore, failed *in limine*, and the statement of claim ought to be struck out. H

[EDITORIAL NOTE. The decision here precisely follows that of ATKINSON, J., in *Jones v. Vernon's Pools, Ltd.* (2), and that decision has now the full approval of the Court of Appeal.

AS TO EXPRESS EXCLUSION OF LEGAL LIABILITY, see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83; and FOR CASES, see DIGEST, Vol. 12, pp. 20-22, Nos. 1-7.]

A Cases referred to :

- (1) *Rose & Frank Co. v. Crompton (J. R.) & Brothers, Ltd.*, [1925] A.C. 445; Digest Supp.; 94 L.J.K.B. 120; 132 L.T. 641.
- (2) *Jones v. Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626; Digest Supp.
- (3) *Fender v. Mildmay*, [1938] A.C. 1; [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 157 L.T. 340.
- (4) *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86; 32 Digest 209, 2599; 68 L.J.Q.B. 34; 79 L.T. 429.

B

APPEAL from a decision of ASQUITH, J., dated Jan. 14, 1939, reversing a decision of the district registrar at Liverpool. The facts are fully set out in the judgment of SCOTT, L.J.

C

F. E. Pritchard, K.C., and *Gerson Newman* for the appellant.
G. J. Lynskey, K.C., and *G. Howard-Jones* for the respondents.

D

SCOTT, L.J. : This action is brought to enforce what is known as a football pool, the result of which, it is alleged by the plaintiff, was that, by reason of an all-correct forecast of results of football matches played on a certain date, he was entitled to receive from the defendant company, which ran the pool, the sum of approximately £4,335. The statement of claim, does not, I think, matter, beyond this. The action purported to be based upon a contract between the plaintiff and the defendants on the footing that the defendants had issued offers *urbi et orbi* inviting competition and promising to pay a sum of money to the successful competitor, upon terms contained in their printed form which, when accepted by a letter lodging a competitive estimate in accordance with the terms of that printed offer, would become a binding contract.

E

F

The defence, beyond putting the plaintiff to proof of various issues, was that the entry form was one which included rules and conditions, to which reference was made in the statement of claim. One of these rules was r. 2, which provided as follows :

G

It is a basic condition of the sending in and the acceptance of this coupon that it is intended and agreed that the conduct of the pools and everything done in connection therewith and all arrangements relating thereto (whether mentioned in these rules or to be implied) and this coupon and any agreement or transaction entered into or payment made by or under it shall not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever or be legally enforceable or the subject of litigation, but all such arrangements, agreements and transactions are binding in honour only.

H

Then there was a rule about investigation by accountants and so on. Rule 14, which related to disqualifications, provided as follows :

This coupon is disqualified but any moneys staked in respect of it are nevertheless payable to the pools, if in fact or in the opinion of the accountants . . . (B) It is not postmarked or does not reach us as provided in these rules or if there is reason to doubt the genuineness of any forecast therein.

The defendants then proceeded to make an allegation of fact that the forecast was not received till a day later than the date on which, in accordance with the rules, it ought to have been received in order to be in time—or, rather, two days later, because Sunday intervened.

Some time after the statement of claim was delivered, which was on Oct. 27, 1938, and after the delivery of the defence, which was on Nov. 26—A namely, on Dec. 30—the defendants applied to the district registrar to strike out the statement of claim or to stay or dismiss the action :

. . . on the ground that the same is frivolous and vexatious and an abuse of the process of the court and that no reasonable cause of action is disclosed.

The first half of those grounds indicates an application to the court under its inherent jurisdiction. The second half indicates an application on the ground that the action came within the provisions of R.S.C., Ord. 25, r. 4, which provides as follows :

The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

The ground of that application, of course, was that the action was based upon a written contract, or a contract which in effect was written, containing an express term that it was not a legally binding contract, but only a contract binding in honour, and that from it no legal obligations of any kind could arise. The application was, in fact, supported by an affidavit of facts, which would be inadmissible upon an application under r. 4, but admissible upon an application to the court in the exercise of its inherent jurisdiction. The registrar dismissed the application. ASQUITH, J., reversed the decision of the district registrar, and ordered that the statement of claim be struck out and that the action

. . . be stayed or dismissed on the ground that the same is frivolous and vexatious and an abuse of the process of the court and that no reasonable cause of action is disclosed [with consequential orders as to costs].

The appellant appeals to this court, and Mr. Pritchard, who has argued the case very succinctly, but very clearly and forcibly, has said everything that could possibly be said in support of the appeal. The way that he put it was, first, that, on an application under either head—namely, under R.S.C., Ord. 25, r. 4, or under the inherent jurisdiction—unless it was an absolutely clear case, the court ought not to stay the proceedings, but should allow the action to go to trial, where it could be fully argued and decided, and he cited various authorities to that effect. To that argument this court answers that it agrees with ASQUITH, J., that in this case everything that could conceivably be brought out at the trial is before the court. The issue depends solely on the facts alleged in the statement of claim when one reads into the statement of claim the whole of the rules and terms contained in the contract, which are stated in the defence. Under modern pleading, a reference in the pleading to a

document in the nature of a contract brings into the pleading the whole document, so that the court can refer to that as a part of the pleading just as if it had been set out under the old pre-Judicature Act procedure of setting out a document on *oyer*. Consequently, the statement of claim itself must be treated as containing the rules which I read from para. 6 of the defence. In consequence of that, the plaintiff is suing upon a contract which in terms says that the contract is not a legally enforceable contract, but is one that is binding in honour only, giving rise, as I have said, to no legal obligations or liabilities whatever. Mr. Pritchard submits that this court ought to allow that question to be argued at the trial, and not decided summarily now. The answer to that, I think, is that it is the duty of this court, as it was the duty of ASQUITH, J., to decide it at this stage, if from anything that could take place hereafter, either as a result of a reply allowed by leave (since the time for reply has expired without one being delivered) or as a result of evidence given at a hypothetical trial, nothing further could be forthcoming by way of assistance to the court in giving its decision upon the effect of this document, couched in the form of a contract, containing an express clause that it is not a contract. That being so, it was the duty of ASQUITH, J., and is now our duty, to deal with the matter forthwith. There can be no conceivable object in allowing the parties to incur further costs in litigation when no good result can come of it, and no alteration whatever can take place in the position which calls for decision to-day.

Mr. Pritchard argued another point. He submitted upon the provision contained in r. 14 that the coupon should be disqualified

... if in fact or in the opinion of the accountants [employed to investigate and report upon the coupons to the defendants] it is not postmarked or does not reach us as provided in these rules or if there is reason to doubt the genuineness of any forecast therein.

He submitted that it was contrary to public policy to bind parties, in such circumstances as were indicated here, and for the purposes of such a pool, to a rule which left it completely within the discretion of the accountants of the defendants, by reason of their feeling a doubt as to the genuineness of a forecast sent in, to say that the defendants were under no liability. In my view, there is no rule of public policy which can be invoked to support that submission. If there be any rule of public policy to which reference can be made, the rule which I think takes precedence of all others in a case like this is that people must be bound by the arrangements which they make when these arrangements are expressed in quite clear language. In the first place, this arrangement was one which in quite clear language was an arrangement in honour only, with no legal attributes at all, and, secondly, even if that conclusion were not enough to cause this court to dismiss the appeal, I think that this term to which the plaintiff agreed with his eyes open, and which I have just quoted, allowing for disqualification by the accountants of any particular entry on the grounds mentioned, is a term of which the plaintiff

could have no right to complain, because he accepted it with his eyes open.

Mr. Pritchard referred us to all the cases bearing upon public policy and upon honour clauses. It is enough for me to say on the latter point that the views expressed by LORD PHILLIMORE in *Rose & Frank Co. v. J. R. Crompton & Brothers, Ltd.* (1), at p. 454, upon an honour clause in the contract in that case are applicable here, and support what I have just said. A

In *Jones v. Vernon's Pools, Ltd.* (2), a case similar to the present, with a rule in the same terms as the honour clause in this football competition, ATKINSON, J., took the view which I have taken. With respect, I think B that he was right.

On the question of public policy, I can see no ground for trying to discover a reason for saying that it was against public policy to allow an honour clause in such a contract, and that the only way of enforcing public policy was to treat that individual clause as cut out of the contract. C That sort of argument involves inventing a new ground of public policy. I refer to what was said by LORD ATKIN in *Fender v. Mildmay* (3), at pp. 11, 12, on that question. In my view, there is no ground of public policy which can be invoked here, and the appeal must, therefore, be dismissed with costs. D

CLAUSON, L.J. : I agree. Having regard to the decision of the House of Lords in *Rose & Frank Co. v. J. R. Crompton & Brothers, Ltd.* (1), it appears to me to be clear that the statement of claim is demurrable. In those circumstances, the judge could not possibly, in my view, have E made any order other than the order he made.

FINLAY, L.J. : I agree in thinking that this case is completely covered by authority.

Appeal dismissed, with costs. F

Solicitors : *Gibson & Weldon*, agents for *J. Maurice Mass*, Liverpool (for the appellant) ; *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the respondents).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.] G

R. v. HAMILTON.

[COURT OF CRIMINAL APPEAL (Charles, Atkinson and Singleton, JJ.),
January 23, 1939.]

Criminal Law—Evidence—Admissibility—Similar offences—Charge involving fraud—Charge of false pretences—Question as to previous offence of obtaining overdraft by misrepresentation—Criminal Evidence Act, 1898 (c. 36), s. 1 (f).

The appellant was charged with obtaining goods by false pretences. He had given worthless cheque in order to obtain goods. At the trial, when he was being cross-examined as to his answer to the police officer when he was charged, he said: "I was wanted on a warrant last March, and that police officer knew that." Thereupon the appellant was asked: "The warrant in relation to last March was in connection with a sum of £200 which you had obtained from Mr. R. J. Cooley of New Malden, Surrey, by fraud?" That question related to the obtaining by the appellant of an overdraft for £200 by certain false representations:—

HELD: the question was one which could not properly be put to the appellant, as it was not a question relating to a similar offence, which would be admissible to prove intent where the gist of the offence charged was fraud.

[EDITORIAL NOTE. Generally speaking, evidence of the commission of similar offences is not admissible, but, where the gist of the offence is fraud, such evidence may be given as illustrating a course of conduct showing an intention to defraud. The evidence, however, must be of a similar fraud, and, in this case, the character of the two fraudulent acts is too diverse for the evidence to be admissible.

AS TO ADMISSION OF EVIDENCE ON A CHARGE OF FALSE PRETENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 186-188, para. 270; and FOR CASES, see DIGEST, Vol. 14, pp. 384-387, Nos. 4052-4069.]

APPEAL by leave against conviction and sentence at the Essex Quarter Sessions on Nov. 21, 1938. The facts are fully set out in the judgment of the court delivered by SINGLETON, J.

J. C. Llewellyn for the appellant.

Percy Lamb for the Crown.

SINGLETON, J. [delivering the judgment of the court]: The appellant Benjamin Hamilton was convicted at the Essex Quarter Sessions on Nov. 21, 1938, of 3 counts of an indictment which charged him with obtaining goods by false pretences, all being in relation to cheques he passed in return for goods which he obtained. It is said that the goods were obtained by false pretences because, at the time the cheques were given by the appellant, there was no money in his bank to meet those cheques, and he must have known that. He was convicted on 3 counts, as I have said, and, after conviction, he admitted 26 cases of fraud, and asked that they should be taken into consideration, and received a sentence of 3 years' penal servitude. He asked for leave to appeal against his conviction and sentence, and for legal aid, and last week this court gave him permission to appeal against conviction, and assigned him counsel. An objection was taken in the course of the cross-examination of the appellant. The appellant was charged with obtaining goods by

false pretences. In order to obtain the goods, he had given cheques which were worthless because there was no money in the bank to meet them. Before Mr. Llewellyn himself cross-examined the prisoner, he referred the chairman to ARCHBOLD'S CRIMINAL PLEADING, 30th Edn., p. 366 :

Where the gist of the alleged offence is fraud intent is material, and evidence of other similar offences is admissible to prove the intent.

The appellant's defence was that he thought that there was, or might have been, money in the account to meet the cheques. It was not disputed by counsel for the defence that, in those circumstances, it was open to the prosecution to cross-examine the prisoner as to other offences of a similar nature. However, while that can be done in a proper case, regard must always be had to the strict terms of the Criminal Evidence Act, 1898, as has been pointed out by this court. The Criminal Evidence Act, 1898, s. 1 (f), provides as follows :

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless (i) proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged . . .

I do not propose to read the other two clauses, as they are not material to the present case. Early in the cross-examination of the appellant, prosecuting counsel asked him these questions :

Is the police officer wrong when he said your reply to his charge was : " All right. I admit doing a bit of fiddling. I did it for the wife's sake " ?—Those actual words. Yes.

That is wrong ?—What I actually said to him was : " Well, for one thing, I have got to bring in a word for private reasons. At the moment, I shall want bail. If I get that, then I will play ball with you."

Do you mind repeating that ?—Yes. I said : " At the moment, for private reasons, I shall want bail. If I get that, I will play ball with you."

Will you explain what that means ?—Yes. Since you want it, you shall have it. I was wanted on a warrant from last March, and that police officer knew that. Because of that, I am here now.

The warrant in relation to last March was in connection with a sum of £200 which you had obtained from Mr. R. J. Cooley of New Malden, Surrey, by fraud ?—That is what the prosecution says. Yes.

And it is what you admit ?—I do not admit anything yet.

Objection is taken to that question :

The warrant in relation to last March was in connection with a sum of £200 which you had obtained from Mr. R. J. Cooley of New Malden, Surrey, by fraud ?

In our view, that is a question which ought not to have been put. It was put, in one sense, accidentally. The prisoner himself had brought it out, and prosecuting counsel proceeded to ask a question which we think he would not have asked if he had not been taken by surprise. The question as to the £200, said to have been obtained by fraud, was a matter relating to the obtaining by the appellant of an overdraft by certain false representations. In our view, it was not a similar offence. It was not a question which could properly be put to rebut the defence put up by the accused, in the circumstances of this case, and it cannot be said that it was a similar offence, as prosecuting counsel has argued this

morning. It is not evidence of an offence which can be used in relation to the section of the Criminal Evidence Act to which I have already referred. As I have said, we think that the question ought not to have been put, but, when this case is regarded as a whole, we feel that that question, and the answer of the accused, could have had little bearing on the result of the case. In fact, we think they had none.

The accused was convicted of the three charges laid against him, and 26 other cases of a like nature were taken into consideration at his own request. He gave evidence himself. He was cross-examined, and he gave his explanations, and it was for the jury to decide whether or not they could accept them. It is impossible to believe that that question, which ought not to have been asked, made any difference.

We think that, in the circumstances of this case, it is right that this appeal should be dismissed, notwithstanding the fact that the point raised in the notice of appeal might be made in the appellant's favour, as, in our view, no substantial miscarriage of justice prevails. We therefore apply to this case the proviso to sect. 4 of the Act. The appeal is dismissed. As leave to appeal was given, the time during which the appellant has been in prison on appeal will count. In other words, the sentence will run from the day of conviction.

Appeal dismissed. Sentence to run from day of conviction.

Solicitors: Registrar of the Court of Criminal Appeal (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

E

JACKSON v. JACKSON (OTHERWISE PRUDOM).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), February 3, 1939.]

F

Divorce—Nullity—Respondent's alleged pregnancy by someone other than petitioner—Birth of child—Admissibility of evidence of non-access before marriage ceremony—Rule in Russell v. Russell—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (d).

G

Upon a petition for a decree of nullity on the ground that at the time of the marriage the wife was pregnant by some person other than the petitioner, the petitioner at the time of the marriage being ignorant of the fact alleged, it was proposed to ask, in the examination in chief of the petitioner, questions the answers to which would show non-access by the petitioner before marriage:—

HELD: the rule that evidence of non-access cannot be given is confined to the period after the marriage, and has no application to the period before the marriage. The questions were, therefore, admissible.

H

[EDITORIAL NOTE.] This case concerns the application of the rule in *Russell v. Russell* (1) to the provision of the Matrimonial Causes Act, 1937, which provides for a decree of nullity where the wife is pregnant at the time of the marriage ceremony by someone other than the husband and the fact is unknown to the husband, and it is made clear that there is no legal objection to evidence of non-access at a time prior to the marriage. As this is a question of nullity, the terms "husband,"

"wife," and "marriage" are, perhaps, not strictly accurate, but their use is certainly very convenient.

As to GROUNDS FOR DECREE OF NULLITY, see HALSBURY, Hailsham Edn., Supp., Divorce, para. 945A; and FOR CASES, see DIGEST, Vol. 27, p. 265, No. 2326, *et seq.*

Cases referred to:

- (1) *Russell v. Russell*, [1924] A.C. 687; 27 Digest 297, 2743; 93 L.J.P. 97; 131 L.T. 482. A
- (2) *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591; 3 Digest 365, 58.
- (3) *The Poulett Peerage*, [1903] A.C. 395; 3 Digest 366, 76; 72 L.J.K.B. 924.

PETITION by a husband for a decree of nullity on the ground that at the time of the marriage the wife was pregnant by some person other than the petitioner, within the Matrimonial Causes Act, 1937, s. 7 (1) which provides as follows: B

In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner, provided that . . . the court shall not grant a decree unless it is satisfied (i) that the petitioner was at the time of the marriage ignorant of the facts alleged. C

The parties were married on Jan. 24, 1938, and on Jan. 29, 1938, the wife gave birth to a child, which subsequently died. The wife denied that at the time of the marriage she was pregnant by some person other than the petitioner, and alleged that the petitioner was the father of the child. In the course of the petitioner's examination in chief, counsel was about to ask questions the answers to which would tend to show that the petitioner had not had sexual relations with the respondent at the probable date of the conception of the child, and, after objection and argument, these questions were held to be admissible. D E

G. H. B. Streatfeild, K.C., and *G. C. Tyndale* for the petitioner.

Victor Williams for the respondent.

HENN COLLINS, J.: Certain questions have been formulated by Mr. Streatfeild, on behalf of the petitioner, which he proposes to put to the petitioner, and objection has been taken to these questions on behalf of the respondent wife, on the ground that the answers would tend to bastardise the child born since the marriage. That that is the tendency, at any rate, of all four questions is undoubted, and the question I have to answer is whether the rule in *Russell v. Russell* (1) constrains me to exclude those questions. I propound the matter for my solution in those terms because the frame of the section under which this question arises is such as to predispose me to the view that the evidence ought to be admitted unless the rule of law excludes it. The section under which it arises is the Matrimonial Causes Act, 1937, s. 7, which provides, in addition to any other ground for which a marriage may be void or voidable, that a marriage shall be voidable on the ground (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. It goes on to provide that, among other F G H

cases provided by (d), the court shall not grant a decree unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged—that is to say, ignorant of the fact that, at the time of the marriage, the wife was pregnant by some person other than the petitioner.

- A As I pointed out in the course of the argument, the section proceeds on an assumption of pregnancy which must itself involve the assumption of the wife having had connection with some male person, and it therefore puts upon the petitioner the obligation of proving what is in effect a negative—namely, that that male person was not himself. In the
- B circumstances in which persons about to marry find themselves, one would expect to find all the evidences of desire and opportunity from which, in cases of divorce, one would be inclined to infer adultery. It must, therefore, be extraordinarily difficult for any petitioner to proceed, under that section, to establish by any evidence but his own that he was not
- C the person responsible. For those reasons, and for some others that Mr. Streatfeild urged upon me, my predisposition is to find that there is no rule of law excluding the kind of evidence which the questions propounded are intended to elicit. However, my predisposition in the matter has, of course, no weight at all if the authorities are against it.
- D Therefore I look critically at the judgment in *Russell v. Russell* (1), which is the most authoritative exposition of a rule of law which has existed for a very long time in the history of our jurisprudence, and I think that that case does not exclude the questions which it is proposed to ask the petitioner. I think that perhaps the most succinct epitome of
- E the statement of the rule is to be found in the opinion of LORD FINLAY, at p. 711. I cannot think that by any inadvertence such a master of precise exposition as was LORD FINLAY used terms which followed the rather general terms in which LORD MANSFIELD expressed it in an earlier case, *Goodright d. Stevens v. Moss* (2). The summary which LORD
- F FINLAY gives is as follows, at p. 711 :

It is beyond controversy that by the common law of England neither husband nor wife could give evidence of non-access after marriage for the purpose of showing that a child of the wife born during the marriage was illegitimate.

- The significance of that is that it is confined to non-access after marriage.
- G The particular question which arises in this case is whether a husband can give evidence as to non-access before a particular date before marriage. I do not think that the rule in the *Russell* case (1), as defined by LORD FINLAY, covers the kind of evidence which it is now proposed to tender. It is quite clear, I think, also, when you look at *The Poulett Peerage* (3),
- H that that is the proper limitation of the rule. The EARL OF HALSBURY, L.C., said, at p. 398 :

The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife. I confess I should be startled if I thought that that which appears to have been in the mind of SIR JOHN ROMILLY at the time he gave the decision referred to could be held to be the law of England. Is it conceivable that a man taking to wife

a person whom he imagined to be a pure virgin, and finding out that he had been deceived and that the woman was pregnant when he married her, should not be at liberty to say afterwards that, so far as he was concerned, he had every reason to believe that she was a virgin; and that, having spurious issue put upon him, he should not be at liberty to say, "I never had intercourse with my wife before marriage"?

He is there saying that a husband may give evidence that he was not the father of a child conceived before marriage. That is precisely the purpose of the questions here, with the distinction that here the questions do not go the length of saying, "I never had intercourse with the woman before marriage," but say only, "I never had access before the named date," that date, of course, being the date calculated with reference to the subsequent birth of the child. I therefore think that these questions are admissible.

Solicitors: *Reed & Reed*, agents for *Colin Brown & Kidson*, Whitby (for the petitioner); *Fielder, Le Riche & Co.*, agents for *King & Thompson*, Middlesbrough (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

WORTHY v. LLOYD.

[COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), February 8, 9, 1939.]

Landlord and Tenant—Rent restriction—House let in two parts—One part decontrolled—Subsequent letting of whole house—Whether subsequent letting within the Acts—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2 (1).

B. was tenant of a controlled house. Before 1932, she had sublet part of it to the respondent, L. On B.'s death in 1932, the appellant, being landlord of the whole house, took possession of the part not sublet to L., and that part then became decontrolled. L. then negotiated to take over the tenancy of the whole house, and on Feb. 29, 1932, the appellant let it to him at a rent of 26s. per week. The rent which the deceased tenant had paid was 17s. 5½d. per week. In 1938 L. refused to pay the rent of 26s. per week, contending that the whole house was still a controlled house, and, upon being sued for arrears of rent, counterclaimed for the return of rent overpaid:—

HELD: upon the proper construction of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), the whole house in 1932 was a controlled house, and the letting was, therefore, subject to the Acts. The tenant was, therefore, entitled to repayment of the amount overpaid, subject to the restriction placed upon such recovery by the Acts.

[EDITORIAL NOTE. The point in this case is in a very narrow compass, and is whether a letting of a whole house, part of which is controlled and the remainder is decontrolled, is a letting subject to the restrictions of the Act. Having regard to previous decisions, the Court of Appeal have decided that such a letting is so subject. The court has, however, indicated a method of letting such premises to which the Acts will not apply, i.e., by letting the controlled part at the controlled rent and by a separate letting of the uncontrolled part at such a rent as will make up the total rent required for the whole premises. As an alternative, the court has suggested

that, by arrangement with the tenant, the landlord should, before the letting, be let into actual possession of the controlled part, and thus decontrol the whole house.

As to DECONTROL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 319-321, paras. 379, 380; and FOR CASES, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7361.]

A Cases referred to :

- (1) *Langley v. Wood* (1926), Estates Gazette Digest 203.
- (2) *London County General Real Property v. Randle* (1930), Estates Gazette Digest 126.
- (3) *Thomas v. Metropolitan Housing Corpn., Ltd.*, [1936] 1 All E.R. 210; Digest Supp.
- (4) *Rider v. Rollit* (1920), 36 T.L.R. 687; 31 Digest 557, 7038.
- (5) *Holden v. Howard*, [1937] 4 All E.R. 483; Digest Supp.
- (6) *Whitehead v. Clifford* (1814), 5 Taunt. 518; 31 Digest 522, 6689.
- (7) *Kearns v. Bedford* (1934), 50 T.L.R. 348; Digest Supp.

B
C APPEAL by the plaintiff from an order of His Honour JUDGE DRUCQUER at the Brentford County Court, dated Oct. 20, 1938. The facts are fully set out in the judgment of SCOTT, L.J.

A. *Safford* for the appellant.

N. C. *Lloyd-Davies* for the respondent.

D *Safford* : The real issue is the nature of the position where a landlord lets to a tenant a house which was, at the moment of letting, only partly controlled. The landlord could have let the uncontrolled part at any rent which he could obtain, if he had let it separately, but, when he lets the whole house to one tenant, at an inclusive rent, it is not possible to say that he is asking too much for the controlled part. The excess beyond E the recoverable rent of the controlled part may be said to be the rent of the uncontrolled portion. The county court judge was wrong in finding for the defendant on the counterclaim for rent overpaid. The whole house must have been in law in the possession of the landlord before he could let it as a whole to the controlled tenant of the upper F part, who must be held to have surrendered his holding when taking the new tenancy. Physical possession is not required to comply with the Act. "Actual" possession has been held to be effected by a symbolical act, as, for instance, the handing over of a key. Equally, in this case, letting the whole house implies that the landlord must have come into G possession of the whole. [Counsel referred to *Thomas v. Metropolitan Housing Corpn., Ltd.* (3) and *Rider v. Rollit* (4).]

H *Lloyd-Davies* : There is a change of possession, but no actual possession of the upper part. Houses must be deemed to be controlled unless the contrary is shown. If there is any doubt on the facts, the tenant must succeed. [Counsel referred to *Langley v. Wood* (1), *London County General Real Property v. Randle* (2), *Holden v. Howard* (5).]

Safford, in reply : Granting a new lease is the first example of a surrender by the operation of law given by WOODFALL ON LANDLORD AND TENANT, and see *Whitehead v. Clifford* (6). There is no difference in principle between the key cases and the granting of a new lease. The

landlord had possession of the whole house, which was, therefore, de-controlled by the 1923 Act: *Kearns v. Bedford* (7).

SCOTT, L.J.: This is an appeal by the plaintiff from an order of His Honour JUDGE DRUCQUER in the Brentford County Court on Oct. 20, 1938. The plaintiff, who was the landlord, was suing the tenant of a house, No. 52, Strafford Road, Acton, in respect of a small sum of £2 19s. 6d., being arrears of rent which the defendant pleaded was irrecoverable on the grounds that the house was still controlled under the Rent Restrictions Acts and that the sum demanded was in excess of that permitted by the Acts to the extent of that figure. There was a counterclaim by him for the recovery of past overpayments on the same basis amounting to some £107, but it was agreed between the parties that, by reason of the limitation of such recoveries to a date six months before that Act came into force—a limitation effected by the Act of 1938—the amount recoverable was only £14 10s. 5d. A

The real question of substance in the case was whether or not the defendant was entitled for the future to have the advantage of this statutory control in respect of the whole house. The judge held that he was. The circumstances are very special, and our decision is, of course, given on those very special circumstances. B

The relevant facts are short. The appellant, the plaintiff, was the freeholder of the house, and down to Feb. 16, 1932, a Mrs. Bartlett had been tenant of the whole house under a controlled tenancy of 17s. 5½d. per week. She herself had occupied the ground floor only and had sublet the upper portion of the premises to the defendant, whose tenancy was likewise controlled. On Feb. 16, 1932, she died, and on Feb. 23 it was arranged between the appellant and those who were, or who were going to be, her personal representatives that they would surrender her tenancy to him. On Feb. 29, an agreement was made between the plaintiff and the defendant that the latter should become tenant of the whole house at a rent of 26s. per week, the plaintiff doing to the ground floor such decorations as might be necessary. The defendant offered to do the work on behalf of the plaintiff, the latter paying him the cost. About the same time, the agent of the plaintiff entered in his rent book: "Out of the Rent Act." The judge held, upon the evidence before him, that the ground floor became decontrolled when the plaintiff took possession of it, but that the plaintiff, on becoming tenant of the whole house, did not become tenant of the ground floor as a separate dwelling-house, so as to lose the advantage of the Rent Restrictions Acts. He held that the other floor remained under the control of the Rent Restrictions Acts, and, in consequence of the upper floor being controlled, he was bound, by reason of that fact and of a new tenancy, to hold that the whole house continued to be controlled. The case for the appellant was based upon sect. 2 (1) of the Act of 1923. The material words of that section are these: C

Where the landlord of a dwelling-house to which the principal Act applies . . . D

comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house: . . .

That part of the section does not fit in with the facts of this case. I now come to the material part :

A Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part. . . .

B That has no bearing upon the present question, but it continues as follows :

. . . and, if the landlord . . . comes into possession of any part not so sub-let, the principal Act shall cease to apply to that part, notwithstanding that a subtenant continues in . . . possession of any other part by virtue of the principal Act.

C It was contended for the appellant that the effect of this subsection was to free the whole dwelling-house from control on this ground. It was said that the landlord took possession of the whole by reason of the facts I have mentioned in regard to the letting by him of the whole house to the respondent and by reason of the further fact that he actually took possession of the ground floor, and agreed, as a term of the new tenancy, to do the decorations. For the respondent, it was contended before us D that the appellant did not take possession within the meaning of sect. 2 (1) of the Act of 1923, because sect. 2 (3) provides as follows :

For the purposes of this section the expression "possession" shall be construed as meaning "actual possession."

E It was submitted that what had happened did not amount to actual possession by the appellant. Whether or not this point was before the county court judge I cannot be sure, because he does not mention it in his judgment. His ground of decision was that the respondent became tenant at an inclusive rent of the whole premises of which the upper floor still remained controlled. He considered himself bound by two cases in the F Divisional Court reported in THE ESTATES GAZETTE DIGEST, one in 1926 and another in 1930. He concluded his judgment with these words :

I accordingly held that the premises as a whole constituted a dwelling-house within the Act.

G The first case was *Langley v. Wood* (1), where the facts were almost identical with those of the present case. I need not go into them in detail, but *SALTER, J.*, who delivered the judgment of the court, consisting of himself and *FRASER, J.*, stated the facts and announced the opinion of the court. He said that the county court judge's decision was right. H I shall have to look at the details of the facts for a moment. *Mrs. Langley* appealed from the decision of the judge at the Brentford County Court given in favour of the tenant, *Miss Wood*. *Mrs. Langley* claimed possession of certain rooms which *Miss Wood* had held as her tenant. *SALTER, J.*, said :

The facts were that the flat had been divided into two parts, the upper and lower floors. On Mar. 8, 1922, the flat was let by *Mr. Carlton*, the then landlord,

to a Mr. Richards, and then towards the end of the year Mr. Richards sublet the upper floor of the flat to Miss Wood.

In the following year, 18 months later, Mr. Richards gave notice to Mr. Carlton that he wanted to give up the tenancy of the flat, and he went out on Oct. 29, 1923. Miss Wood remained in possession of the upper floor, and the lower floor became untenanted and unoccupied. The county court judge found that the landlord obtained actual possession of the lower floor. Consequently the Act ceased to apply to the lower floor, but none the less it continued to apply to the upper floor, which continued for a time to be Miss Wood's dwelling-house. If at any time the landlord had sought to retain possession of the lower floor, he would have been entitled to it. However, the matter did not rest there. After a short interval, an agreement was made under which Miss Wood became the tenant from Mr. Carlton of the whole of the flat at a rent of 30s. per week. The effect of that was, in his Lordship's opinion, that the two floors which had been separate dwelling-houses became one dwelling. In Jan., 1924, Mr. Carlton sold his interests to Mrs. Langley, the landlord who gave notice in that year to the tenant Miss Wood. Miss Wood, however, refused to quit, and an action for ejectment was brought. In his Lordship's opinion, Miss Wood was protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2). The flat was let to her as a separate dwelling by Mr. Carlton, whose rights Mrs. Langley had, and, in his Lordship's opinion, the flat was a dwelling-house to which the Act applied. That decision does not in terms say that the whole house became a house to which the Act applied, but it implies it, and that was the reasoning of the judge. That case was followed in the later case, to which I need not refer.

In this case, it is quite clear that the landlord, who is the appellant, could, had he chosen, have brought about the decontrol of the whole house in two ways. If the present respondent had said that he wanted a tenancy of the whole house, the landlord could have replied: "I am not willing to give you a tenancy of the whole house unless you help me to get the house freed from the control of the Acts. If you will kindly take all your furniture out of the upper floor and put it for a moment in my part of the house, which is decontrolled, since I have taken possession of it, then we will discuss the matter, and you shall have your tenancy on the terms you ask." Alternatively, he could have said to him: "Stay where you are, leaving your furniture where it is, and I will enter into a double agreement with you—an agreement in respect of your upper floor, which will remain controlled at the controlled rent, which will have to be ascertained, on the basis of the previous rent of the whole house, by an apportionment, and also an agreement creating a separate tenancy in respect of the ground floor—and the rent of the ground floor will be such figure as, when added to the new, ascertained controlled rent of the upper floor, you are willing to pay—namely, 26s. in all." He took neither of those courses. He entered into an agreement with the respondent, the

respondent remaining in possession of his upper floor, never moving out of it, that he should have the tenancy of the whole house at 26s. per week. Those are the facts which led to the subsequent dispute. For some years the respondent continued to pay the agreed rent, and then later he was no doubt told that he might possibly gain by raising the question, A which he did. He said that the rent of 26s. was in excess of the rent to which the plaintiff was entitled by reason of the Act, on the footing that, in the circumstances, when the new arrangement was made, and when he entered into a tenancy of the whole house, the whole house at that time B house had been decontrolled for a short time. On that basis, he claimed as a defence to the plaintiff's claim the extent of the amount of the plaintiff's claim, and at the same time counterclaimed for the figure—which, by reason of the Act of 1938, had been limited to £14 odd—of past overpayment, which he was entitled, under the terms of the Act, C to recover. That was the position before the county court judge. The judge himself, having heard the witnesses, has given a judgment in the following terms :

The first question to be decided was whether the ground floor occupied by the late Mrs. Bartlett was repossessed by the plaintiff.

D He finds that it was, and that thereupon it became decontrolled. I need not refer to the details of the evidence. It is a finding of fact, and is binding on this court, although I should like to say that I think that there was ample evidence for that finding. At the same time, shortly after Mrs. Bartlett died, he says that the defendant made inquiry as to E whether he could become tenant of the whole house. Then the judge states the agreement reached, and deals with the question of decorations. In effect, what he says about the decorations is that that small point is plainly wholly irrelevant to anything we have to decide. It looked at first as if it had been an arrangement that the landlord should do the F decorations, as a condition of the new tenancy, and whilst he was in possession. The evidence did not amount to that, and the judge has found that it has no effect on the issue in the case. He continues :

G There were no keys to the rooms of the ground floor, and, in the circumstances, the landlord did all that was necessary to take possession and control of the ground floor. . . . Even though the ground floor became decontrolled, however, the defendant did not become tenant of the ground floor as a separate dwelling-house. He became tenant of the whole of the premises at an inclusive rent, of which premises the upper floor was still controlled by the Rent Acts.

Then he says quite shortly that he decides in favour of the defendant and against the landlord, that the whole dwelling-house became a con- H trolled house, by reason of the agreement, treating both parts of the house as parts of one house—one tenancy at an inclusive rent for the whole—and that the upper part of the house never ceased to be controlled, praying in aid as the ground for his decision the judgment of the court which I have already read.

We have listened to very interesting arguments in this case, but I think

that it is wise in these cases on these very technical matters, in consequence of the multiplicity of this legislation, to say as little as possible about issues which arise only incidentally, and which do not affect the decision of the case. In my view, there is no choice, in regard to a whole house under one tenancy, between its being subject to the Act as a whole house and being not subject to the Act at all. I do not think that, if the house is treated as a whole *quoad* the tenancy, it can at the same time be treated as if it consisted of two conventional part-houses, on the ground that there are provisions in the Act that there may be a part of an existing house which is deemed to be a separate house for the purpose of the Act. A

Consequently, the court has to decide whether or not, if a part of a house has never been decontrolled at all, and if a tenancy is created by agreement between the landlord and the tenant, the tenant shall, without giving up possession, and without the part that he has occupied becoming decontrolled, become the tenant of the whole. My conclusion in law is that it is impossible for the landlord to sue for a rent of the whole which disregards the limitation of the Act in regard to the rent chargeable in respect of the portion that was always subject to control. It is obvious that that particular contingency was never considered from this point of view by the legislature. It is one of those omissions which is bound to arise in this type of legislation and so many of which have been cured at different stages in the long series of Acts on this subject. However, there it is, and, although, in my opinion, it is a great hardship on the landlord in this case, since he could so easily, and in full compliance with the provisions of the statute, have obtained freedom, yet, by his ignorance of the law and his failure to get adequate legal assistance at the time, he is left in a position where his tenant may take the line he has taken. The defendant is entitled to his legal rights under the Act, but the fact that he paid his rent of 26s. per week for many years before he raised the question rather looks as if the bargain he made quite freely in 1932 was a perfectly fair bargain in the circumstances, and the fact that he has been able in this way to get his bargain arbitrarily cut down at the expense of the plaintiff is a result at which the plaintiff may feel a little sore. However, that is one of the chance results of a large body of legislation which, undoubtedly on the whole, has been very beneficial to the country. The appeal will be dismissed, with costs. B

CLAUSON, L.J. : I agree. C

FINLAY, L.J. : I also agree. D

Appeal dismissed, with costs.

Solicitors : *Fairchild Greig & Co.* (for the appellant) ; *D. A. Roberts Thomas* (for the respondent). E

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.] F

H

BRADFORD THIRD EQUITABLE BENEFIT BUILDING
SOCIETY v. BORDERS.

[CHANCERY DIVISION (Bennett, J.), June 22, 27, 28, 29, July 29,
October 13, 14, 18, 19, 20, 21, 25, 26, 27, 28, November 1, 16, 17,
1938, February 13, 1939.]

A

Building Societies—Advances—Security on which advances can be made—Mortgage of freeholds—Collateral charge on fund—"Pooling agreement"—Validity—Injunction—Execution of mortgage—Estoppel—Fraudulent statements by third party—Building Societies Act, 1874 (c. 42), ss. 12, 13, 25—Building Societies Act, 1894 (c. 47), ss. 13 (1), 17.

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The defendant purchased a freehold house from a firm of builders at the price of £730 in respect of which the plaintiffs lent upon mortgage £693. The defendant had in fact been let into possession of the house before the execution of the mortgage. The normal sum which the plaintiffs could have advanced upon the security of the house was £545, but, as they had a collateral security by way of a charge upon sums of money deposited with them by the builders, they were willing to advance the larger sum. Of the sum of £693, only £650 was paid in respect of the purchase, £6 being retained in respect of costs and £37 being placed to the deposit fund over which there was a collateral charge. The defendant before the purchase had been given a brochure issued by the builders stating that the house would be built under the strictest supervision by the local authority, would be thoroughly inspected by the plaintiffs' surveyors many times during its erection, and would be constructed of exceptionally good materials by excellent workmen. The brochure further stated that a leading building society was lending on mortgage of the houses up to 95 per cent. of the purchase price, and this brochure had been discussed with the defendant in the presence of a representative of the plaintiffs. There was an acute controversy of fact as to whether the defendant executed the mortgage deed produced at the trial, and upon this it was found that execution by the defendant was not proved by the plaintiffs. The defendant had paid instalments under the mortgage of £121 16s. and admitted that she had executed a mortgage (not the one produced at the trial), but only as an escrow, and subject to the making good of certain defects in the house. It was contended that she was estopped by her actions from setting up that the execution was conditional. The defendant also contended that the collateral security taken by the plaintiffs rendered the mortgage *ultra vires* the plaintiff society and illegal under the Building Societies Acts and the rules of the plaintiff society, and was, therefore, unenforceable by them. Lastly the defendant counterclaimed for damages for fraudulent misrepresentation by oral statements supported by the contents of the brochure, and for an injunction to restrain the plaintiffs from acting *ultra vires* :—

HELD (i) the action failed upon the finding of fact that the plaintiffs had not proved that the defendant had executed the mortgage sued upon.

(ii) the defendant was not estopped from setting up that the execution of the deed was conditional, since in correspondence, at the time the payments were made, she had stated the facts as she now alleged them to be.

(iii) the mortgage was, as between the plaintiff and defendant, a mortgage of freeholds, and the fact that there was to be a collateral security, which might be unauthorised by the Acts, with another party did not make it unenforceable as between the plaintiffs and the defendant, so long as the security of the freehold estate was not merely nominal. The mortgage was not authorised by the rules of the plaintiff society, but that did not make it unenforceable against the defendant so long

as it is not outside the plaintiffs' powers as defined by the Building Societies Act, 1874, s. 13.

(iv) it was not shown that the plaintiffs had made themselves responsible for the statements alleged to be fraudulent and the counter-claim for damages for fraud failed.

(v) having succeeded in her defence that she had not executed the mortgage deed, she had not received an advance from the plaintiff society and was not a member. She could not, therefore, maintain an action for an injunction.

[EDITORIAL NOTE.] The form of transaction here considered has become so common in recent years that it is impossible to say that any aspect of this complicated case is not of great importance not only to professional men and the building societies, but also to a large body of the general public. It has not, perhaps, been appreciated that building societies might be sued in respect of false statements made in the puffs of building estates where the building operations are financed by them. However this and the other incidental questions may be viewed, the point of paramount importance must be the validity of mortgages supported by what is known as a pooling agreement. It is here decided that as between the mortgagee and the society the pooling agreement does not affect the validity of the mortgage. The mortgage in itself, in a case like the present, is a real security upon freehold property and cannot in any sense be called a security upon personal estate attempted to be supported by a nominal or sham security upon freeholds. In this connection it is immaterial that the mortgage violates the rules of the society so long as the rules are narrower in scope than the statutory provisions. All that is necessary is that the statutory provisions shall be complied with. This, however, is not to say, that the pooling agreement, or collateral security by charge on money deposited, is a valid transaction. That transaction could only be attacked in an action between the parties to the agreement, that is the society and the builder, or possibly by a member of the society suing on behalf of himself and all other members of the society. The validity of that transaction remains to be tested.

AS TO STATUTORY REGULATION OF BUILDING SOCIETY MORTGAGES, see HALSBURY, Hailsham Edn., Vol. 3, pp. 410, 411, paras. 775-777; and FOR CASES, see DIGEST, Vol. 7, pp. 472, 473, Nos. 112-116.]

Cases referred to :

- (1) *Sheffield & South Yorkshire Permanent Building Society v. Aizlewood* (1889), 44 Ch. D. 412; 7 Digest 472, 112; 59 L.J. Ch. 34; 62 L.T. 678.
- (2) *Cullerne v. London & Suburban General Permanent Building Society* (1890), 25 Q.B.D. 485; 7 Digest 473, 116; 59 L.J.Q.B. 525; 63 L.T. 511.

ACTION for possession of a dwelling-house by the mortgagee thereof raising a number of issues, the material parts of the pleadings being fully stated in the opening passages of the judgment.

The facts and arguments are also fully set out in the judgment.

Ronald F. Roxburgh, K.C., and *M. Gravenor Hewins* for the plaintiffs.

The defendant appeared in person.

BENNETT, J. : The plaintiffs in this action are an incorporated body. They were established as long ago as 1854, and were incorporated in 1875 under the provisions of the Building Societies Act, 1874. The defendant, a married woman, is the wife of a London taxi-cab driver. She lives with her husband in her own freehold dwelling-house, now known as 181, Kingsway, West Wickham, in the county of Kent. Originally her house was known as 187, Kingsway, and, since it is so described in

all the documents in the case, I shall refer to it by its original number. The relief claimed by the plaintiffs is an order for possession of the defendant's dwelling-house. Their claim is based on the provisions of a mortgage deed, dated Oct. 10, 1934. The plaintiffs' cause of action is stated on the writ of summons, which was issued out of the Bradford district registry on June 23, 1937. I will read the claim indorsed on the writ :

- (1) The plaintiffs are entitled to possession of the freehold property with the appurtenances known as 187, Kingsway, West Wickham, in the county of Kent.
- (2) Under and by virtue of a mortgage dated Oct. 10, 1934, and made between the defendant of the first part James Walter Borders of the second part and the plaintiffs of the third part the defendant attorned tenant to the plaintiffs of the property demised by the said mortgage the plaintiffs being at liberty at any time after the power of sale under the said mortgage had arisen to enter on all or any part of the said property and determine the said tenancy without previous notice.
- (3) The power of sale under the said mortgage has duly arisen by reason of the defendant being in arrear to the extent of 3 months' subscriptions therein covenanted to be paid.
- (4) The plaintiffs claim possession of the said property.
- The defendant has set up a number of defences, and one defence of fact is of some difficulty. She has sworn that the mortgage deed was not executed by her. She has also raised by way of defence a question of law which is of importance to a number of building societies. She has raised a counterclaim against the plaintiffs in which she charges them with fraud and claims damages for their fraud. She also counterclaims for an injunction to restrain the plaintiffs from entering upon transactions which she alleges are beyond their powers. Except in regard to certain amendments to her pleadings, the defendant has acted as her own lawyer. This fact has not simplified the decision of a somewhat complicated case.
- The first question to be decided is whether the mortgage deed was executed by the defendant. That deed has at the foot of it two signatures purporting to be those of the defendant and her husband. He was a party to the deed, to guarantee his wife's debt. There is on the deed the signature "J. Y. White," who is described as a clerk to Trotter, Leaf & Pitcairn, solicitors, of 12, High Street, Bromley, Kent. J. Y. White is stated to be the witness attesting the signatures of the defendant and her husband. The defendant and her husband admit that they signed a mortgage deed, by which the defendant mortgaged No. 187, Kingsway, to the plaintiffs, and by which Mr. Borders guaranteed the defendant's debt, but both of them have sworn that the signatures at the foot of the mortgage deed are not theirs. They have sworn—and their evidence is supported by the evidence of a Mr. Marriott—that upon the mortgage deed on which they wrote their signatures there was written in ink by Mr. Borders a note to the effect that the deed was not to come into operation until certain works had been executed upon the defendant's house. They have also sworn that Mr. Borders' signature was attested by a Mr. Feldmar. If these statements be true, the mortgage deed in question cannot be the defendant's deed. The plaintiffs concede that White never saw the defendant or her husband execute the mortgage deed. They never called White to explain how his name was put upon

the deed as the attesting witness. They sought to prove the execution of the deed by the evidence of Mr. Feldmar. He swore that he saw Mr. and Mrs. Borders put their signatures to the mortgage deed, and that the signatures purporting to be theirs at the foot of that deed were in fact theirs, put there in his presence. I have read the evidence more than once, and I have compared the disputed signatures on the mortgage deed with the signatures proved or admitted to be those of the defendant and her husband. In the end, the plaintiffs have not discharged the burden resting upon them of proving that that mortgage deed was executed by the defendant or her husband. The action must, therefore, fail.

I will now state why I have reached my conclusion. To weigh all the evidence, it is necessary, I think, to know all the circumstances surrounding the actors in the transaction upon the day in Sept., 1934, when the defendant and her husband executed, as they admit they did, a mortgage deed in favour of the plaintiffs. To know these, it is necessary to go back to the end of Jan., 1934. At that time, a limited company with the name of Morrell (Builders), Ltd. (to which I shall hereafter refer as Morrells) were engaged in building a number of small houses upon an estate known as the Coney Hall Estate, West Wickham, Kent. The development of this estate was a speculation on the part of Morrells. They wanted to build houses and sell them as fast as they could. To assist them in selling their houses to purchasers who were unable to find the whole of the purchase money, Morrells had made arrangements with building societies to lend the purchasers part of the purchase money. As is usually the case with building society mortgages, the principal and interest secured by the mortgages were repayable by instalments spread over a period of years. Morrells had offices at Bromley, Kent, and sharing these offices with them were a firm of solicitors, Messrs. Trotter, Leaf & Pitcairn. These solicitors nominally transacted the legal work connected with the sale of Morrells houses and the mortgaging of them by purchasers to building societies. So far as I know, no partner of the firm of Trotter, Leaf & Pitcairn took any part in the transaction of Morrells' legal business at Bromley. This was all carried through under the supervision of Mr. Feldmar, who was not himself a solicitor, but was a managing clerk. Mr. Feldmar is no longer connected with the law. He is now engaged in the building industry. In Jan., 1934, Mr. Feldmar had as an assistant a man named Reynolds. Mr. Feldmar was at this time the secretary of Morrells.

Morrells had put out a lot of advertising matter to assist them in selling their houses on the Coney Hall Estate. Some of this came to the knowledge of the defendant and her husband in Jan., 1934, and, attracted by it, they paid a visit to Morrells' offices at Bromley on a date which can be fixed as having been Feb. 1, 1934. They were taken by one of Morrells' salesmen to look at the Coney Hall Estate, and, as a result of their inspection, they took a fancy to No. 187, Kingsway,

then very nearly a completed dwelling-house. On this occasion, they were given a copy of a printed brochure which Morrells were then using to advertise their houses. The defendant has identified a print of the brochure which was given to them on this occasion. Before the visit came to an end, Mr. Borders had paid Morrells the sum of £1, and had
A received from the salesman a receipt, which reads as follows :

Received from Mr. J. W. Borders the sum of £1 being an initial deposit for the freehold of plot No. 187, Kingsway, Coney Hall, at the price of £690 subject to contract. In the event of withdrawal from the purchase this deposit is not returnable.

It is this receipt which enables me to fix the date of the visit. For
B myself, I would suspect that, once a prospective purchaser has been induced to part with £1, his fate is sealed. Poor people cannot afford easily to throw away £1. After this visit, Mr. Borders, accompanied by his friend Mr. Marriott, again visited the estate on some date between Feb. 1 and Feb. 9. On Feb. 9, the defendant paid a second visit to
C Morrells' offices, being accompanied by her husband and Mr. Marriott. The party did not leave Morrells' offices on this occasion, and they there saw and talked with Mr. Feldmar, Mr. Reynolds, and a man who has not been identified but who was introduced to them as a representative of the plaintiffs. A number of matters were discussed at this interview,
D including some of the statements in the brochure, which contains a number of specious statements designed to leave upon the mind of the reader an impression of the high quality of the materials and workmanship used in the construction of houses built by Morrells. At p. 23 are references to the way in which money can be saved by Morrells
E because of the extensive scale of their building operations, and included in the statements is one in these terms :

All building is carried out under the strictest supervision of the local authorities, and you will be reassured to learn that, before your home has grown even so far as the damp-course—the double-course of fine slate which ensures the dryness of the house—it has been inspected no less than four times.

F At p. 24 there is this reference to a building society :

Morrell (Builders), Ltd., are the only builders in Great Britain who can offer, by special arrangement with a leading building society, a 95 per cent. mortgage advance over a period of 24 years at 5 per cent. interest. This proves without a shadow of doubt, the amazing value of Morrell homes. Each house is individually
G inspected by the building society surveyor during the course of construction, and again when the last coat of paint is finished.

The evidence of the defendant and her witnesses was that the statements in this brochure, including those I have read and others, were discussed at length. I have no reason to doubt the evidence of the defendant
H and her witnesses as to what was said, and I have no doubt that they all thought that Morrells' houses were exceptionally well built, for the reason, amongst others, that they were told that a leading building society would advance to a purchaser 95 per cent. of the purchase price. That representation suggested what must have been known by Morrells to be false, and concealed what must have been known to be the truth.

At this time, Morrells had no contractual relationship with the plaintiffs, but I think that there is no doubt that at some time or another they must have had arrangements with some other building society under which, on providing collateral security, that building society would lend to the purchaser of a house from Morrells 95 per cent. of the purchase price. In Feb., 1934, although Morrells had not concluded any contract with the plaintiffs, negotiations had been in progress between them for a long period of time, and these came to a conclusion on Mar. 3, 1934, when they were embodied in an agreement to which I shall have to refer. The effect of the agreement was that the plaintiffs agreed to lend a purchaser from Morrells 95 per cent. of his purchase money and Morrells agreed to deposit part of the purchase money with the plaintiffs, to be held by the plaintiffs upon the terms of what is called a pooling agreement. In Feb., 1934, the negotiations between the plaintiffs and Morrells were so far advanced that Morrells were able to assure would-be purchasers that the plaintiffs would lend them a part of their purchase money.

Before the interview of Feb. 9 began, having anticipated what was likely to be the outcome of it, Feldmar had filled in ready for signature two printed forms of contract between Mr. Borders and Morrells. The first was for the purchase by Mr. Borders from Morrells of a plot of land described as 187, Kingsway, for £100. The second was for the erection by Morrells for Mr. Borders of a dwelling-house upon that plot for the sum of £595. The agreements are upon printed forms, and in each agreement Mr. Borders' name appears in typewriting as the name of the person contracting. In the course of the interview, Mr. Borders for some reason or another appears to have been unwilling to bind himself. Mrs. Borders, however, was willing, and Morrells were willing to contract with her. Accordingly the two agreements were altered in manuscript by writing therein the name of the defendant as the party to contract with Morrells. They were signed by Mr. Feldmar in the name of Messrs. Trotter, Leaf & Pitcairn, as solicitors for Morrells.

As I have said, the first of these agreements is a contract for the sale of a plot of land, No. 187, Kingsway, for the sum of £100. The second is a contract for the building of a house on the plot by Morrells. It reads as follows :

Subject to the approval of the plans by the local authority the builder will erect and complete a house and offices on No. 187, Kingsway, forming part of the Coney Hall Estate Hayes in the county of Kent similar to that already erected on No. — Kingsway Coney Hall aforesaid for the sum of £590 and will complete all the said works with materials of the same quality as those used in the houses already erected on the estate on or before Mar. 13, 1934, unless the builder shall be prevented by any strike or cause whatsoever from so doing. The said sum of £590 shall be paid by the owner to the builder immediately the said house and offices shall have been completed fit for occupation with the exception of papering. All additions (if any) shall be paid for at the same time. The owner shall before the builder commences building deposit with him a conveyance of the land upon which such house and offices are to be built and at the same time execute a memorandum of charge in favour of the builder for securing to him the payment of all moneys payable to him under or by virtue of this contract in the form which has already been produced to the owner for perusal.

As I have stated, when the defendant first visited the Coney Hall Estate on Feb. 1, 1934, the house she agreed to buy was almost completed.

The conveyance of the land to the defendant appears to have been effected by a conveyance dated Jan. 31, 1934, produced at the trial by the plaintiffs. At this date, the defendant knew nothing about the matter. Morrells' seal on this conveyance is stated to have been affixed in the presence of Mr. Feldmar, who is there described as Morrells' secretary. In the conveyance, Morrells acknowledge the receipt from the defendant of the sum of £100. The defendant had not seen the conveyance until it was produced at the trial. She never paid Morrells £100 for the land. She never deposited the conveyance with Morrells in accordance with the provisions of cl. 3 of the building agreement, and she never executed a memorandum of charge in favour of Morrells. None of the documents upon which the defendant's title is supposed to be founded appears to have any relation to actual fact.

Having entered into the contracts, the defendant signed an application for a loan, her application being addressed to the plaintiffs. The form has been destroyed, and it is not certain what was the sum which the plaintiffs were asked to advance. However, from a letter of Mar. 2, 1934, addressed to the plaintiffs by Messrs. Trotter, Leaf & Pitcairn, it looks as if the sum were £556.

On Feb. 22, 1934, the plaintiffs' surveyors, Messrs. Douglas Young & Co., made a written valuation of the house, the value put upon it being the contract price—namely, £690. Subsequently, and before Mar. 2, the defendant ordered a garage to be built at an additional cost of £40, and on Mar. 2, 1934, Messrs. Trotter, Leaf & Pitcairn wrote to the plaintiffs asking them for an advance of £692, on the footing that the total purchase price payable by the defendant was £730. On Mar. 3, 1934, the defendant paid Morrells the sum of £33 on account of the purchase price, and thereupon Morrells gave her possession of 187, Kingsway, where the defendant has ever since lived.

At this time, the defendant knew nothing about the conveyance to her by Morrells of the land on which her house stood, but it must then have been executed, because, on Mar. 2, 1934, Messrs. Read, Eaton & Co., the plaintiffs' solicitors in Bradford, sent to Messrs. Trotter, Leaf & Pitcairn a mortgage for execution by the defendant. They would not have done this, I think, unless they had seen a conveyance to the defendant. The mortgage deed sent to Messrs. Trotter, Leaf & Pitcairn on Mar. 2 was returned by them to Messrs. Read, Eaton & Co. on Mar. 13, the reason being that the defendant, having ordered a garage to be built, wished for a larger loan.

The question of the mortgage remained in abeyance throughout the months of April, May and June, whilst the defendant's garage was being built. In the meantime, defects began to appear in the defendant's house. I have no doubt about this. She saw Mr. Wallace Young, a partner in the firm of surveyors who were valuing the defendant's house

for the plaintiffs when he visited her property for the purpose of seeing if the garage was completed. She saw him towards the end of June, and she then complained that the roof was leaking, that damp was coming into the front bedroom and the small bedroom, that there were defects in the hot water system, and that the builders' rubbish had been left in the garden. After this meeting, Mr. Young wrote to the plaintiffs on June 30 as follows: A

In reply to your letter of the 29th inst., we have again inspected this house this week. The garage is completed with the exception of some final painting, and we can certify that an additional £40 may be added to the mortgage, making our total valuation £730. We may mention that the house is occupied, and the purchaser has complained of a few items which we had inspected, and which the estate developers have agreed to rectify. B

On July 2, 1934, Messrs. Read, Eaton & Co., the plaintiffs' Bradford solicitors, wrote to Messrs. Trotter, Leaf & Pitcairn the letter of that date: C

Borders to The Bradford Third Building Society. Plot No. 187, Kingsway, Hayes, Kent.

We enclose engrossment of mortgage and specimen signature card. The amount payable on completion will be £650, made up as follows: Advance £693, less collateral £37, charges £6, making a total of £43, leaving the amount to be advanced £650.

In the course of Mr. Feldmar's evidence, it came out that Messrs. Trotter, Leaf & Pitcairn acted as Messrs. Read, Eaton & Co.'s agents in obtaining the signatures of mortgagors of houses on the Coney Hall Estate, who borrowed from the plaintiffs the purchase money to enable them to complete their purchase. Messrs. Trotter, Leaf & Pitcairn received from Messrs. Read, Eaton & Co. a part of the latter's costs as mortgagees' solicitors. D
E

Early in July, 1934, a mortgage deed was left at the defendant's house for her signature, either by Mr. Feldmar or by his assistant, Mr. Reynolds. The defendant at this time was not willing to execute a mortgage. She had had promises made to her to remedy the defects in her house of which she had complained. Those promises had not been fulfilled, and she was unwilling to execute a mortgage until her requirements had been complied with. Her evidence (and I accept it) was that, when the deed was brought to her house by Feldmar, she refused to sign it, because the defects of which she had complained to Mr. Young had not been remedied. She said that Mr. Feldmar assured her and her husband that the defects of which she complained would be put right. Mr. Feldmar went away with the deed unsigned. F
G

At this time the defendant's position, if her story be true, was a strong one—stronger, perhaps, than she knew. The house had been conveyed to her. She was lawfully in occupation of it. The only way Morrells had of getting her out of it was to take proceedings to enforce the charge given to them by the second of the two building agreements. Morrells would not have found it easy to enforce that charge if the fact was, as I think that it was, that the defendant's house was a badly built one. H

Mr. Feldmar called upon the defendant a second time with the deed. This time the defendant was alone. Her evidence was that on this occasion he was very offensive, telling her that she was trying to live rent free in the house, and that they were not going to stand it any longer. He left the deed with her this time, saying: "It is to be signed, and I will come back again." When she was giving her evidence at this stage, she took the mortgage deed into her hands, and, having looked at it, swore that it was not the document which Mr. Feldmar left with her. Later, Mr. Feldmar called again, and had another interview. At this interview, it is common ground between the parties that the defendant and her husband signed a mortgage deed, and it is common ground that Mr. Feldmar left the interview with a mortgage deed so signed in his pocket. The question to be solved is whether the mortgage deed produced in the action is the deed which Mr. Feldmar then took away. The defendant, her husband, and Mr. Marriott have all sworn that it is not. Mr. Feldmar alone has sworn that it is.

The first point that arises is as to the date of the transaction. The defendant and her witnesses all swore that the date was Sept. 18, 1934. On behalf of the plaintiffs, it is argued that Sept. 18 cannot have been the date, although that was the date which Mr. Feldmar with his own hand wrote on a document which he handed to the defendant when the deed was signed. The second point that arises is whether the transaction took place, as the defendant and her witnesses say, at or about 2.30 p.m., or as Mr. Feldmar says, at about 9 p.m.

Before coming to the oral evidence, the physical condition of this mortgage deed must be noticed. It is for the most part a printed form commonly used by the plaintiffs, and clearly one of their forms. In the print are insertions in manuscript and in typewriting. It is dated Oct. 10, 1934. No one suggests that it was signed on that day. The words "tenth" and "October" are in manuscript, and were inserted, perfectly properly, by Mr. Kellett, a managing clerk employed by Messrs. Read, Eaton & Co., of Bradford, the solicitors for the plaintiffs. The names, address, and descriptions of the defendant and her husband are inserted in the printed form in typewriting, and so, too, is the amount of the loan, £693, the rate of interest, £5 per cent., and the amount of the monthly instalments. The remainder of the deed is printed. The mortgaged property is described in the schedule. The whole of the schedule is in typewriting, excepting the date of the conveyance by Morrells to the defendant. There the word "thirty-first" and the word "January" are in manuscript. There was no evidence to identify the person who wrote those words. They were not inserted by Mr. Kellett. The attestation clauses are typed, and in those clauses the signature "J. Y. White" appears as the name of the person in whose presence the defendant and her husband signed, sealed and delivered the deed. The description of White—namely, "Clerk to Messrs. Trotter, Leaf & Pitcairn, solicitors, 12, High Street, Bromley, Kent"—is impressed on

the deed by means of a rubber stamp. The deed has an indorsement, in part in print, in part in manuscript, and in part in typewriting. The manuscript relates to the date Oct. 10, and is obviously the handwriting of Mr. Kellett. The name of the mortgagor, and a short description of the mortgaged property, are in typewriting. The remainder of the indorsement is in print. There is no trace of any note written on it in ink. On the occasion on which the defendant signed the mortgage, Mr. Feldmar with his own hand wrote and gave to the defendant this letter, dated Sept. 18, 1934 :

Re 187, Kingsway.

In consideration of your executing the mortgage in favour of the Bradford Building Society we undertake on behalf of our clients, Morrell (Builders), Ltd., to hold the mortgage until the following works have been executed : Make good plaster round door jamb in front bedroom, remedy dampness in first and third bedrooms, make roof watertight, and remedy defects, if any, in roof timbers, remove surplus muck from the garden and replace with soil.

Every word and figure is in Mr. Feldmar's own hand. He may, of course, have made a mistake in the date he put upon the letter. In argument, the plaintiffs suggest that he did. The defendant, her husband, and Mr. Marriott have all sworn that the letter was written on Sept. 18, 1934, and that Mr. Feldmar made no mistake about it when he so dated it. The defendant produced a typewritten copy of a letter which, according to the evidence of herself, her husband, and Mr. Marriott, was composed by her husband, typed by herself on Sept. 18, and posted to the plaintiffs on that day. I will read the letter. It is addressed to "The Manager, Bradford Third Equitable Benefit Building Society, 48, Market Street, Bradford," and it says :

I have to-day signed the mortgage deed in respect of the above property, and placed it in the possession of Messrs. Trotter, Leaf & Pitcairn, solicitors, who are acting for Messrs. Morrells and myself to hold pending certain necessary repairs and defects being made good. The mortgage deed is still undated and will not be handed to you until the above works are carried out, and with my consent, and a note to that effect has been attached to the mortgage deed. I am enclosing a copy of the agreement signed by Messrs. Trotter, Leaf & Pitcairn setting forth the works to be carried out. Will you therefore please note that no arrangements for completion are to be made until you hear further from me, and no money should be advanced without my agreement.

The plaintiffs called a witness named Clough, one of their two secretaries, and sought by his evidence to prove that they never received the letter. I accept the evidence of the defendant and her witnesses in regard to this letter. The evidence of Mr. Clough is not conclusive that the plaintiffs did not receive the letter. Like so much of the evidence called by the plaintiffs, it was incomplete. Mr. Clough did not prove that he was at the plaintiffs' office opening their letters on those days when, in the ordinary course of post, a letter posted in Kent on Sept. 18, 1934, would have been received at Bradford. This letter helps to fix the date of the interview as having been Sept. 18, 1934, but I realise that the date on this letter may have been taken from the letter written by Mr. Feldmar, and that he may have made a mistake. [His Lordship then read the evidence relating to the execution of the mortgage deed.]

The burden of proving that the defendant executed that mortgage deed rests on the plaintiffs. At the end of the case, they had not satisfied me that she did so, and the result is that their action must fail. Since I have reached this conclusion, strictly speaking, it is unnecessary for me to express an opinion upon the other grounds of defence set up by

A the defendant. However, since the matter will probably go to appeal, it may be of assistance to the Court of Appeal if I state the other grounds of defence, and my conclusions upon them. I hope to be able to do so quite briefly. For the purpose of considering the other grounds of defence it must, of course, be assumed that this mortgage deed was

B executed by the defendant and her husband. On this assumption, she pleads that it was executed by her as an escrow upon a condition that it was not to be put into operation, but was to be retained by Messrs. Trotter, Leaf & Pitcairn, and not delivered until certain works had been carried out at No. 187, Kingsway. In my judgment, she has proved

C beyond question that this mortgage deed was so executed and handed over to Mr. Feldmar. Mr. and Mrs. Borders have clearly proved this fact, and their oral evidence is supported by the undertaking written by Feldmar on Sept. 18, 1934. The conditions are set out in the undertaking, which I have already read. The defendant has proved

D that the conditions were not fulfilled. Knowledge of the fact that the deed was executed by the defendant as an escrow must be imputed to the plaintiffs, because, for the purpose of getting the deed executed, Feldmar was their agent. The defendant, therefore, has established her plea. The plaintiffs reply, however, that she is estopped from

E setting it up—that is to say, her conduct has been such that she cannot be permitted to give evidence of the truth—and that, accordingly, she is bound by the deed. The acts relied upon by the plaintiffs as creating the estoppel are the writing of certain letters specified in their particulars. The first is the undated authority, signed by the

F defendant and given to Feldmar on Sept. 18, 1934, authorising the plaintiffs to pay to Trotter, Leaf & Pitcairn the money they were lending to the defendant. This letter was handed over to the plaintiffs, along with the mortgage deed, in breach of the undertaking given to the defendant by Feldmar, and cannot be relied upon as an act of the

G defendant. There are 6 other letters written by the defendant, 5 in 1936 and one in 1937. It is to be borne in mind that on Jan. 14, 1935, at the very moment when the plaintiffs required the defendant to make payments under her mortgage deed, the defendant, through her husband, wrote to the plaintiffs, giving them a quite truthful account of what

H Feldmar had done when the mortgage had been executed. The letter, which is addressed to the secretary of the Bradford Third Equitable Building Society, is as follows :

I have a letter dated Sept. 18, 1934, from Messrs. Trotter, Leaf & Pitcairn, undertaking to hold in their possession the deed of mortgage *re* 187, Kingsway, until the execution of certain named repairs. One item, in particular, dampness in bedrooms and sitting has not been yet started on. To my surprise, I received a

letter from you dated Jan. 10, with a statement from which it appears the mortgage deed has been handed to you and £693 advanced by you to Morrells. This is a contravention of the contract I hold, and I would be glad to know on what date you advanced the cash to Morrells, and consequently what I owe in repayments. I am communicating with Messrs. Trotter, Leaf & Pitcairn and I would be glad if you would see into the matter. It is quite clear to me that you would not have advanced the cash if you had inspected the premises at the time, and I feel inclined to press Messrs. Morrell and Messrs. Trotter, etc. very heavily in consequence of their action. If the work can be carried out within a day or two, I shall feel happier.

Mr. Borders swore that, at the time he wrote to the plaintiffs, he also telephoned to Messrs. Trotter, Leaf & Pitcairn. The case the defendant now seeks to rely on is that which she stated to the plaintiffs when she first knew that the plaintiffs had acted upon the mortgage.

It is true that she afterwards made payments upon the footing that the mortgage bound her, and it is true that she wrote letters that would leave upon the mind of the reader the impression that the mortgage deed was binding upon her. The truth is that at that moment—namely, Jan. 14, 1935—it was not, and the truth is that the condition upon which the defendant and her husband signed the mortgage deed has never yet been fulfilled. The question is whether the defendant has done anything or said anything which precludes her from relying on the truth. She is so precluded if, but only if, the plaintiffs, believing (because of what the defendant wrote or did) that she was bound by the deed, did something, or refrained from doing something which they would otherwise have done or refrained from doing, and were thereby prejudiced. The plaintiffs have given no real evidence at all that, because of what the defendant wrote or did, they did, or refrained from doing, anything, and were thereby prejudiced. The only evidence relied on was that of a witness named Lee, who described himself as being the head of the plaintiffs' arrears department, and who in his re-examination gave some evidence upon which the plaintiffs relied. In my judgment, Mr. Lee's evidence was insufficient to establish a case of estoppel against the defendant. As an alternative to relying on estoppel in its strict sense, the plaintiffs contended that the defendant was bound by the deed because she had approbated it, and, having approbated it, could not afterwards be allowed to reprobate it. I never did understand this contention. The defendant did not get possession of her house under the mortgage. She was let into possession of 187, Kingsway, by Morrells, and I have never been able to understand what was the act of approbation of the mortgage deed by the defendant which prevents her from saying that it is not her deed. I would hold that the defendant, assuming that this mortgage deed was signed by her, is not estopped from setting up the plea that it was executed upon a condition not yet fulfilled, and, therefore, is not binding on her.

The third ground of defence was set up by amendment. The defendant asserts that the transaction between the plaintiffs and herself was *ultra vires* the plaintiffs, and is, therefore, unenforceable by them. The substance of the defence is this. The plaintiffs lent the defendant £693,

taking from her a mortgage on her house. The normal amount that the plaintiffs would have advanced to her on the security of her house, which, with the garage, had been valued at £730, was £545. They advanced her £693, because, in addition to the security of her house, they had a collateral security from Morrells upon a fund of money provided by Morrells to secure loans by the plaintiffs to the defendant and other persons who bought houses from Morrells. There is no doubt, I think, about the facts. The defendant's house, with the garage, was valued by the plaintiffs' surveyor, Mr. Wallace Young, at £730, its cost price.

- A** On July 16, 1934, the directors of the plaintiffs resolved to advance the defendant £545, or £693 with collateral, at 5 per cent. At this date, there was in operation a written agreement between the plaintiffs and Morrells under which the plaintiffs had agreed with Morrells to make to purchasers of houses from Morrells advances in excess of the plaintiffs' normal advances on Morrells providing the plaintiffs with collateral security. This agreement had been made on Mar. 3, 1934, after protracted negotiations between Morrells and the plaintiffs. The agreement was in the form of an undertaking addressed by the directors of Morrells and by Morrells to the plaintiffs, and reads as follows :

- D** In connection with the deposits which Cyril Herbert Morrell and Stanley Charles Morrell from time to time make with you for securing advances in excess of the society's normal lending limit on properties erected and sold by Morrell (Builders) Ltd. and mortgaged to you Morrell (Builders) Ltd. and the said Cyril Herbert Morrell and Stanley Charles Morrell hereby jointly and severally agree as follows : The said deposits shall be held by you upon the terms and subject to the conditions set out in the attached specimen charge (signed for the purpose of identification by the said Cyril Herbert Morrell) and the said Morrell (Builders) Ltd. and Cyril Herbert Morrell and Stanley Charles Morrell further jointly and severally undertake and agree that when collateral deposits shall have been made in respect of 50 mortgages or at any time prior to the completion of the said 50 mortgages on being requested by you so to do to forthwith execute a charge containing the terms and conditions set out in the said specimen hereto attached such charge to include all the collateral deposits which may have been made up to the time of your requesting the completion of such charge.

- F** The material part of the annexed charge is as follows, the parties to it being Morrells, the company, Cyril Herbert Morrell and Stanley Charles Morrell, and the plaintiffs. There are two recitals :

- G** Whereas the society [the plaintiffs] at the request of the company [Morrells] and the guarantors [the two directors of Morrells] have advanced to the several persons (hereinafter either separately or collectively according to the context referred to as "the mortgagors") named and described in the first column of the schedule hereto annexed the several sums (hereinafter either separately or collectively according to the context referred to as "the principal mortgage moneys") mentioned in the second column of the said schedule by way of mortgage upon the property short particulars whereof are specified in the third column of the said schedule (which said properties are hereinafter either separately or collectively according to the context referred to as "the mortgaged premises") and whereas in pursuance of the said advances (which advances are in excess of the society's normal lending limit) the guarantors have from time to time deposited with the society the sums mentioned in the fourth column in the said schedule which sums together with all accumulated interest thereon are hereinafter referred to as "the deposit") Now it is witnessed that the deposit shall bear interest and the company and the guarantors hereby jointly and severally agree and declare that the deposit shall be charged in favour of and taken and held by the society as additional security for all principal mortgage

moneys subscriptions instalments fees premiums costs interest and other payments payable by the mortgagors to the society under and by virtue of all or any of the mortgages mentioned in the fifth column of the said schedule or by the rules of the society. And the company and the guarantors hereby further jointly and severally agree with the society that the total amount of the deposit shall be taken and held by the society to make good the loss (if any) (including therein fines costs fees and other moneys paid by the society in respect of or on account of the mortgaged premises) sustained by the society in respect of the mortgaged premises on the terms and subject to the following conditions.

Then there follow certain powers in regard to the rights of the parties over the deposits. Such being the contractual relationship between the plaintiffs and Morrells when in Oct., 1934, the plaintiffs received from Messrs. Trotter, Leaf & Pitcairn the defendant's mortgage deed, and an authority signed by the defendant, they drew, and sent to Messrs. Trotter Leaf & Pitcairn, a cheque for £650, and no more. Out of the sum of £693 expressed to be secured by the mortgage deed, they retained £43, £6 to pay their solicitors' costs, and £37, which was afterwards subjected to a pooling agreement, dated Oct. 17, 1934, made between Morrells and themselves. This pooling agreement was similar in all respects to the charge annexed to the memorandum of Mar. 3, 1934, which I have just read, and the sum of £37, with 49 other sums, was deducted from the sums supposed to have been advanced by the plaintiffs to 49 other borrowers, made a collateral security provided by Morrells for money advanced by the plaintiffs to the defendant and 49 other borrowers. The question is whether the transaction between the plaintiffs and defendant is rendered invalid and unenforceable because of these collateral agreements. In support of her contention, the defendant relies on the provisions of the Building Societies Acts and the rules of the plaintiff society, asserting that the plaintiffs have infringed both the rules and the provisions of the statutes. The relevant provisions of the Building Societies Acts referred to were the Building Societies Act, 1874, ss. 13, 25, and the Building Societies Act, 1894, ss. 13 (1), 17.

Sect. 13 of the Act of 1874 is as follows :

Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage ; and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall as soon afterwards as may be conveniently practicable be sold or converted into money.

Sect. 25 of that Act provides as follows :

Any society under this Act may from time to time, as the rules permit, invest any portion of the funds of the society, not immediately required for its purposes, upon real or leasehold securities, or in the public funds, or in or upon any parliamentary stock or securities, or in or upon any stock or securities payment of the interest on which is guaranteed by authority of Parliament, or in the case of terminating societies, with other societies under this Act ; and for the purpose of

investments in the public funds or upon security of copyhold or customary estate, the society, or the board of directors or committee of management thereof, may from time to time appoint and remove trustees.

Sect 13 (1) of the Act of 1894 provides as follows :

- A A society under the Building Societies Acts shall not advance money on the security of any freehold, copyhold, or leasehold estate which is subject to a prior mortgage, unless the prior mortgage is in favour of the society making the advance.

Sect. 17 of that Act provides as follows :

- B The powers of investment under the Building Societies Act, 1874, s. 25, shall include power to invest in or upon any security in which trustees are for the time being authorised by law to invest.

- C Since the transaction between the plaintiff and the defendants was not an investment of a portion of the funds of the society not immediately required for its purpose, I am not concerned with sect. 25 of the Act of 1874, nor with sect. 17 of the Act of 1894. Sect. 13 of the Act of 1874 is the only statutory provision which needs to be considered and applied. That section confines the activities of a building society to very narrow limits. The fund of money raised by the subscriptions of members can be advanced only to members of the society, and to them only upon the security of freehold and leasehold estate by way of mortgage. The provisions of the section were considered by STIRLING, J., as he then was, in *Sheffield & South Yorkshire Permanent Building Society v. Aizlewood* (1). That was a case in which a building society in liquidation sought to make directors liable for losses incurred in connection with a loan of £25,000 made upon a mortgage of a leasehold colliery, and, as collateral security, a charge upon certain beneficial interests in personal estate. It was contended that the inclusion of a collateral charge upon personal estate in a mortgage of leaseholds invalidated the whole transaction. The decision of the judge was that it did not.

- F STIRLING, J., said, at pp. 451, 452 :

- G It was next said that the advance was not made exclusively on the security of leasehold estate, but was made partially on the security of the interests of Mrs. Joseph and her children in the funds held on the trusts of the two settlements of Sept. 28, 1876, and Jan. 15, 1877. It was said that those interests constituted an essential and integral part of the securities taken by the plaintiff society, and that reliance was placed upon them by the directors ; and it was contended that the inclusion of those interests in the securities vitiated the whole transaction—that, in fact, the inclusion of any personal element in the security would vitiate such a transaction. If this contention were well founded, then it would seem to follow that the inclusion in a building society's mortgage of a personal covenant by the mortgagor for repayment of the advance, and reliance placed by the officers of the society on the solvency of the mortgagor, might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and in my judgment properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society ; and I think that the officers of the society might, to a certain extent, and for certain purposes, rely on the solvency of the mortgagor. For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject matter of the security. If the circumstances of

the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like advantage by means of the personal guarantee of a third party or a charge on some readily available pure personal estate. The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874, and the question for the officers of the society to determine is what amount may properly be advanced. . . .

The decision is against the defendant's contention. The terms of the section were again considered by LINDLEY, L.J., as he then was, in delivering the judgment of the Court of Appeal in *Cullerne v. London & Suburban General Permanent Building Society* (2). In that case, the question arose on a counterclaim by the defendant society against the plaintiff, a director, for having concurred in a resolution authorising advances to members of the society on their shares. An advance was made to a member on his shares, and a loss was incurred. The plaintiff was no party to the actual advance. The decision was that the plaintiff was not liable, for that the cause of the loss was the wrongful act of the directors who made the advance, and not the passing of the resolution. LINDLEY, L.J., however, did express his opinion upon the powers of the society in very clear terms, at p. 488 :

On looking carefully at the statutes by which these societies are governed, viz., 6 & 7 Will. 4, c. 32, s. 4, and the previous statutes there referred to, viz., 10 Geo. 4, c. 56, ss. 2, 13, 30, and 31, and 4 & 5 Will. 4, c. 40, s. 9, it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold, or leasehold. The later Act, 37 & 38 Vict. c. 42, ss. 13, 25, is to the same effect, except that the public funds are added.

This is all the authority on the interpretation and effect of the statutory provisions, and, guided by it, and with the language of the section in mind, I conclude that the mortgage in question is not beyond the powers of the society. It is a mortgage of freehold estate. The security of the freehold estate is not merely nominal. As between the plaintiffs and the defendant, the transaction is one of loan on the security of freehold property. It is not a case in which freehold land has been added to unauthorised security merely to make it appear that the transaction was one of loan upon authorised security when the truth was otherwise. I express no opinion upon the validity of the pooling agreement between the plaintiffs and Morrells, or upon the validity of the collateral charges given by Morrells to the plaintiffs. That raises quite different considerations, and those considerations are not raised by the defendant's defence.

There remain to be considered the rules of the plaintiff society, the relevant rules being rr. 1, 23, 24, which read as follow :

1. The name of the society shall be the Bradford Third Equitable Benefit Building Society, and it is established on the permanent principle; its objects being to receive money on investment as subscriptions and loans, and out of the funds so raised to make advances on the security of freehold or leasehold estate by way of mortgage, pursuant to the Building Societies Acts.

23. Any person desirous of receiving an advance, or of ascertaining what amount will be advanced, upon any property, shall give to the secretary, on a form supplied for the purpose, a description of the premises intended to be offered as security. The surveyor's fee for inspection of the property must be paid at the same time, and his report thereon shall be confidential, and for the sole use of the directors and officers.

A 24. When the directors are of opinion that the premises are a sufficient security, and the solicitor has certified that the title to the property is satisfactory, the amount granted shall be paid to the borrower, on his executing a mortgage of the premises in such form and with such conditions as the solicitors shall require, and depositing the same, with all other title deeds, with the society.

The rules, I think, narrow, so far as the plaintiffs are concerned, the limits imposed upon building societies in general by sect. 13 of the Act of 1874. The Act merely confines the securities upon which the funds of a society may be advanced to mortgages of freehold or leasehold land. The rules impose a limit upon the amount of money which the directors of the plaintiffs may advance out of the plaintiffs' moneys upon such securities. Rule 23 in effect provides that the land proposed as security C for a loan is to be valued by the plaintiffs' surveyor. The effect of r. 24, in my judgment, is to limit the amount the directors may advance out of the plaintiffs' moneys to such an amount as they think can be recovered out of the land taken as security, without regard to anything else. In my judgment, if, in fixing the amount to be advanced, the D plaintiffs' directors have regard to collateral security provided by a third party, they violate the terms of r. 24. In the present case, on the facts proved, the directors of the plaintiffs would not have advanced to the defendant £693 on the security of 187, Kingsway, without collateral security. The minutes of their meeting of July 16, 1934, show that they E would not have advanced more than £545 upon the security of her house alone. In my judgment, the directors of the plaintiffs have, therefore, broken the plaintiffs' rules. However, a mere violation by the directors of the plaintiffs of the plaintiffs' rules will not invalidate a transaction. The rule is narrower than the law requires it to be. So long as the F transaction between the plaintiffs and the defendant is not outside the powers of the plaintiffs, as defined by the Act of Parliament, it is not, in my judgment, an illegal or invalid transaction, or one which the plaintiffs cannot enforce.

The last ground of defence taken was that, at the date when the writ G was issued—namely, June 23, 1937—there was not due from the defendant to the plaintiffs 3 months' arrears of subscription, and, therefore, that the plaintiffs were not entitled to recover possession of the defendants' house. The provision in the mortgage deed, upon which the plaintiffs founded their right to possession, is cl. 11, which enables the plaintiffs H to recover possession whenever the power of sale has arisen under the mortgage. Clause 4 provides for the exercise of the power of sale whenever there is in arrear an amount equal to 3 months' subscriptions.

On Oct. 10, 1934, the plaintiffs paid Trotter, Leaf & Pitcairn £650. They retained £6 for costs and £37 to form a part of their collateral security, and they claim that on that date they are to be considered

as having lent the defendant £693. I will assume that this claim is correct. Under the plaintiffs' rules, advances are liable to interest from the first day of the month in which they are granted. The defendant, therefore, under the rules, became liable to pay interest from Oct. 1, 1934. The mortgage deed has this recital:

And whereas the said mortgagor a member of such society is entitled to an advance of £693 repayable (including interest at the rate of £5 per centum per annum) by subscriptions of £4 4s. per calendar month and the said mortgagor and the said surety have agreed to secure the payment of the subscriptions and other payments prescribed by and the due observance of the rules of the said society in relation thereto as hereinafter appearing. . . .

The covenant is as follows (Clause 7):

The said mortgagor and the said surety hereby jointly and severally covenant with the said society that the said mortgagor or the said surety will from time to time hereafter duly pay all the subscriptions and other payments and observe and perform all the regulations respectively prescribed by the said rules in respect of the said present and future advance or advances and which on the part of the said mortgagor and the said surety are or ought to be respectively paid observed or performed.

Rule 27 of the plaintiffs' rules provides as follows:

Every borrowing member shall repay his advance with interest by monthly subscriptions; the rate of such subscriptions shall be fixed by the directors and may be altered by them at any time as they may decide. The first subscription shall be due during the month in which the advance is made, or otherwise as may be agreed upon.

Between Oct. 1, 1934, and June 23, 1937, the defendant paid to the plaintiffs £121 16s. If her covenant was to pay £4 4s. per calendar month, she should have paid by that date £133 8s., and therefore, she was 3 months in arrear with her subscription. Her case is that, upon a true construction of the rules and the covenant, she has not covenanted to pay £4 4s. per month, but £4 3s. 2d. She says that the meaning of the resolution of the directors was that she was to be lent £693, repayable together with interest at 5 per cent. per annum, by monthly instalments spread over a period of 24 years, and she says that the monthly sum required for that purpose is not £4 4s., but £4 3s. 2d. £4 4s. per month, so she says—and rightly—is the sum required to repay £700, not £693, with interest at £5 per cent. by monthly instalments over a period of 24 years. The covenant is not as clear as I think it might be, but, having regard to the fact that the recital states that she has agreed to pay subscriptions of £4 4s. per month, in my judgment she has covenanted to pay the subscription which is set out in the recital—namely, £4 4s. per month—and, upon that construction, she was 3 months in arrear, to the extent of £12 12s., at the time when the action was commenced. Thus, that ground of defence, in my judgment, fails.

I now turn to the counterclaim. The first claim the defendant makes against the plaintiffs is for damages for fraudulent misrepresentation. She alleges that representations were made to her to the effect (i) that No. 187, Kingsway, was erected in accordance with the bye-laws and other requirements of the local authority in whose area it was situate,

- (ii) that her house had been inspected by the plaintiffs' surveyor whilst it was in course of erection and again when it had been completed, and (iii) that the house she was buying was made of exceptionally good materials, put together by excellent workmen. She alleges that these representations were made to her orally by a number of persons on
- A Feb. 9, 1934, and that one of such persons was introduced to her as an agent of the plaintiffs. She alleges that the oral representations were supported by the brochure to which I have already referred, and that she was led to believe that the building society referred to in the brochure was the plaintiffs. The pleadings are not as accurate as they ought to be having regard to the fact that the defendant is charging the plaintiffs with fraud. The evidence on behalf of the defendant as to what she was told before she contracted to buy her house consisted of her own evidence and that of her husband and Mr. Marriott. The evidence has satisfied me that it was represented to her (i) that all the houses on the Coney
- C Hall Estate were inspected by the surveyor for the local authority many times before completion, (ii) that all the houses upon which the plaintiffs advanced money were inspected by the plaintiffs' surveyor during construction and after completion, (iii) that the plaintiffs would advance upon the security of one of Morrells' houses 95 per cent. of its contract
- D price, and (iv) that this alleged fact was proof that Morrells' houses were exceptionally well built. The defendant has satisfied me that, upon the faith of these representations, she was induced to buy No. 187, Kingsway. In my judgment, however, her case for damages for fraud fails, because she has failed to prove that the plaintiffs were in any way responsible
- E for the representations made to her. It has been proved that no representative of the plaintiffs was present at the interview of Feb. 9, 1934. I confess that I should have been pleased to see a director or manager of the plaintiffs in the witness-box, and to have had a satisfactory explanation of how, if the directors knew of the brochure and of the statements
- F it contained, they continued to have business associations with Morrells. I have read the statement in the brochure with reference to a building society. If the directors of the plaintiffs knew of that statement after Mar. 3, 1934, and thereafter lent money of the plaintiffs to persons who were buying houses from Morrells, I do not understand how they as
- G honest men could have done so without making it clear to the borrower that, so far as the plaintiffs were concerned, the statement was untrue. Mr. Clough said that he thought that the directors of the plaintiffs knew of the brochure in Mar., 1934. They lent money afterwards. The loan to the defendant was made afterwards. She certainly was never told
- H what the true position was, and, as I say, I should have been glad to have had an explanation from a director of the plaintiffs with regard to it.

It is not necessary to consider in any detail whether the defendant has proved that the representations made to her were false. A great deal of time was occupied by the defendant and by the plaintiffs in leading

evidence upon the question whether or not the defendant's house was a well-built house, and whether or not the local byelaws had been complied with. I do not know why the plaintiffs occupied time over these questions. Their real case was that they were not responsible for any of the representations made to the defendant on Feb. 9. Since the evidence on both sides was led and has been discussed, I will express my views on it. The defendant proved, in my judgment, that her house was damp because of its faulty construction. She proved that the builders failed to comply with the local byelaws. She proved that the roof of her house was badly constructed, and that the roof timbers were inadequate in size. She proved that the foundations of the house were insufficient, and that the builders had adopted deceptive means of concealing their insufficiency. She proved that the house was not exceptionally good, either in workmanship or in materials. On the contrary, she proved it to be badly built with bad materials. The case against the plaintiffs fails, because she has failed to prove that they were responsible for the representations made to her.

The second cause of action set up by the defendant in her counterclaim is for an injunction to restrain the plaintiffs from acting *ultra vires*. She claims an injunction to restrain the plaintiffs in the future from entering into transactions with others similar in kind to the transaction into which they entered with her. I have already decided that such transactions are not *ultra vires*. Furthermore, the defendant cannot maintain an action for an injunction to restrain the plaintiffs from acting *ultra vires* otherwise than as a member of the plaintiffs. She is not a member unless she has had an advance, and, having succeeded in her defence, she cannot be a member. Thus, on that ground, her counterclaim for an injunction must fail. I have now dealt with all the matters in dispute between the parties, and all that remains is to deal with the costs. I do not think there is any real ground for departing from the strict order. The action must be dismissed with costs, and so must the counterclaim. I propose to make the costs incurred in connection with the amendment costs in the action and the counterclaim.

Action and counterclaim dismissed with costs.

Solicitors : *Henry Boustred & Sons*, agents for *J. Eaton & Co.*, Bradford (for the plaintiffs).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

R. v. BILLER.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **December 16, 1938.**]

Criminal Law—Punishment—Borstal treatment—Prisoner's only previous conviction dealt with by probation order—Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1).

The appellant, a youth of 17 years of age, was convicted of stealing £3 by means of a forged entry in a Post Office Savings Bank book. He had previously been put upon probation upon a conviction for stealing from a dwelling-house. He was committed to quarter sessions in order that a sentence of detention in a Borstal institution might be passed upon him and was so sentenced by quarter sessions:—

HELD: the case came within the terms of the Criminal Justice Administration Act, 1914, s. 10, and the appellant was rightly sent to a Borstal institution.

[EDITORIAL NOTE. There seems to have been some doubt whether, in a case of this kind, it could properly be said that the offender had criminal habits or tendencies, but the court have held that the case comes quite within the section and that such an accused is a proper one upon conviction for Borstal treatment.

AS TO BORSTAL DETENTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 243-245, paras. 343-345; and FOR CASES, see DIGEST, Vol. 14, pp. 480, 481, Nos. 5238-5252.]

APPEAL from a sentence ordering the prisoner to be detained in a Borstal institution. The facts are fully stated in the judgment.

J. C. Phipps for the appellant.

S. H. Noakes for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: This appellant, Joseph Biller, is appealing to this court by virtue of a certificate granted to him by the deputy chairman of the County of London Quarter Sessions, who says in his certificate that the question is a proper one to be argued before this court. Therefore, the case is treated as an appeal, and the deputy chairman has been good enough to give us the grounds upon which he comes to that conclusion.

It is not a case in which the appellant was convicted at quarter sessions. He had been convicted at the Thames Police Court of an offence which was within the jurisdiction of that court, and, by virtue of the Criminal Justice Administration Act, 1914, s. 10, he was committed to quarter sessions in order that quarter sessions might consider the appropriate sentence to be passed upon him. Sect. 10 of the Act provides as follows:

(1) Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and (a) it appears to the court that the offender is not less than 16 nor more than 21 years of age; and (b) it is proved that the offender has previously been convicted of any offence, or that, having been previously discharged on probation, he failed to observe a condition of his recognisance; and (c) it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the

court, in lieu of passing sentence, to commit the offender to prison until the next assizes or quarter sessions, whichever appears to the court to be more convenient, and the court of assize or court of quarter sessions, as the case may be, shall inquire into the circumstances of the case [and may pass a sentence which includes a sentence in a Borstal institution].

That is what was done in this case. It was proved before the magistrate that the accused had committed the crime of obtaining £3 from the Postmaster-General by means of a forged entry in a Post Office Savings Bank book. That offence comes within the language of the section, and the magistrate, it must be taken, was informed that this person had been convicted of stealing £3 in cash from a dwelling-house and had been put on probation for that offence—that is to say, that he was discharged on the terms that he obeyed the orders of the probation officer. He was then committed, under sect. 10, to quarter sessions for sentence. At the court of quarter sessions, a certificate of conviction at the Thames Police Court was duly proved. It was further proved that the accused had been bound over on July 1, and the police officer stated other matters, which are now not in dispute—namely, that the accused was a person who could properly be described as having criminal habits or tendencies—and he was sentenced to a term of detention in a Borstal institution for a period not exceeding 3 years.

This court has felt some difficulty in understanding what is the point of law which is said to be involved in this case. Without discussing the matter further, it is sufficient to say that this case comes precisely within the language of sect. 10 of the Act to which I have referred. This young man, who is in fact 17 years of age, is a person who was summarily convicted of an offence of the class mentioned in the section, and it was proved before the magistrate, and proved before quarter sessions subsequently, that he had been previously discharged on probation and that he had failed to observe the terms of his recognisance into which he had then entered, as was proved by the fact that he had committed the offence of which he was there and then convicted by the magistrate. In our view, the case comes precisely within the section, and there is no ground for interfering with the sentence passed by quarter sessions. The appeal is dismissed. The time during which the appellant has been treated in custody as an appellant will count as part of his sentence.

Appeal dismissed.

Solicitors : Registrar of the Court of Criminal Appeal (for the appellant) ;
Legal Department, Metropolitan Police (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

PRATT v. PRATT.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), December 15, 1938.]

A *Divorce—Desertion—Letter by deserting spouse asking for meeting to discuss resumption of cohabitation—No reply by other spouse—Whether period of desertion interrupted.*

A wife had admittedly deserted her husband in 1934. In 1936, the wife wrote asking the husband to meet her and discuss the future. The husband refused to see her. In 1938, the husband petitioned for divorce on the ground of desertion for a period of more than 3 years immediately preceding the presentation of the petition:—

B HELD: there had not been desertion without cause, as it was the duty of the husband at least to meet his wife when requested by her to do so and give her an opportunity of stating her wishes.

C [EDITORIAL NOTE. The spouse who claims to have been deserted is not justified in refusing a *bona fide* offer by the other spouse to return to cohabitation. The present case seems to go a step further and to show that a spouse must entertain a proposal to consider the terms on which cohabitation may be resumed, and must give an opportunity for the matter to be discussed.

As TO OFFER TO RETURN, see HALSBURY, Hailsham Edn., Vol. 10, pp. 657, 658, para. 967; and FOR CASES, see DIGEST, Vol. 27, pp. 312-315, Nos. 2901-2929.]

D APPEAL by the husband petitioner from an order of FINLAY, J., at Winchester Assizes, dated July 13, 1938, dismissing the husband's undefended petition for dissolution of marriage on the ground of desertion. The parties were married on Sept. 14, 1933, and there was
E no issue of the marriage. On Aug. 11, 1934, the wife left her husband, and all efforts by solicitors to secure a renewal of cohabitation were unsuccessful. During the course of these attempts at reconciliation, the wife sought to impose two conditions as a preliminary to her return to her husband, (i) that she should take an old nurse to live with
F her, and (ii) that there should be no marital intercourse between her husband and herself. Although she later abandoned the first condition, she always insisted upon the second. In June, 1935, she wrote to her husband asking him to provide her with evidence of adultery so that she could take proceedings for divorce, but her husband refused
G to accede to this request. In Sept., 1936, she again wrote to her husband asking him to meet her and discuss the future. The following passage is an extract from that letter:

H My idea in coming to see you was to discuss this, and I suggest that we should meet occasionally and go out together—in short, make a new start, with a view to making a home together in the future.

On Jan. 1, 1938, the husband filed a petition for the dissolution of the marriage on the ground of desertion. The petition came before FINLAY, J., at the Winchester Assizes, on July 13, 1938, and he held that the effect of the correspondence in Sept., 1936, was to put an end to the wife's desertion, which had begun in 1934.

The Matrimonial Causes Act, 1937, s. 2, provides as follows :

A petition for divorce may be presented to the High Court . . . either by the husband or the wife on the ground that the respondent . . . (b) has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition . . .

Noel Middleton, K.C., and *J. Scott Henderson* for the petitioner. A

The respondent did not appear and was not represented.

Middleton, K.C. : The wife clearly deserted her husband in 1934, and the onus is on her to show that she has made a genuine offer to resume cohabitation and terminate desertion. She has done no more than make a mere offer to discuss the situation. B

SCOTT, L.J. : It is obvious that there was desertion of the husband by the wife from Aug., 1934, until Sept., 1936. Throughout that period, the wife repeatedly wrote stating that on no account would she resume cohabitation with her husband. It was held by FINLAY, J., that it was impossible, after that correspondence had passed between the parties, to allege desertion by the wife without cause. It is for this court to decide whether or not FINLAY, J., was right in that conclusion. We have considered the cases cited, and we do not think that they establish any legal principle applicable to the question which we have to decide—namely, whether or not the husband can say that the wife still deserted him without cause after he had refused even to see her and discuss their relations. In my opinion, it is impossible to say that FINLAY, J., decided the matter wrongly. C
D

When husband and wife are living apart in circumstances constituting desertion of the one by the other, and when the deserting spouse writes to the other and asks for an interview to discuss the position, it is the duty of the party receiving that request at least to meet the deserting spouse, and give him or her an opportunity of saying what he or she wishes. In my opinion, the judge was right, and this appeal must be dismissed. E
F

MACKINNON and DU PARCQ, L.JJ., agreed.

Appeal dismissed, with costs.

Solicitors : *Peacock & Goddard*, agents for *Truill, Castleman-Smith & G Wilson*, Blandford (for the petitioner).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

BULLOCK v. BORRETT.

[KING'S BENCH DIVISION (Finlay, L.J., sitting as an additional judge),
February 1, 2, 1939.]

Evidence—Admissibility—Documents—Evidence of deceased witness—Statement made to police officer and signed by deceased—Deposition of evidence given on oath in police court but not signed by the deceased—Evidence Act, 1938 (c. 28), s. 1.

An independent witness of a motor car accident had since died. At the trial of an action for damages for personal injuries arising out of this accident, it was sought to give in evidence (i) a statement made in writing to a police officer by the deceased, and signed by him, and (ii) a deposition made by the justices' clerk of evidence given by the deceased upon oath at a police court hearing, but not signed or initialled by the deceased:—

HELD: both these documents were admissible under the Evidence Act, 1938.

[EDITORIAL NOTE. The objection to the admission in evidence of the second document was in fact waived, but the judge seems to have formed the clear view that it was admissible. The fact that the documents are admitted does not in any way determine the weight that is to be given to them as evidence. That is a matter for separate consideration.

AS TO DOCUMENTARY EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, p. 640, para. 708 *et seq.*; and FOR CASES, see DIGEST, Vol. 22, pp. 191, 192, Nos. 1615-1625. See also YEARLY SUPREME COURT PRACTICE, 1939, p. 626.]

ACTION for damages for injuries caused by the allegedly negligent driving of a motor car. An independent witness to the accident which had caused the injuries had since died, and it was contended that the following documents were available as evidence, by reason of the Evidence Act, 1938: (i) a statement made the day after the accident by the deceased to a police officer who took it down in writing, whereupon it was signed by the deceased, and (ii) the notes made by the justices' clerk, but not signed, of the evidence given by the deceased upon oath at the hearing of a summons at a police court some two months after the accident.

The Evidence Act, 1938, s. 1, provides as follows:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:

(i) if the maker of the statement either (a) had personal knowledge of the matters dealt with by the statement, or (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and (ii) if the maker of the statement is called as a witness in the proceedings.

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. . . .

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part

thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

W. Granville Wingate for the plaintiffs.

M. D. Van Oss for the defendant *Borrett*.

Tristram Beresford, K.C., and *Felix Denny* for the defendant *Bradshaw*. A

(1) *As to the statement made to the police officer*.

Wingate: The statement made to the police officer is admissible. It is clearly within the terms of the Evidence Act, 1938, s. 1 (1).

Beresford, K.C.: This statement is not admissible. The Evidence Act, 1938, s. 1 (1), envisages a document prepared by the person himself, not one prepared by someone else. If this is to be admitted, then the deposition is also admissible. That is also within the words of the section: "any statement made by a person in a document." B

Van Oss: The contention that the document must be made by the man himself cannot be supported. It is negatived by subsect. (4). These two documents must be considered separately. It does not follow that, because one may be admissible, the other must also be. The statement made to the police officer is admissible. The independent witness must be taken to have vouched for its accuracy by signing it. C

FINLAY, L.J.: I propose now to rule that this statement is properly admissible. It is convenient that counsel should know that, unless I am satisfied that I ought to exclude it, I shall admit Mr. Beresford's statement made on oath, and, if, indeed, I found, on further argument that might be addressed to me, that I was constrained by the construction of the Act not to admit that, I should obviously attach the necessary weight to it. I shall admit it. D

(2) *As to the depositions*.

Beresford, K.C.: If the deposition is not admissible under sect. 1 (1) (a), it is justified under sect. 1 (1) (b). It was the clerk's duty to prepare the document, and it forms part of a continuous record. The information was supplied to him by one who might reasonably be supposed to have had personal knowledge of the matter. Subsect. (4) does not apply to subsect. (1) (b), as the witness, instead of signing the document, gave evidence on oath. F G

Van Oss: Subsect. (4) is fatal to the admissibility of this document. It was never signed or initialled by the witness. I am, however, prepared to waive any objection, but I would draw the attention of the court to the provisions of sect. 2 (1) regarding the weight to be attached to such documents. H

FINLAY, L.J.: In this case, I propose not to say a very great deal about the Act, but I am of opinion, and indeed it has now been conceded, that the evidence is admissible. Anybody who followed this case—I need

not go over it—would at once appreciate that, if one has admitted, as I think I was bound to admit, the statement made to the police officer, quite obviously this deposition ought also to be looked at. If one did not look at it, the result would be, I think, that one could attach hardly any weight to the former statement, because one would know that

A another statement on oath had been made by the man who made the statement that I admitted yesterday. Looking at the Evidence Act, 1938, s. 1 (1) (i) (b), and sect. 1 (4), which is the section which no doubt causes some difficulty, I think that, on the proper construction of those subsections, this note of the evidence given in a magisterial inquiry

B is admissible. I think that Mr. Tristram Beresford was right in his argument about it, but I do not propose to decide anything about that, because Mr. Van Oss, I think, if I may say so, has quite properly withdrawn any objection to the notes being read. If one is to look at one statement, however, it is unjust that one should not look at

C both. As to what weight, if any, may be attached to them, I say nothing whatever. The section to which my attention has been called says nothing about weight. What weight ought to be attached to these statements, or either of them, is a thing about which I say nothing, because, naturally, I cannot form any view in my own mind until I have

D heard the evidence. It is usually oral evidence which I act upon in a case of this sort, and therefore, I will wait.

Depositions admitted and read.

Solicitors: *Harry Chandler* (for the plaintiffs); *L. Bingham & Co.*, agents for *Hartley & Hine*, Hitchin (for the defendant Borrett); *F. J. Stewart* (for the defendant Bradshaw).

E

{*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*}

**Re RIPON (HIGHFIELD) HOUSING ORDER, 1938.
APPLICATIONS OF WHITE AND COLLINS.**

[KING'S BENCH DIVISION (Charles, J.), **February 7, 8, 1939.**]

Public Health—Housing—Compulsory purchase—“Park, garden or pleasure ground”—“Required for the amenity or convenience of any house”—Finality of Minister's decision—Housing Act, 1936 (c. 51), s. 75. A

A local authority, proceeding under the Housing Act, 1936, ss. 73, 74, made a compulsory purchase order for the purpose of acquiring land as a site for the erection of houses for the working classes. The land acquired was alleged to be part of the grounds of a large house, and, therefore, not properly included in a compulsory purchase order as forming—
in the words of sect. 75—“part of any park, garden or pleasure ground,
or otherwise required for the amenity or convenience of any house.” B
A local inquiry was duly held, and the Minister confirmed the order, but excluded a considerable part of the land therefrom :—

HELD : the proper procedure by local inquiry having been duly followed, the matter could not be reheard by the court, nor could the conclusion of the Minister be disturbed. C

[EDITORIAL NOTE.] This case is very similar in its facts to *Re Newhill Compulsory Purchase Order, 1937, Application of Payne* (1), but the judgment herein lays more emphasis on the point that, unless the proceedings by way of local inquiry can be properly attacked as having proceeded on some wrong principle or in the absence of some necessary party, the decision of the Minister is final. The court will not retry or rehear the same matter as that which was before the local inquiry. D

AS TO CONDITIONS OF ACQUISITION OF LAND FOR HOUSING PURPOSES, see *HALSBURY, Hailsham Edn.*, Vol. 26, pp. 562-564, para. 1185. FOR THE HOUSING ACT, 1936, s. 75, see *HALSBURY'S COMPLETE STATUTES OF ENGLAND*, Vol. 29, p. 622.]

Cases referred to : E

- (1) *Re Newhill Compulsory Purchase Order, 1937, Application of Payne*, [1938] 2 All E.R. 163; Digest Supp.
- (2) *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150.

APPLICATION that a compulsory purchase order providing for the purchase of approximately 23 acres near to a house called Highfield might be quashed, upon the ground that the land ordered to be purchased compulsorily was part of a park, and therefore exempt from the operation of such an order by the Housing Act, 1936, s. 75. F

The Highfield estate was described in the affidavit in support of the application as follows : G

The estate comprises approximately 35.72 acres of land including 27 acres of paddock land in the nature of amenity park land and approximately 8 acres of grounds with chauffeur's lodge, large garages, conservatories and kitchen gardens. The house itself is an imposing stone-built residence. It is a house of the type and size to which it is invariably expected to find paddock and parkland attached. Without them the house and grounds are not such as to attract a purchaser or tenant. H

To the west and north-west of the dwelling-house and gardens lies an expanse of open grassland studded with trees of an approximate area of 23.46 acres. This land is undoubtedly the parkland attaching to the house of Highfield. It is obvious on inspection of the site that the architect in designing Highfield so placed the house as to benefit by the amenity of the open stretch of land on its west side while at

the same time a convenient and pleasant approach was provided from Palace Road and College Road with a through drive, the approach from Palace Road being made through the gardens and the latter through the park. It is an essential part of a house of this type to possess besides its ordinary formal garden an open expanse of paddock land, generally as in this case possessing ornamental timber and described as a park or park land. The primary purpose of this parkland is the protection of the mansion house, both as to its approach and its aspect. Often the land can be utilised for running horses etc. but usually it is let off to neighbouring farmers or owners for grazing purposes, and the fact that this land is so let does not render it the less properly described in the market as parkland. In the case of Highfield I understand the parkland in question has been let off for grazing. This does not detract from the amenity which it attaches to the principal dwelling-house. The size of this park is not excessive when viewed from the aspect of the type of property of which it forms a vital part. In many cases a considerably larger area attaches as parkland to a house of the type of Highfield. In my opinion any substantially less area would be insufficient for the amenity of the property in question.

W. E. P. Done for the appellants.

Valentine Holmes for the respondent.

CHARLES, J. : On Jan. 3, 1938, the Ripon Corporation made an order, under the Housing Act, 1936, Part V, for the compulsory acquisition of approximately 23 acres near to a house called Highfield. On July 13, that compulsory purchase order was made the subject of a confirmation order by the minister, and the confirmation order reduced the area of that land to a certain extent. I now have before me an application, or an appeal, under the Housing Act, 1936, Sched. II, asking that the compulsory purchase order may be quashed, on the ground that the land ordered to be purchased compulsorily is part of a park, and, therefore, exempt from the operation of such order by reason of the Housing Act, 1936, s. 75.

Let us see for a moment what the local authority, the Ripon Corporation, have done. They have acted in accordance with sects. 73 and 74 of the Act. Sect. 73 provides as follows :

A local authority shall have power under this Part of this Act (a) to acquire any land, including any houses or other buildings thereon, as a site for the erection of houses for the working classes. . . .

Sect. 74 (1), which deals with the mode of acquisition of land for the provision of such accommodation, provides as follows :

Land for the purposes of this Part of this Act may be acquired by a local authority by agreement, or they may be authorised to purchase land compulsorily for those purposes by means of a compulsory purchase order made and submitted to the Minister and confirmed by him in accordance with the provisions of Sched. I to this Act.

It will be seen, therefore, that what they have to do, or what they may do, is not to make a compulsory purchase order and leave it there. All these matters are linked together. Thus, what they have to make is "a compulsory purchase order made and submitted to the Minister and confirmed by him." In this case, that procedure was duly followed, and, as I say, on July 13, 1938, the confirmation order was made.

What are the powers of this court in considering an appeal of this

sort ? The powers are to be found in Sched. II, cl. 2 (2), which provides as follows :

. . . where any such application is duly made, the court . . . (ii) if satisfied upon the hearing of the application that the order . . . is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order . . .

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I am asked to quash the order by reason of the appeal that is made under Sched. II, and so I have to see, first, whether or not this order is within the powers of this Act. It appears to me that the right which

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is given to a local authority to make the compulsory purchase order is quite undoubted, and is not altered in any way by sect. 75. The local authority fix upon land which they say is suitable for the purpose for which they are going to purchase it compulsorily. That is within the statute and it is within the powers of the Act. After that, the matter

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is not finished, because thereafter objection may be made under sect. 75 that this is land which forms part of a park, garden or pleasure ground, or is otherwise required for the amenity or convenience of the house. Those matters have to be considered to see whether or not, on objection being taken, that objection is sustainable, and certain machinery is set up whereby one can arrive at an ascertainment of the true position.

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The method which is prescribed by the statute is that the Minister shall appoint an inspector—in this case he did so—that the inspector shall hold a local inquiry and hear all sides, and that it shall be within his power—and possibly, I think, one of his duties—himself to inspect the land in question, and, having heard the evidence and heard the submissions, which may be right or may be wrong, report the result of his inquiry to the Minister. Then, when the Minister has that report before him, he has to apply his mind to the matter, with all such assistance as he may be able to get, in order to come to a conclusion as to whether or not the objection is sustained, and in order to come to a conclusion that this is in truth and in fact a park so as to bring it within the ambit of sect. 75.

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I have before me the affidavit of the Director and Principal Assistant Secretary of the Housing and Town Planning Division of the Ministry of Health, Mr. J. C. Wrigley. He says :

Before a decision was arrived at to confirm the order the subject-matter of this appeal with modifications the report of Mr. E. E. Hall as to the evidence given at the inquiry and as to his personal inspection of the land included in the order together with the representations made by the applicants were duly considered. As a result of such consideration it was considered that the land the subject-matter of this appeal did not form part of the park, garden or pleasure ground of Highfield and that in any event the same was not required for the amenities or convenience of the said house.

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That says very plainly and very clearly that the locality, the evidence given, and the representations made on the one side and on the other side were all duly considered, and that a conclusion in fact was arrived at.

I agree with what DU PARCQ, J., said in *Re Newhill Compulsory Purchase Order, 1937, Application of Payne* (1). Whatever view I might take as

to what conclusion I might have arrived at upon the evidence, I say nothing as to that, for I refuse to retry or to rehear the case here. I have no power to do so, in my view. I agree with DU PARCQ, J., when he says, at p. 167 :

A Even if I am wrong about that [he had made a conclusion of fact himself which he need not have made, and which I humbly think he had no power to make], it is enough to say that the evidence does not satisfy me that the Minister was wrong when he came to the conclusion, as again Mr. Wrigley's affidavit shows that he did, that it was not a pleasure ground. . . . The Minister having made up his mind [whether or not a space was required for the amenity or convenience of the house], as far as I can tell, on proper materials, and without misdirecting himself as to the true point at issue, it is not for me to interfere, when there are no materials upon which I can interfere.

B That was a decision under this very section, and the appeal was made under sect. 75. It really is a case almost exactly in point.

C Just a word as to *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (2). It is quite true that that applies to clearance areas and to another part of the Act which is certainly not subject to the qualifications contained in sect. 75, but none the less the principle which is enunciated there, and which has always been held to be a good principle, is that, where there is evidence upon which the Minister could arrive at the conclusion at which he did arrive, it is not for the Appeal Court to allow the appeal by rehearing the case and hearing evidence and considering evidence and disagreeing with the conclusion of the Minister. It is a finding of fact, and by that finding of fact I am bound.

D As to the house itself, it was a large house, of 24 rooms, and, of course, it would be very desirable to the owners of the house to retain surrounding land, whether it be scrubby land or grass land or whatever it may be, in order that they might have air space and freedom around the house. It is not of great importance, I think, perhaps, in this house (I am not affecting to decide upon the evidence, I am only indicating the facts that were, amongst others, before the Minister), because the field—that is to say, the space which is found to be not a park—is really almost at the back of the house. It is not in the front of the house as it was in *Payne's* case (1). There is a belt of trees which screens that back part of the house to a considerable extent. All those matters, it is clear, were in fact considered, as Mr. Wrigley deposes to in his affidavit. They were considered, because actually a considerable portion of the land which was made the subject of the compulsory purchase order was taken out by the Minister and restored to the Highfield estate. Moreover, if one looks at the position of that piece of ground so restored or eliminated from the original land sought to be taken by compulsory purchase, it is quite clear that the matter of the amenities and convenience of the house has in fact been under consideration. I only say that for my own satisfaction, because, when the Minister of Health, through his appointed agent, Mr. Wrigley, swears that the whole of the matter was considered, that the report of the inspector as to the evidence given at the inquiry, and as to his personal inspection of the land, and the representations made by the applicants, were all duly

considered, I am quite unprepared to say, or to believe, that they were not duly considered. Indeed, I think, that I would have no business to say any such thing. There was full consideration given to these matters, and, as I find, after full consideration, in accordance with the procedure laid down in the Act, the Minister arrived at a conclusion which is indeed a conclusion of fact, and which, therefore, I am of opinion it is not open to this court to disturb. The appeal must, therefore, be dismissed, with costs. A

Appeal dismissed, with costs.

Solicitors: *Clarke, Rawlins & Co.*, agents for *J. H. & H. F. Rennoldson*, South Shields (for the appellants); *Solicitor to the Ministry of Health* (for the respondent). B

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO., LTD.
(IN LIQUIDATION).

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **November 24, 25, 28, 29, 1938, January 30, 1939.**]

A *Privy Council—Nova Scotia—Shipping—Bill of lading—Omission to incorporate Hague Rules—Act of country of port of shipment requiring incorporation—Consignees and ship of another country—Illegality—Law governing contract—Newfoundland Carriage of Goods by Sea Act, 1932 (c. 18), ss. 1, 3.*

B The appellants, carrying on business in New York, were the consignees of a cargo of cured herrings for carriage from Newfoundland to New York in a ship owned by the respondents and registered in Nova Scotia. Bills of lading were issued at the Newfoundland port, and, through error or inadvertence, they were old ones used outside Newfoundland, and did not incorporate the Hague Rules, which had been adopted by the Carriage of Goods by Sea Act, 1932, enacted in Newfoundland.

C While on her voyage the ship ran ashore, and ultimately the cargo was salvaged and forwarded to New York, in a damaged condition, in another ship. There the appellants took delivery under the bills of lading, paid freight, and then claimed for the damage to the herrings and for salvage and other expenses. The respondents admitted that the loss was due to the captain's negligence in the navigation of the ship. The provisions either of the bills of lading or of the Carriage of Goods by Sea Act would exempt the respondents from liability for a loss due to negligence. The bills of lading provided that they should be governed by English law. The appellants contended that the bills of lading were illegal, null and void, due to the failure of the respondents to comply with the imperative provisions of the Carriage of Goods by Sea Act, 1932, and that the respondents were a common carrier, and, as such, liable to the appellants for breach of duty, independent of contract, the liability being one founded in tort, arising from the respondents' status as a common carrier. The respondents maintained that the rules applied by the Act of 1932 governed the contract of carriage evidenced by the bills of lading, and said that they were exempted by the rules from liability, or, even if the rules did not apply, by the provisions contained in the bills of lading, and their contention

D was accepted by the Supreme Court in Nova Scotia, and, on appeal, affirmed by the full court of the province, who held that the illegality was one in which both parties were equally concerned, and, accordingly, that the action failed, whether laid in contract or in tort:—

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HELD: (i) the bills of lading were not illegal documents, and the express words of the bill of lading must receive effect, with the result that the contract was governed by English law.

G (ii) the omission of the clause paramount contained in sect. 3 of the Newfoundland Act did not make the bills of lading illegal documents, as the section was directory, and not obligatory, and failure to comply with its terms did not nullify the contract contained in the bills of lading.

(iii) the bills of lading were binding according to their terms, and the respondents were entitled to succeed in their defence.

H *The Torni (11) disapproved.*

[EDITORIAL NOTE. The judgment herein contains a full consideration of the effect of the incorporation of a clause that a contract is to be governed by English law in a contract that may be illegal under some other law. Even though the bills of lading here in question might have to be considered illegal documents in Newfoundland, that would not necessarily mean that they would be so considered elsewhere, unless, upon the proper principles of the conflict of laws being applied, they

must be held to be governed by the law of Newfoundland. Apart from this, however, the judgment considers the construction of Acts incorporating the Hague Rules in terms which must apply to many such Acts, and is, therefore, of importance in every country where such Acts have been passed.

AS TO ADOPTION OF HAGUE RULES, see HALSBURY, Hailsham Edn., Vol. 30, pp. 606-608, paras. 766, 767; and FOR CASES, see DIGEST, Vol. 41, pp. 381-384, Nos. 2269-2290.]

Cases referred to:

- (1) *Dobell & Co. v. S.S. Rosemore Co.*, [1895] 2 Q.B. 408; 41 Digest 429, 2697; 64 L.J.Q.B. 777; 73 L.T. 74.
- (2) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236; 156 L.T. 352.
- (3) *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287; 11 Digest 397, 699; 89 L.J.K.B. 999; 123 L.T. 375.
- (4) *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589; 11 Digest 396, 688; 53 L.J.Q.B. 156; 50 L.T. 194.
- (5) *Liverpool & Great Western Steam Co. v. Phenix Insurance Co., The Montana* (1889), 129 U.S. 397.
- (6) *Re Missouri S.S. Co.* (1889), 42 Ch.D. 321; 11 Digest 389, 646; 58 L.J.Ch. 721; *sub nom. Re Missouri S.S. Co., Monroe's Claim*, 61 L.T. 316.
- (7) *Liverpool Borough Bank v. Turner* (1860), 2 De G.F. & J. 502; 41 Digest 179, 190; 30 L.J.Ch. 379; 3 L.T. 494.
- (8) *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q.B. 700; 12 Digest 295, 2431; 62 L.J.M.C. 129; 68 L.T. 690.
- (9) *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.*, [1931] S.O. 722; Digest Supp.
- (10) *Trinidad Shipping Co. v. Alston*, [1920] A.C. 888; 41 Digest 621, 4523; 89 L.J.P.C. 185; 123 L.T. 476.
- (11) *The Torni*, [1932] P. 78; Digest Supp.; 101 L.J.P. 44; 147 L.T. 208.
- (12) *The Industrie*, [1894] P. 58; 41 Digest 652, 4846; 63 L.J.P. 84; 70 L.T. 791.
- (13) *Elder, Dempster & Co. v. Paterson, Zochonis & Co., Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 41 Digest 478, 3118; 93 L.J.K.B. 625; 131 L.T. 449; *revers.*, [1923] 1 K.B. 420.
- (14) *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538; Digest Supp.; 103 L.J.P.C. 166; 151 L.T. 549.
- (15) *Bonnard v. Dott*, [1906] 1 Ch. 740; 35 Digest 204, 302; 75 L.J.Ch. 446; 94 L.T. 656.
- (16) *Victorian Daylesford Syndicate, Ltd. v. Dott*, [1905] 2 Ch. 624; 35 Digest 204, 301; 74 L.J.Ch. 673; 93 L.T. 627; *on appeal*, [1906] 1 Ch. 747, n.
- (17) *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; 35 Digest 205, 303; 76 L.J.Ch. 187; 96 L.T. 301.
- (18) *London & North Western Ry. Co. v. Hudson (Richard) & Sons, Ltd.*, [1920] A.C. 324; 8 Digest 19, 90; 89 L.J.K.B. 323; 122 L.T. 530.
- (19) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (20) *Feret v. Hill* (1854), 15 C.B. 207; 12 Digest 290, 2387; 23 L.J.C.P. 185; 23 L.T.O.S. 158.
- (21) *Alexander v. Rayson*, [1936] 1 K.B. 169; Digest Supp.; 105 L.J.K.B. 148; 154 L.T. 205.
- (22) *Taylor v. Chester* (1869), L.R. 4 Q.B. 309; 12 Digest 279, 2285; 38 L.J.Q.B. 225; 21 L.T. 359.
- (23) *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177.

- (24) *Angliss (W.) & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 41 Digest 474, 3054; 96 L.J.K.B. 1084; 137 L.T. 727.
- (25) *Sewell v. Burdick* (1884), 10 App. Cas. 74; 41 Digest 372, 2186; 54 L.J.Q.B. 156; 52 L.T. 445; *revsg.*, 13 Q.B.D. 159; *restg.* (1883), 10 Q.B.D. 363.
- A (26) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 12 Digest 271, 2220; 90 L.J.K.B. 821; 125 L.T. 161.
- (27) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; Digest Supp.; 93 L.J.K.B. 97; 130 L.T. 418.
- (28) *Kerrison v. Cole* (1807), 8 East, 231; 12 Digest 293, 2420.
- (29) *Major v. Canadian Pacific Ry. Co.*, [1922] 3 W.W.R. 512; Digest Supp.
- (30) *Scheurman v. Scheurman* (1916), 52 S.C.R. 625; 25 Digest 209, case g.
- B (31) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 17 Digest 331, 1424; 60 L.J.Q.B. 295; 63 L.T. 739.

APPEAL by leave of the Supreme Court of Nova Scotia from an order of the full court (GRAHAM, CARROLL, HALL, DOULL and ARCHIBALD, JJ.), dated Feb. 19, 1938, dismissing an appeal from a judgment of the Supreme Court (SIR JOSEPH CHISHOLM, C.J.), dated July 8, 1937. The facts of the case are set out in the judgment of their Lordships delivered by LORD WRIGHT.

G. McL. Daley, K.C., and *W. Lennox McNair* for the appellants.

C. B. Smith, K.C., and *C. T. Miller* for the respondents.

- D *Daley, K.C.*: The respondent company cannot avail itself of the exceptions from liability contained in the bills of lading to escape its common law liability, the bill of lading being illegal, null and void, due to the failure of the respondent to comply with the imperative provisions of the Carriage of Goods by Sea Act, 1932, s. 3, nor can the
- E respondent avail itself of the exceptions from liability contained in the rules scheduled to that Act, since these rules were never effectually incorporated in the contract between the parties. Sect. 3 is imperative, and not directory, and, if the bill of lading is illegal in Newfoundland, no other country can enforce it. The common law liability of the respondent as a common carrier still remains, and the appellant can
- F recover in an action based on tort. We are not relying here upon the illegal contract. [Counsel referred to *Liverpool Borough Bank v. Turner* (7), *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.* (14), *Dobell & Co. v. S.S. Rossmore Co.* (1), *Re Missouri S.S. Co.* (6), *The Torni* (11), *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.* (9), *Bonnard v. Dott* (15), *Victorian Daylesford Syndicate, Ltd. v. Dott* (16), *Lodge v. National Union Investment Co., Ltd.* (17), *London & North Western Ry. Co. v. Hudson (Richard) & Sons, Ltd.* (18), *McAlister (or Donoghue) v. Stevenson* (19), *Feret v. Hill* (20), *Alexander v. Rayson* (21), *Taylor v. Chester* (22), SCRUTTON ON CHARTERPARTIES, 13th Edn., p. 419, DICEY ON CONFLICT OF LAWS, 5th Edn., p. 647, r. 160, ANSON ON CONTRACT, 18th Edn., p. 251, and WINFIELD ON THE LAW OF TORT, 1931 Edn., pp. 100, 101, on the question of bailment.]

McNair: The issue of the bill of lading in Newfoundland without the clause paramount is prohibited by the positive law of Newfoundland,

and, therefore, illegal. If so prohibited, the contract is void everywhere, and no court will enforce it. Without the clause paramount, the rules themselves have no life. Both parties were engaged in an unlawful transaction, and both were guilty of non-compliance with the statute. Neither, therefore, can put the offending document in suit, and we are left with the residual relationship between the parties. It is open to the goods owner to say that the respondent company held itself out as a common carrier, and promised to carry the goods to New York, and he can sue on his proprietary rights in tort. [Counsel referred to *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (23), *W. Angliss & Co. (Australia) Proprietary v. Peninsular & Oriental Steam Navigation Co.* (24), *The Torni* (11), *Sewell v. Burdick* (25), *Re Missouri S.S. Co.* (6), *Re Mahmud & Ispahani* (26), *Anderson, Ltd. v. Daniel* (27), *Alexander v. Rayson* (21), *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (13), STOREY ON BAILMENTS, 9th Edn., sect. 576, and SCRUTTON ON CHARTERPARTIES, 13th Edn., p. 292, art. 93.]

Smith, K.C. : No question of illegality arises, but, by reason of the express words of the statute, the rules apply, and govern the contract of carriage. Even if this is not so, the contract evidenced by the bills of lading in question being held to be an illegal contract, no cause of action can arise from it. If the contract be held to be illegal, the appellant cannot entirely disregard it and sue in tort. Under the law of Newfoundland, the bills of lading were not invalidated by the failure to insert the express statement required by the section, and, by force of the statute, the rules apply, and govern the rights and immunities of the parties, notwithstanding the omission. Even if the contract be held to be illegal as contravening the Newfoundland statute and rules, it is still not destroyed, but the provisions of the rules are substituted for the offending clauses. If the contract be held to be illegal by any law, no cause of action can arise upon it, and the courts will refuse to work out the rights of the parties on any equitable basis or otherwise. The appellants' argument is based on contract. They set up what must be a contract for the carriage of the goods. The only contract given in evidence is that contained in or evidenced by the bills of lading. [Counsel referred to *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (13), *The Torni* (11), *Kerrison v. Cole* (28), *Kearney v. Whitehaven Colliery Co.* (8), *Major v. Canadian Pacific Ry. Co.* (29) and *Scheuerman v. Scheuerman* (30).]

Miller referred to *Chatenay v. Brazilian Submarine Telegraph Co., Ltd.* (31).

McNair, in reply.

LORD WRIGHT : This appeal arises out of a claim made against the respondent, a body corporate incorporated under the law of Nova Scotia now in liquidation, as owner of the motor vessel *Hurry On*, registered at the port of Halifax, Nova Scotia. The claim was made by the appellant, a body corporate carrying on business at New York, in the United

States, for damage and loss suffered in respect of consignments of herrings which were being carried in the *Hurry On* from Middle Arm, Newfoundland, to New York, and were delivered in a damaged condition.

- In Jan., 1935, the *Hurry On* was put up as a general ship for the carriage of cargo, including herrings, from Newfoundland ports to New York. Middle Arm was one of these ports. At that port there were loaded in the *Hurry On* three lots of herrings in barrels for carriage to New York. The appellant purchased the herrings from M. G. Basha, whose name appears on the bills of lading. It is not clear when the property passed, but, so far as concerns this case, the appellant may be treated as owner of the herrings at all material times. Bills of lading were issued on behalf of the ship. They were dated Middle Arm, Jan. 15, 1935, and acknowledged receipt on board of the goods in apparent good order and condition from M. G. Basha, and provided for delivery in the like apparent good order and condition at New York

... unto order Commercial National Bank and Trust Co., notify Vita Food Products, New York, or his or their assigns.

- W. A. Shaw acted for the ship as broker or agent in Newfoundland to secure the cargo, and J. Poole acted as a sort of supercargo, and signed the bills of lading for the ship. By some error or inadvertence, the bills of lading so signed by Poole were old ones used outside Newfoundland by Shaw at other ports for other vessels, and did not incorporate the Hague Rules, which had been adopted by the Carriage of Goods by Sea Act enacted in Newfoundland in 1932. It is this fact or accident which has led to the questions agitated in this case.

- The *Hurry On* sailed from Middle Arm on Jan. 16, 1935, bound for New York with the herrings on board. On Jan. 18, 1935, she ran into bad weather and ice off the coast of Nova Scotia. The captain decided to make for a port of refuge, but, in the attempt to do so, ran ashore at Grady Point in Nova Scotia in a gale of wind. The ship was eventually got off and taken to Guysboro, where the herrings were unloaded, reconditioned and forwarded by another ship to New York. At New York, the appellant took delivery of the herrings in their damaged condition under the bills of lading, and paid freight, and then claimed for the damage to the herrings and for salvage and other expenses. The allegation in the action that the ship was unseaworthy was rejected by the courts in Canada, and need not now be considered. It is, however, admitted that the loss was due to the captain's negligence in navigation. The provisions either of the bills of lading or of the Carriage of Goods by Sea Act would exempt the respondent from liability for a loss due to negligence, but it was contended, on various grounds to be discussed later, that, as the Act had not been complied with, the exceptions did not avail the respondent, and that it was subject to the liabilities of a common carrier. This contention was rejected by SIR JOSEPH CHISHOLM, C.J., in Nova Scotia, where the action was brought, and

also by the Supreme Court of the Province. In addition, the Supreme Court held that, if the bills of lading were illegal, the parties were *in pari delicto*, and that on that ground also the action must fail.

The bills of lading are in identical terms except as to the description of the goods included in each parcel, and it will be convenient to begin by stating briefly the substance of them and of the Act. The bills of lading contained, as already stated, an acknowledgment that the goods had been received on board for carriage to New York, with a proviso that they should be at shipper's risk while at the dock pending loading. There was a later clause by which, in accepting the bill of lading, the shipper, consignee and holder of the bill of lading agreed to be bound by all its stipulations as fully as if the shipper, consignee or holder had signed it. The bill of lading set out in detail the "terms and conditions of this contract bill of lading which are hereby mutually agreed upon as follows." These terms and conditions, so far as material, may be briefly summarised. There were the usual exceptions of sea and other perils, and the usual exemptions of specified classes of damage such as leakage, breakage and so forth. Of these latter, cl. 7 is specially material in this case. It contains a general exemption, in respect of the goods carried, from liability for all damage capable of being covered by insurance, and from liability above a certain value per package unless a special declaration is made. There followed a wide general exemption of loss or damage due to negligence of the shipowners' servants at or after the commencement of the voyage, or to unseaworthiness, provided all reasonable means had been taken to provide against it. General average was to be settled according to York Antwerp Rules, 1924, and adjusted in the country selected by the owners. The same clause also provided :

This contract shall be governed by English law.

By cl. 8, the liability of the goods to contribute to general average and similar charges was not to be affected though the necessity for that contribution was due to negligence or unseaworthiness, provided, however, that due diligence was exercised to make the ship seaworthy and properly manned, equipped or supplied. By cl. 22, no claim was to be admitted unless made in writing within 15 days after delivery or failure to deliver the goods. Provision was also made that in the case of shipments from the United States the Harter Act, 1893, was to apply. It was also stipulated that, save as so provided, the bill of lading was subject to the terms and provisions of, and exemptions from liability contained in, the then-unrepealed Canadian Water Carriage of Goods Act, 1910, and the clause of that Act which declared illegal, null and void any clauses exempting the shipowners from liability save in accordance with the provisions of that Act was specifically incorporated. The Canadian Act only applies to shipments of goods from any port in Canada, whether to ports in Canada or to ports outside Canada, and, accordingly, *prima facie*, would not apply to a shipment from Newfoundland. In any

event, the incorporation of the Canadian Act, like the incorporation of the Harter Act, would only have effect as a matter of contract on the principles laid down in *Dobell & Co. v. S.S. Rossmore Co.* (1).

The Newfoundland Act, passed in 1932, recited that it was expedient that the rules agreed to as a draft convention for the unification of certain rules relating to bills of lading by the delegates of a number of States, including the delegates representing His Majesty at the international conference on maritime law held at Brussels in Oct., 1922, and afterwards amended at a further conference at Brussels in Oct., 1923, should, subject to the provisions of the Act :

... be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading.

Of the sections of the Act, it is necessary to set out sects. 1 and 3 in full. They provide as follows :

1. Subject to the provisions of this Act, the rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this dominion to any other port whether in or outside this dominion.

3. Every bill of lading or similar document of title issued in this dominion which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act.

Sects. 4, 5 and 6 (3) contain certain provisions to which the rules are subject. Sect. 7 gives to any court in Newfoundland having jurisdiction to the amount claimed power to try any action for loss or damage to goods carried by sea to or from the Dominion of Newfoundland, notwithstanding any stipulation in the bill of lading or similar document. The

rules which are thus given the force of law are set out in full in the schedule to the Act. These rules, often called the Hague Rules, are identical with those scheduled to the British Sea Carriage of Goods Act, 1924, and have now been adopted, with or without modifications, by certain foreign States, including recently the United States, and also

by the Crown Colonies, by Australia, by Canada, and by New Zealand. They confer rights and immunities, and also impose liabilities, upon the shipowner—liabilities which he cannot escape, since art. III (8) avoids any clause or agreement relieving the carrier from the liability for negligence imposed by the rules or lessening that liability. However, the

Act and rules only apply where a bill of lading is issued, and there is no provision making it imperative for the carrier to issue a bill of lading save on demand of the shipper.

If the rules are compared with the provisions of the bills of lading in suit, they agree in substance in respect of the relevant matters—namely,

liability in respect of negligence and unseaworthiness. In some respects, the rules go beyond the bills of lading, as, for instance, where they provide that the carrier is to be released from liability if suit is not brought within one year after delivery has been, or should have been, made. In other respects, the bills of lading contain provisions which are outside the scope of the Act and rules. The bills of lading are, furthermore, docu-

ments of title, which define the contractual voyage and provide for general average and for the obligation to deliver the goods which are received at the dock and actually loaded. Moreover, they expressly stipulate that the proper law of the contract is to be English law. It is necessary to bear such matters in mind when the central questions in the case are being considered—that is, the questions whether the failure to obey sect. 3 of the Act is illegal under the law of Newfoundland, the place where the contract was made, and whether that failure renders the contract void in the courts of Nova Scotia, and, in either event, what is the resultant legal position. SIR JOSEPH CHISHOLM, C.J., held that, notwithstanding the non-inclusion of the clause paramount (by which is meant the clause specified in sect. 3), the bills of lading were effective documents, but are subject, not to the exemptions of the bills themselves, but to those prescribed in the rules, and that, in the circumstances, the latter exemptions gave a good defence to the shipowner, so that the action failed. The Supreme Court also held that the action failed, but reached that conclusion by a different route. The reasoning of the judges did not in all respects agree, but in substance they held that disobedience to sect. 3 constituted an illegality in which both parties were equally concerned, and, accordingly, the action failed, whether laid in contract or in tort. They held that the appellant's arguments involved it in a dilemma. Either the bills of lading were good or they were illegal. In either event, the suit failed. Their Lordships are of opinion that the bills of lading were not illegal, and that they must be accepted as valid documents by the courts of Nova Scotia. The precise meaning of this statement, however, and the reasoning on which it is based, require elucidation.

The first question to determine is the true construction of sects. 1 and 3 of the Act. Sect. 1 provides for the application of the rules to every bill of lading for the carriage of goods by sea in ships from any port in Newfoundland to any other port, whether in or outside that dominion. The appellant contended that, since sect. 1 only provided that the rules should have effect "subject to the provisions of this Act," the rules could not apply to a bill of lading unless the terms of sect. 3 were complied with. Their Lordships do not so construe the section. In their opinion, the words "subject to the provisions of this Act" merely mean, in this connection, that the rules are to apply, but subject to the modifications contained in sects. 2, 4, 5 and 6 (3) of the Act. To read these words as meaning that the rules are only to have effect if the requirements of sect. 3 are complied with would be to put an unnecessarily wide interpretation upon them, instead of the narrower meaning, which is more natural and obvious. In their Lordships' judgment, sect. 1 is the dominant section. Sect. 3 merely requires the bill of lading to contain an express statement of the effect of sect. 1. This view of the relative effect of the sections raises the question whether the mandatory provision of sect. 3, which cannot change the effect of sect. 1, is, under

Newfoundland law, directory or imperative, and, if imperative, whether a failure to comply with it renders the contract void, either in Newfoundland or in courts outside the dominion.

It will be convenient at this point to determine the proper law of the contract. In their Lordships' opinion, the express words of the bill of lading must receive effect, with the result that the contract is governed by English law. It is now well settled that, by English law (and the law of Nova Scotia is the same), the proper law of the contract "is the law which the parties intended to apply." That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances. Nevertheless, as LORD ATKIN, dealing with cases where the intention of the parties is expressed, said in *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* (2) (a case which contains the latest enunciation of this principle), at p. 529 :

Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive.

It is objected that this is too broadly stated, and that some qualifications are necessary. It is true that, in questions relating to the conflict of laws, rules cannot generally be stated in absolute terms, but rather as

prima facie presumptions, but, where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case, however, it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction, which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York, between residents in these countries contains nothing to connect it in any way with English law, and, therefore, that that choice could not be taken seriously. Their Lordships reject this argument, both on grounds of principle and on the facts. Connection with English law is not, as a matter of principle, essential. The provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is, even where the parties are not English and the transactions are carried on completely outside England. Moreover, in the present case, the *Hurry On*, though on a Canadian register, is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case, parties may reasonably desire that the familiar principles of English commercial law should apply. The other ground urged is that the choice of English law is inconsistent with the provisions of the bill of lading, and that in respect of certain goods the Harter Act or the Canadian Water Carriage of Goods Act, 1910 (now repealed,

but in force at the date of the bill of lading), was to apply. It has been explained that the incorporation of these Acts may have only contractual effect, but, in any case, though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and, apart from such incorporation, other laws may have to be regarded in giving effect A to the contract. The proper law of the contract does, indeed, fix the interpretation and construction of its express terms, and supply the relevant background of statutory or implied terms, but that part of the English law which is commonly called the conflict of laws requires, where proper, the application of foreign law. For example, English law B will not enforce a performance contrary to the law of the place of performance in circumstances like those existing in *Ralli Bros. v. Compañía Naviera Sota y Aznar* (3), and the law of the place of performance, though it will not be effective to affect the construction of the contract in regard to its substance (which must be ascertained according C to the rule of the proper law, as was held in *Jacobs v. Crédit Lyonnais* (4)), will still regulate what were called in that case the incidents and mode of performance in that place. English law will, in these, and sometimes in other, respects, import a foreign law, but the contract is still governed D by its proper law. The reference to the United States and the Canadian Acts does not, on any view, supersede English law, which is to govern the contract, nor does Newfoundland law, though Newfoundland was the place where the contract was made, apply to oust English law from being the law of the contract, and, as such, from being the law which defines its nature, obligation and interpretation, though Newfoundland law might E apply to the incidents of performance to be done in Newfoundland. There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure F to comply with sect. 3 of the Act.

If, however, by reason of this failure to obey the Act, the bills of lading were illegal in Newfoundland, it would not follow as a necessary consequence that a Nova Scotian court, applying the proper law of the contract, would, in its own forum, treat them as illegal, though the position of a G court in Newfoundland might be different if it held them illegal by Newfoundland law. A court in Newfoundland would be bound to apply the law enacted by its own legislature, if it applied, and thus might treat the bills as illegal, just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the H United States, though in relation to the carriage of goods to England in an English ship: *The Montana* (5). Such a clause, it was held, was against public policy, and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *Re Missouri*

S.S. Co. (6), where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy, though the shipment took place in America and the bill of lading was issued there, and that the clause, being valid in English law, must receive effect.

- A With these considerations in mind, it is necessary first to consider if the bills of lading are illegal by Newfoundland law. If they are not, the question of illegality cannot arise in the courts of another jurisdiction, e.g., those of Nova Scotia. Illegality is a concept of so many varying and diverse applications that in each case it is necessary to scrutinise the particular circumstances with precision in order to determine if there is illegality, and, if so, what is its effect. As LORD CAMPBELL, L.C., said in reference to statutory prohibitions in *Liverpool Borough Bank v. Turner* (7), at pp. 507, 508 :

- C No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

- In that case, the court, by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument, where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. On the other hand, cases can be cited where the contract was not avoided by some particular illegality, for example, *Kearney v. Whitehaven Colliery Co.* (8), where an illegality in a certain respect in an agreement of employment was held not to vitiate the whole contract. Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds. Are there such grounds for holding that the Newfoundland law does in Newfoundland nullify bills of lading such as those in question? In their Lordships' opinion, there are not. The matter can be tested by asking what the position would be if a bill of lading set out *in extenso* the exact provisions of the rules, but failed to contain an express statement, in compliance with sect. 3, that the provisions of the rules applied to it. Surely such a bill of lading could not be regarded as illegal. Again, what is the position where not only is a shipment made in a Newfoundland port but the port of delivery also is in Newfoundland? In such a case, sect. 1, by its own force, imports the rules, and sect. 3 is merely an intimation of what, if the parties concerned are all residents or natives of Newfoundland and bound by that law, they must be taken to be aware of.

At least, this is the position if Newfoundland law governs the contract. It seems impossible to hold that in such cases the bills of lading would be illegal and void. If that is so of a transaction beginning and ending in Newfoundland, and if such a transaction is not illegal, their Lordships do not think that such a transaction is to be treated as illegal because the place of delivery is outside Newfoundland, and the parties or some of them are outside that dominion, and are not bound by its laws. It is said that the rules are not made part of the contract save when there is an express clause in the contract stating that they are to apply, as provided in sect. 3, and that to hold the bills of lading legal and effective documents without such a clause would frustrate the purpose of the Hague Rules and of the international conference, which aims at an obligatory unification of bills of lading all over the world, at least so far as particular nations adopt them. The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes sect. 3, nor does it impose penalties for failure to comply with sect. 3, nor does it in terms expressly prohibit the failure. Indeed, there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all: *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.* (9). The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious. A foreign merchant or banker could not be assumed to know or to inquire what the Newfoundland law is, at any rate when the bill of lading is not expressed to be governed by Newfoundland law, and still less when it provides that it is governed by English law. It would seriously impair business dealings with bills of lading if they could not be taken at their face value, and as expressing all the relevant conditions of the contract. It was partly for that reason that in *Dobell & Co. v. S.S. Rossmore Co.* (1) the Court of Appeal refused to treat the Harter Act as having any effect as a foreign law affecting the validity of the contract, but treated it only as part of the English contractual document which expressly embodied it. A bill of lading fulfils functions other than merely that of setting out the conditions of carriage. It is a document of title, which, if indorsed, passes the property, and which, if money is advanced upon it, as is done in the ordinary course of business, passes a special property by way of pledge to the banker or other lender. It would be a grave matter if business men, when dealing with a bill of lading, had, in a case like the present, to inquire into the foreign law ruling at the port of shipment.

All these reasons seem to justify the conclusion that the omission of what is called the clause paramount does not make the bills of lading illegal documents in whole or in part, either within Newfoundland or outside it. Sect. 3 is, in their Lordships' judgment, directory. It is not obligatory. Nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the true construction of the statute, having regard to its scope and

its purpose, and to the inconvenience which would follow from any other conclusion. If that is so, the bills of lading are binding according to their terms, and, consequently, the respondent is entitled to succeed in its defence.

- However, on the basis that the bills of lading were illegal in Newfoundland, in that their issue without the clause paramount was prohibited by the law of that country, it was argued that no court in any country would enforce their terms and exemptions, and that the carriage would, therefore, be upon the terms implied where goods are taken for carriage by a common carrier—that is, subject only to the exception of the act of God and the King's enemies. No further terms, it was said, could be implied, nor could any reliance be put upon the provisions of the Hague Rules, since they had not been incorporated in the bills of lading by the insertion of the clause paramount. The appellant contended that, unless the clause was inserted, no contract between carrier and shipper which included the provisions of the Hague Rules was entered into. Nor could the Act be said to have incorporated them even in Newfoundland itself, since sect. 1 only provided that the rules should have effect "subject to the provisions of this Act," a phrase which the appellant maintained meant, *inter alia*, that the rules were not incorporated unless the provisions of sect. 3 were complied with. For reasons already explained, their Lordships do not so construe the section.

- However, whatever view a Newfoundland court might take whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated the Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case, where the action was brought, not in a Newfoundland, but in a Nova Scotian, court. It may be that, if suit were brought on these bills of lading in a Newfoundland court, and the court held they were illegal, they would refuse to give effect to them, on the basis that a court is bound to obey the laws of its own legislature or its own common law, as indeed the United States Supreme Court did in *The Montana* (5). It does not follow, however, that any other court could properly act in the same way. If it has before it a contract good by its own law, or by the proper law of the contract, it will, in proper cases, give effect to the contract, and ignore the foreign law. This was done in the *Missouri* case (6), both by CHITTY, J., and by the Court of Appeal. LORD HALSBURY, L.C., having stated that the contrary view would mean that no country would enforce a contract made in another country unless their laws were the same, said, at p. 336 :

- ... there may be stipulations which one country may enforce and which another country may not enforce, and ... to determine whether they are enforceable or not you must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract.

Having held that the law of the contract was English, he went on to hold that the exception of negligence, even if of no validity in the place

where made, must receive effect in English law, although the exception of negligence was invalid in the United States as being against the public policy of that country, and although to do an act contrary to public policy is one type of illegal action. The same attitude is illustrated in *Dobell & Co. v. S.S. Rossmore Co.* (1), where the Harter Act, which declares certain stipulations to be unlawful, and imposes penalties on shipowners inserting them in bills of lading, was not considered as affecting the English contract as a part of the contract where its provisions were infringed, save in so far as it was expressly incorporated. Foreign law was also disregarded in *Trinidad Shipping Co. v. Alston* (10), where the contract was an English contract, and payment of certain rebates on freight were rendered illegal by the law of the United States where the freight was payable. From the rule which he states, LORD HALSBURY, L.C., in the *Missouri* case (6) puts aside (p. 336)

... questions in which the positive law of the country [the foreign country] forbids contracts to be made. When a contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it.

In this passage, LORD HALSBURY, L.C., would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English court to give effect to the transaction, just as an English court may refuse, in proper cases, to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of LORD HALSBURY'S proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which, by the foreign law of the place where a contract was entered into, are essential to its formation, though even in that case the validity of the contract may depend on its proper law. However, whatever the precise ambit of that saving expression, it is clear that it does not apply to such a statutory enactment as sect. 3, even if disobedience to it were regarded as rendering the bill of lading in some sense illegal.

It is, however, necessary, before parting with this aspect of the case to consider whether *The Torni* (11) (in which the Court of Appeal affirmed the judgment of LANGTON, J.) should be applied, as the respondent's counsel contend it should, in the respondent's favour. The bills of lading in that case had been issued in Palestine, a territory over which His Majesty held a mandate. Two bills of lading, the only bills material in the case, had been indorsed to Hull merchants. The shipment was to Hull. The question was whether these bills of lading were to be construed according to their actual terms or whether those terms were supplemented or supplanted by the Hague Rules, there being in Palestine a Sea Carriage of Goods Ordinance corresponding to the Newfoundland Act. There were certain differences between that case and the present. One was that the bills of lading had a clause providing that they were

“ to be construed in accordance with English law,” not, as in the present case, “ shall be governed by English law.” In their Lordships’ judgment, that distinction is merely verbal, and is too narrow to make a substantial difference. The construction of a contract by English law involves the applications to its terms of the relevant English statutes, whatever they
A may be, and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense, the construing of the contract has the effect that the contract is to be governed by English law. In addition, even apart from that term (and *a fortiori* with it), the form of the bill of lading would point
B to it being an English contract: *The Industrie* (12). The law of the flag was Esthonian, which was not likely to be taken as the proper law of the contract. The other distinction was in sect. 4 of the Palestine Ordinance, which corresponded to sect. 3 of the Newfoundland Act. The former section, which was otherwise identical with sect. 3, contained
C the additional words :

... and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement.

In view of the effect of sect. 1, as construed by their Lordships, the additional words seem to them to add nothing in substance. The
D indorsees were claiming in the action for damage and short delivery, and the question whether the bills of lading were subject to the provisions of the ordinance was set down for trial as a preliminary issue. The Court of Appeal held that they were. The grounds of this decision were that the bills would have been illegal because they did not contain
E the stipulated express clause had it not been for the fact that its omission was immaterial, because, by the law of Palestine, the clause was incorporated whether expressly inserted or not, and the bills of lading were, therefore, legal. It was also held that the stipulation that the contract should be construed by English law did not mean that English law
F should be the proper law of the contract, but merely that English rules of construction, as contrasted with English substantive law, should apply. The law of Palestine was the substantive law to be applied, and governed the contract.

As already indicated, their Lordships do not agree with this view.
G With the greatest respect to the Court of Appeal, their Lordships are of opinion that the decision is contrary to the principles on which they have proceeded in the previous part of this judgment, and that it cannot be supported. The Palestine Ordinance, so far as appears, did not, any more than the Newfoundland Act, make the contract illegal so as to
H nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract—that is, the law by which it was to be enforced and governed—should be English law. To do so is to contravene the fundamental principle of the English rule of conflict of laws—namely, that intention is the general test of what law is to

apply. The effect of the judgment seems to be to read the bill of lading as if it expressly provided that it was to be governed by the law of Palestine. Nor does the Court of Appeal seem to have had its attention directed to the *prima facie* rule that an English court dealing with a contract made in a foreign jurisdiction, as Palestine was, must first ascertain the bargain of the parties, and give effect to that bargain, unless A debarred by some provision of the foreign law which binds the court. In general, for reasons already explained, legislative provisions such as those in question do not have extra-territorial effect, and do not debar the court from giving effect to the bargain of the parties. The exceptions to this general rule do not apply here. It may be that a court B in Palestine, bound to give effect to the laws under which it exercises jurisdiction, might arrive at a different conclusion. No opinion can here be expressed on that matter, nor would it be material in considering the effect which a court outside Palestine should give to the contract. Nor is it necessary to consider what the position would have been if the bills C of lading had expressed that they were governed by the law of Palestine. Their Lordships do not think that they should follow or apply the reasoning in *The Torni* (11).

A further question strenuously argued on the assumption that the bills of lading were illegal and void was that the appellant was entitled to D recover in tort against the respondent as a bailee, which had no contractual protection but was simply liable for its admitted negligence, whether as common carrier or as bare bailee. As the assumption, in their Lordships' judgment, fails, the question does not arise. It may, however, be pointed out that, if there were illegality in respect of the E bills of lading, both parties would be *in pari delicto*. In a case like this, the bills of lading contain the contract. On that footing, they are issued by the shipowner and accepted by the shipper, as, indeed, the bills expressly state. The question of illegality would not depend on pleading or procedure, or on who first might or should produce the documents. F It would be a question of substance, of which, if necessary, the court would of its own motion take cognisance, and to which the court would give effect. Furthermore, though there may be cases in which an action may be brought indifferently either in contract or in tort, this is not such a case. The actual transaction between the parties cannot be G ignored, even in an action in tort. The transaction includes as an essential part the bills of lading, whether regarded from the point of view of the contractual exceptions or from that of illegality. To apply the language of LORD SUMNER in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (13), at p. 564, there is not here a bald bailment with H unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact. Hence, even on that footing, the respondent would fail, either because it was party to an illegality avoiding the contract, or, alternatively, because the contractual exemptions could not be ignored. Their Lordships are of opinion that the

appeal should be dismissed with costs, and will humbly so advise His Majesty.

Appeal dismissed, with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants);
A *Botterell & Roche* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

R. v. MILNE. R. v. LEONARD. R. v. BOUNDFORD.

B [COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Charles and Humphreys, JJ.), **December 19, 1938.**]

Gaming and Wagering—Betting houses—Club—User by bookmaker—Special user—Betting Act, 1853 (c. 119), s. 3.

C The defendant M. was the manager of a club the members of which came there in the afternoon during the hours when bets are usually made. A servant of a bookmaker had an office directly above the premises occupied by the club, and the members of the club placed their bets with him by telephone. It was not proved that there was any ready-money betting, but it was proved that the servant of the bookmaker came down to the club premises after the result of each race had been declared, whereupon the members either received their winnings or paid their losses. The judge directed the jury that it was not sufficient that the bookmaker's servant should use the club premises as an ordinary member of the club, but that it was necessary that he should have had some special user of the club for the purpose of the betting transactions. The jury convicted the defendant M., with two other defendants, of conspiring together to keep a betting house, contrary to the Betting Act, 1853, s. 3 :—

E **HELD:** the jury were properly directed, and, upon the facts, the defendants had conspired together to keep a betting house contrary to the Betting Act, 1853, s. 3.

[**EDITORIAL NOTE.** The judgment herein shows the difficulty of explaining to a jury the complicated nature of the law relating to the keeping of betting houses. A F dissertation on the whole law of betting houses would be likely to confuse the jury, and is, therefore, wholly out of place. The present case turns upon the fact that to secure a conviction it must be shown that the use of the premises by the servant of the bookmaker was a special user, giving to the servant of the bookmaker a character analogous to that of the owner of the club. On this point, the cases, commencing with the well-known authority of *Powell v. Kempton Park Racecourse Co.* (1), are considered, and the distinction between user of a club as a member thereof and user as the owner thereof is carefully drawn. The defence attempted to draw a distinction between a person betting with the members face to face and one dealing with them by means of the telephone, but this contention was rejected, on the ground that it could make no difference to the legal position.

G AS TO BETTING HOUSES, see HALSBURY, *Hailsham Edn.*, Vol. 15, pp. 513-516, paras. 919-921; and FOR CASES, see DIGEST, Vol. 25, pp. 445, 446, Nos. 380-394.]

H Cases referred to :

- (1) *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143; 25 Digest 441, 358; 68 L.J.Q.B. 392; 80 L.T. 538; *affg.*, [1897] 2 Q.B. 242.
- (2) *Belton v. Busby*, [1899] 2 Q.B. 380; 25 Digest 445, 390; 68 L.J.Q.B. 859; 81 L.T. 196.
- (3) *Samuel v. Adelaide Club, Ltd.*, [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116.

APPEALS against conviction for conspiring together to keep a betting house, contrary to the Betting Act, 1853, s. 3, which provides as follows :

Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them ; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them ; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them ; shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding £100, as shall be adjudged by such justices and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding 6 calendar months.

The facts are fully set out in the judgment.

A. T. Denning, K.C., and H. C. Leon for the appellants.

J. G. Trapnell, K.C., and E. Clarke for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: These three persons, Florence Milne, Howard Boundford and John Charles Leonard, were convicted at the Central Criminal Court, before the commissioner, of various offences. They were all convicted of conspiring together to keep a betting house, contrary to the language of the Betting Act, 1853, at a place called the Byculla Club, in the City. Mrs. Milne was convicted on a count charging her directly with being a person who was the keeper of those premises, keeping and using them for the purpose of another person, and being a person using the premises for betting with persons resorting thereto. Boundford was convicted of assisting Mrs. Milne in that illegal keeping of the club. Leonard was convicted only on the first count, which in effect charged that all of these three persons were parties to an agreement that the club should be so kept. No point arises in this appeal, which is an appeal by all three of those persons against their conviction, as to the evidence in the case. It must be taken that there was ample evidence to support the convictions, if the law was correctly stated by the commissioner in his summing up. The commissioner stated categorically to the jury—and, in our opinion, perfectly rightly—that, in his opinion, there was ample evidence to justify their coming to the conclusion to which the prosecution asked them to come. The only question in the appeal is as to whether the law stated by the commissioner is correctly stated. The indictment was drawn in the terms of the Betting Act, 1853, s. 3. It is not an easy section to construe, as the courts have found, and particularly is it not an easy section to be dealt with by any judge presiding over a court, and having the duty of explaining it to a jury. Simple language which they will understand must be used to a jury, and a dissertation on the whole law of betting houses would be completely out of place, and likely to confuse rather than to assist.

- The commissioner used plain and simple language, and perfectly correct language, in the opinion of this court, with a view to directing the jury as to the facts which they would have to find before they could convict any of these persons. The law may be stated very shortly in this way. It is not an offence to bet. It is not an offence for a person
- A to allow others to bet in his house, or premises. The thing which is forbidden by this section is the keeping of what is termed a betting house, which, by sect. 1, is declared to be a common nuisance and contrary to law. For that purpose, elaborate language is used in order to bring within the ambit of the section persons who, by whatever devices
- B they may have attempted to do so, are enabling others to use their premises for the purpose of a betting house. In this case, what was said was this: "Here is a club. It is called a club because at present the legislature permits any number of people to come together and form themselves into a club."
- C This was a club the annual subscription to which was 1s., and it was a club rightly described by the commissioner as devoted to betting, and to nothing else. That was the object with which the members came there in the afternoon during betting hours. The owner, or ostensible manager, of the club was the defendant Milne. The members in fact
- D practically all betted with one bookmaker, and that was the result of a scheme which the bookmaker himself, Payne, in giving evidence, described as a scheme which had been devised with a desire to evade the terms of the Betting Act, 1853, s. 3, and yet to give the advantages of enabling him to have a betting house at that club. He did not use
- E that expression, but that is undoubtedly what he meant. He had an office 50 yds. away from the premises of the club, but he himself had other things to do at his office than to attend to this club, and therefore he took premises which were directly above the premises occupied by the club. There he installed a servant of his, a man named Green, and
- F Green's business, according to the original case for the prosecution, was to receive bets, including ready-money bets, on behalf of Payne at that little office. That was not proved. That was putting it a little too high. It was admitted that that did not take place, and the charge had to be withdrawn. The other activity of the man Green was that he was
- G there during betting hours, and it was most convenient for the members of the club that, after the result of each race at the different meetings was declared on the telephone, the members should be able to go up to Green's room, or he should be able to come down a few stairs to the club premises, he being a member, and that he could settle up, and the
- H members either receive their winnings or pay their losses. At the end of the day, when all the races were over and the results declared, Green used to go down and settle up on the premises of the club. That was a convenient arrangement for the members of the club, and there was ample evidence that the members so regarded it. In itself, it is not illegal, because it is not illegal for the settlement of bets to take place

on any particular premises. They are not thereby used for the purposes of betting.

Evidence was given as to the user of this club, and the commissioner, when he came to sum up, told the jury first that they must be satisfied that the club—note the word “club”—the premises, were substantially kept for the purpose of betting. No complaint is made of that. He then told them that they must be satisfied that the premises were kept so that Payne, who was a bookmaker, could use the club virtually as his betting office, and he said that it was not sufficient that Payne should be using the club in the way in which every member of the club used it. There must be some special user by him, and the way in which, according to the evidence in this case, the prosecution invited them to come to the conclusion that he had some special user of the club, that he was in a position different from that of other members of the club, and in a position which may be described as akin to that of the owner of the club, is that it is alleged that there was an arrangement between himself and Mrs. Milne that he should have special facilities for betting with the members of the club, and it was a question of fact for them, the jury, to decide, whether he was a person who was really using this club in a manner analogous to the user by a person who himself was betting with persons resorting thereto. That the persons resorted thereto for the purpose of betting was not contested. They were the members.

In these circumstances, it is said that the judge misdirected the jury. In my opinion, he directed them perfectly properly. He directed them, first of all, substantially on the lines laid down by the House of Lords in the classical, well-known opinion of the EARL OF HALSBURY, L.C., and of other members of the House of Lords in *Powell v. Kempton Park Racecourse Co.* (1). The decision in that case was to the effect that, inasmuch as the bookmakers in the ring at the Kempton Park Racecourse were not given any special facilities for betting by the proprietors of the racecourse—they were not charged any more or less than was any other person going into the ring, they were not allotted any particular place, or given any special facilities, but were treated like any other people—it could not be said that those bookmakers were using that ring in a character analogous to that of a person who owned the ring. Therefore it was held that those bookmakers were not using that ring in the sense given to the word “user” by their Lordships in that case. That was followed, it is to be observed, by *Belton v. Busby* (2), a case which is useful in the present case, and which was decided very soon after *Powell v. Kempton Park Racecourse Co.* (1). It was sought to extend the doctrine of *Powell's* case (1) to the case of a public-house. It was proved that a bookmaker used a public-house repeatedly and regularly for the purpose of making bets with customers, but it was said: “He has no place allotted to him for the purpose of betting with his customers. He uses different parts of the bar. How

can it be said that he uses the premises in a manner analogous to the owner of the premises ? ” The answer which was made by the Divisional Court in that case appears in the judgment of GRANTHAM, J., at p. 383 :

A There is, it seems to me, this great distinction between the racecourse cases, such as *Powell v. Kempton Park Racecourse Co.* (1), and the present, that in the former the bookmakers and the members of the public who bet with them go into the racecourse inclosures on exactly the same footing ; the place is open to them both on the same terms ; the one has no greater right to be there than the other. But that was not the case here. The bookmaker Woods had something in the nature of a right or licence to use the bar of the beerhouse for the purposes of his betting business over and above the right of an ordinary member of the public to resort there. This seems clear from the findings of the magistrate.

B What in fact the magistrate found there was that the proprietor of the beerhouse had given him permission—tacit permission, but permission—to use the bar for the purpose of his business. GRANTHAM, J., continues, at pp. 383, 384 :

C The case finds that he was allowed to remain there regularly for certain hours every day, although he was not there as a customer of the beerhouse, and did not order any of the beer which was to be got there ; whereas ordinary members of the public would not be allowed to remain there unless they purchased the beer.

D That case seems to show that a person who uses premises for the purpose of betting may himself commit an offence, and may bring the owner or keeper of the premises into the category of persons who offend against the Betting Act, 1853, if he does so with the permission of, or by arrangement with, the owner or keeper of the premises. It appears to the court that that was precisely the case here. There was evidence on which the jury could find as they did. It was rightly laid down by the commissioner as a test in this case : “ Was this person Payne a bookmaker, using these premises by arrangement with, and with the permission of, Milne, who was the keeper of the premises ? If so, you have sufficient evidence to justify your coming to the conclusion that he was using the premises in the way indicated by their Lordships in the *Kempton Park* case (1), and by this court in *Belton v. Busby* (2).”

F There is only one other point in this case, and that is this. It was said : “ But he cannot be said to be using the premises in the way the bookmaker did in *Belton v. Busby* (2), and in which a number of other persons had been held to use the premises, because he did not go there himself. All he did was to telephone.” In our opinion, ATKINSON, J.,

G was quite right in *Samuel v. Adelaide Club, Ltd.* (3), to which reference has been made. He there quite rightly rejected a contention, which indeed appears scarcely to have been made seriously, by counsel for the defendant. It was that it could not be said that in that case the bookmaker was using the premises, because he was only telephoning to the premises.

H As ATKINSON, J., pointed out, and as this court is clearly of opinion, it is the right and only view that a person who uses the telephone by permission of the owner of the premises, and who telephones, and continues telephoning the whole afternoon, to the members of the club, is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them. It is his voice

which reaches the members at the other end of the telephone, and the oral arrangement which is sufficient to make the bet is made on the telephone in exactly the same way as that in which it would be made if those persons were face to face, instead of being separated, as they were, by a distance of 50 yds.

In our view, therefore, the mere fact that, instead of Mr. Payne A coming to the premises and making bets with the members face to face, he stayed on his own premises, but used the club premises for the purpose of his betting business, as his betting office, for the essential part of the business of making a bet—that is, the acceptance of a bet, or the proposal of a bet by the persons who were there betting with B him—the mere fact that he used the telephone for that purpose can make no difference to the legal position. That seems to dispose of this case. This court is of opinion that the various passages to which C reference has been made, which it is not necessary to repeat, and which were all to the same effect, were passages which sufficiently correctly stated the law, and indicated correctly to the jury the question of fact D which it remained for them to find, and which, indeed, they must be taken to have found against the appellants. Another point, described by Mr. Denning as a subsidiary point, and at one time said to be a point which he agreed would not be strong enough to justify this court in quashing the conviction, but which subsequently he desired to make, and did make, is this. The judge, in the course of a long summing up, was repeating to the jury what he had said many times before, in these words :

If you are satisfied that there was an arrangement—tacit, if you like, but which E was perfectly well understood—that it was to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had, that that room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you, it may be a useful pointer to you when you consider what Green said, that it was an arrangement with the club that that room was there—if you are satisfied of that, then the offence has been committed.

When he used the words “it may be a useful pointer to you when you F consider what Green said, that it was an arrangement with the club that that room was there,” he was referring to something he had said before. That was when he was dealing with the case of Green. He had pointed out to the jury quite correctly that Green himself had G said, on the occasion of the raid, that the room in which he was then sitting had been taken as a result of an arrangement with the club, as he understood, and he repeats it here, and it is true that he repeats the words without a warning to the jury that they must not take that H into their consideration when they are considering the cases of Milne, Boundford and Leonard, though they might do so in considering the case of Green. In the opinion of this court, that slip, as it undoubtedly was—that omission to mention that fact—was not such a serious matter as to justify this court in coming to the conclusion that there has been a miscarriage of justice. Far from it. The expression “it may be a

useful pointer to you " is not quite the same as saying—indeed, it is quite a different thing from saying—" I direct you that you may consider that evidence." It is merely a reference to what he had already said—namely, that Green had made that statement, as he undoubtedly had. Accordingly, we are satisfied that no injustice was done to the

A appellants as the result of the mere slip on the part of the commissioner in omitting to say: " Of course, you will not consider that in the case of the three other persons." In point of fact, Green, the only person who said that, was acquitted, and the others were convicted. There is no ground for interfering with the convictions in this case, and the appeals

B must be dismissed.

Appeals dismissed.

Solicitors: *Docker, Andrew & Co.* (for the appellants); *Anthony Pickford*, City Solicitor (for the Crown).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

C

MAHON v. OSBORNE.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **January 16, 17, 18, February 10, 1939.**]

D

Medicine—Negligence—Surgical operation—Swab left in patient—Res ipsa loquitur—Difficulty of operation—Condition of patient—Counting of swabs.

The appellant, the resident surgeon, performed an abdominal operation with the help of an anaesthetist, a theatre sister and two nurses. The operation was admittedly a difficult one, and, at its conclusion, the usual count of the swabs which had been used was made, when the surgeon was informed that the count was correct. It was found, as a result of a further operation about 2 months later, that one swab had been left under the part of the liver which is close to the stomach. The patient died, and it was common ground that his death was due to the leaving of the swab in the abdomen. The system in use at the hospital of checking the count of the swabs was fully described in evidence, and was held to be satisfactory. In an action brought by the mother of the deceased against the surgeon for damages for negligence in the performance of the operation, the plaintiff contended that the doctrine of *res ipsa loquitur* was applicable to the circumstances:—

E

F

HELD (GODDARD, L.J., dissenting): (i) the doctrine of *res ipsa loquitur* did not apply in the case of a complicated surgical operation, since an ordinary reasonable man, knowing the facts, could not, without the help of expert evidence of the precautions necessary in such an operation, say that the event which had happened must have been due to a failure on the part of the surgeon to exercise due care.

G

(ii) the counting of the swabs is a task that ought not to be put on the surgeon, but his duty to search for swabs that may have been left in the patient differs according to the nature of the operation and the condition of the patient.

H

[**EDITORIAL NOTE.** It is well settled that a surgeon's duty is only to be reasonably skilled in the art which he professes and to be careful in the exercise thereof. He is not required to be as skilful as the most eminent member of his profession, but only to be as skilful as a normally skilful member of it. The present case, however, deals with an extension of this well-settled principle. It may be that

what has here been called an extension of the principle can be regarded as purely a question of fact, but it is submitted that, at the lowest, it is a mixed question of fact and law. It would seem to follow from the judgments herein that the measure of skill and care must vary with the nature of the operation, and also with the condition of the patient. Where the condition of the patient makes it essential that the operation shall be concluded at the earliest possible moment, it may be that the surgeon is justified in omitting those extra precautions which he would take in a case where there was no real danger from a prolongation of the time of the operation. In any event, all these are matters upon which the court, and the jury if there is one, must be informed by proper expert evidence, and, having heard such evidence, must decide whether the defendant surgeon has exercised that degree of care and skill which those expert in such matters think to be necessary. It is held that, since these matters do not come within the ordinary experience of mankind, the doctrine or principle of *res ipsa loquitur* is not applicable to such a case. A

AS TO DEGREE OF CARE AND SKILL REQUIRED, see HALSBURY, Hailsham Edn., Vol. 22, pp. 318, 319, paras. 600-604; and FOR CASES, see DIGEST, Vol. 34, pp. 548, 549, Nos. 57-73.] B

Cases referred to :

- (1) *Ballard v. North British Ry. Co.*, [1923] S.C. 43; 36 Digest 88, case 581 *xix*.
- (2) *McGowan v. Stott* (1920), 99 L.J.K.B. 357, n.; Digest Supp.; 143 L.T. 217.
- (3) *Scott v. London Dock Co.* (1865), 3 H. & C. 596; 36 Digest 91, 601; 34 L.J.Ex. 220; 13 L.T. 148.
- (4) *Van Wyk v. Lewis*, [1924] App. D. 438 (South Africa).
- (5) *James v. Dunlop* (1931), British Medical Journal, Apr. 25.
- (6) *Lindsey County Council v. Marshall*, [1937] A.C. 97; [1936] 2 All E.R. 1076; Digest Supp.; 105 L.J.K.B. 614; 155 L.T. 297; *affg.*, [1935] 1 K.B. 516. C

APPEAL by the defendant surgeon from a judgment at a trial before ATKINSON, J., and a special jury at Manchester Assizes, dated Apr. 26, 1938, by way of application for judgment or new trial on appeal. The facts are fully set out in the judgment of SCOTT, L.J. D

J. Morris, K.C., *H. C. Dickens* and *D. H. Elletson* for the appellant, *E. Rowson* for the respondent.

Morris, K.C. : The question is whether or not, having regard to the condition of the patient, the surgeon made a reasonable search for swabs before he asked the nurse if the count showed that they were all accounted for. He did make a reasonable search. The nurse's answer being in the affirmative, the surgeon was entitled to rely on the system, which was designed to insure that the swabs were all removed. For a surgeon to overlook a swab is not necessarily negligence in all circumstances. The appellant did nothing wrong, and he was entitled to rely on the system. The judge's references to the judgment of SCRUTTON, L.J., in *James v. Dunlop* (5) amounted to a misdirection. E

Dickens followed on the same side. F

Rowson : It is the surgeon's duty to remove the swabs. If there is one left in the wound, there is obvious negligence, which requires an answer. The evidence of the appellant's expert witnesses shows that the search that he did make was not sufficient. G

Morris, K.C., in reply. H

SCOTT, L.J. : This case is one of very great and general importance. It calls for close and anxious attention by reason of the double need on the one hand of enforcing a high standard of care in the surgeon against the grave danger of an overlooked swab, and on the other of protecting the surgeon from the risk of condemnation for actionable want of care

A where he has in reality been doing his best for his patient, but has, under the urgent need of closing the operation as quickly as possible in the presence of other dangers to the patient, made a slip of memory, perhaps through a failure, unrealised by him, of a mechanical precaution like the swab clip. Whether or not that slip amounts to negligence may be a

B difficult question. The important principle is that a decision of actionable want of care cannot justly be reached without taking due account of all the circumstances of the particular operation, and the legal standard of care cannot be set higher than that of the ordinarily good and careful practitioner in those circumstances. In the present case, on the evidence

C given, I feel difficulty in seeing how, with proper direction, a verdict could rightly have been given against the surgeon. However, I cannot say that there was no evidence fit to be left to the jury. We cannot, therefore, enter judgment for the surgeon. Even on the issue of a new trial, the problem for the court is not altogether easy, because of the way

D in which some of the questions were put to, and answered by, the appellant and other witnesses. I have approached its consideration with all the reluctance to interfere which is proper in a case of the kind tried before a jury, but I have come to the conclusion, for reasons which I will endeavour to make clear in the course of this judgment, that, in

E spite of the obvious anxiety of the judge—and, no doubt, of the jury—to see that justice was done, the appellant did not, in the result, get a satisfactory trial, and that, accordingly, the verdict and judgment should be set aside and a new trial had between the parties.

The appellant was the resident surgeon at the Park Hospital, Davey-hulme, near Manchester. His qualifications were that he was a Fellow of the English Royal College of Surgeons, a Bachelor of Science, a Bachelor of Medicine and a Bachelor of Surgery. At the time of the trial he was 33 years of age, and had been at Park Hospital 2 years 8 months. Over 3,000 operations had been performed during his time

G there, and there had been no case of a swab being left in a patient. He had himself there performed between 600 and 700 abdominal operations, including many perforation cases, and had had no mishap. The deceased patient, a young man of 24 years of age, had supported his mother out of his wages to the extent of about £1 per week. Both the appellant

H and the theatre sister, who was the chief nurse at the operation, were made defendants to the writ. The respondent claimed damages both under Lord Campbell's Act as a dependant and under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix to the estate. The jury found, against the appellant, that he had been negligent, but, in favour of Nurse Ashburner, that she had not been negligent. They

fixed the damages at £600 in all under the two Acts, £200 under the former and £400 under the latter Act. There is no dispute on amount in the appeal. The verdict in favour of Nurse Ashburner was given in very peculiar circumstances. The plaintiff had made her co-defendant with the surgeon. The writ was duly served on her in Aug., 1937, but she had no spare money, imagined that her interest would be looked after A by the surgeon, never consulted a solicitor, and failed to enter an appearance. Interlocutory judgment was signed against her in November, but no notice of it was sent to her. She attended the trial solely because the defendant surgeon's legal advisers wanted her evidence. During the trial, the judge obtained her consent, first to the jury assessing damages B as between the plaintiff and her, and then to their giving a verdict on the issue of her liability. The observations of the judge, in the presence of the jury, were very favourable to her, and after a still more favourable summing up in her case, the jury not unnaturally held that she had not been negligent. C

Over and above the light the case may throw on the right directions to a jury on questions of the nature and measure of a surgeon's duty to his patient in the conduct of operations, and particularly in the conduct of major abdominal operations, it is also important because an unreported decision of the Court of Appeal in 1931 was used by the judge at the trial below as if the sentences he quoted from the judgments of SCRUTTON and GREER, L.JJ., laid down propositions of law generally D applicable, instead of being statements addressed to, and limited by, the particular facts of that case. His use of it was the more unjustifiable as he had no authorised report of it, but only an incomplete newspaper E note, with extracts of the judgment. The notes conveyed an erroneous impression of the scope of the decision, as we were able to see from a complete transcript of the judgments, which was supplied to us. I think that the way in which the judge dealt with it was bound to mislead the F jury.

The patient was brought to the Park Hospital at 3.40 a.m. on Mar. 4, 1937. The defendant surgeon was aroused from bed and made an immediate examination. He diagnosed a perforated duodenal ulcer, and decided that an immediate operation was essential. The staff attending him in the operating theatre were the anæsthetist and three members G of the nursing staff—namely, Nurse Ashburner, acting on that night in the capacity of theatre sister, Nurse Edmunds, a senior probationer, acting as second nurse in attendance upon the surgeon, and another nurse, a junior probationer, acting as theatre runner. He had no assistant H surgeon to help him, and had himself, therefore, to perform every one of the many and varied surgical functions involved in the complicated operation which he had to carry out in the particular case. In his evidence, he said that each of the nurses was fully competent for her task. It was the duty of the nurses, following a carefully devised system of checks and counterchecks, with blackboard and

numbered hooks in regular use at that hospital to count all swabs brought to the operating table, to keep the count during the operation, and, at its conclusion, to tell the surgeon, in answer to his question, whether or not all swabs were accounted for. Much time was spent during the trial on explaining the system in use at this hospital for the nurses' count of the swabs, but, in my opinion, not very usefully. It was no doubt the duty of the hospital to have a good system, but the question as to what particular method had been adopted by the hospital was not material to the actual issues in the case. It was enough for the surgeon to establish that it was a really good system, and of that the defendant himself and the two distinguished surgeons he called, one of whom was the visiting surgeon at the same hospital, gave evidence. The best system, however, is liable on occasion to accidental error if it depends on the human factor, and the very perfection of the system may even mislead, and, in the rare event, prove the cause of the trouble. I shall return later to the question of what bearing the nurses' count had upon the duty of the surgeon and the issue of liability in this case. It is enough for the moment to say that, at the conclusion of the operation, when the surgeon thought that he had removed all packing swabs, and was ready to sew up the peritoneum, he asked the usual question of Nurse Ashburner whether the count was correct, and was informed by her that it was. He then sewed up the patient with the unsuspected swab inside him. The count was wrong. The patient lived for another 2 months after the operation in question, when a further operation became necessary, and in the course of that operation a packing swab, left in at the first operation, was discovered lying just under the part of the liver which is close to the stomach. It had there caused an abscess, and, in spite of the second operation, the abscess caused the death of the patient 2 days later. It was common ground at the trial that the cause of death was the swab left in the abdomen at the first operation.

The plaintiff's case as opened at the trial was put forward on the footing that the principle of *res ipsa loquitur* applies to every surgical case where a swab is left in the patient. Certain answers to interrogatories addressed to the appellant eliciting the main facts were put in. Disregarding questions relating to details of the count, the gist of these answers was as follows. The appellant admitted that all swabs deliberately inserted were so inserted by him, or by Nurse Ashburner on his instructions. Interrogatories 7, 8 and 11, and the answers, were as follow :

7. Were any, and, if so, how many, swabs removed from the deceased prior to the conclusion of the said operation? If yes, on whose instructions were they removed and what became of them?—In answer to the seventh interrogatory, I say that during the course of the said operation swabs which had been inserted were from time to time removed from the patient's body by me or my co-defendant at my request. Before finally completing the operation, I or my co-defendant removed from the patient's body all the swabs of the presence of which I was aware. I do not know how many swabs were removed prior to the conclusion of the operation. The soiled swabs, after removal, and if not replaced in the patient's body, were dropped into a bucket, and from there transferred by the junior probationer

nurse to hooks on a swab-rack in the theatre. When 5 of the said hooks were occupied by swabs, the said nurse called my co-defendant's attention to the fact, and, when the latter had verified that this was so, the 5 swabs were dropped into a gulley by the junior probationer nurse, who then crossed off a figure 5 on the blackboard.

8. Did you or some other, and what, person purport to remove the swabs from the deceased's abdomen? Whose duty do you allege it was to remove the swabs inserted in the deceased's abdomen? If the said swabs were removed by some person other than you, on whose instructions were they acting?—In answer to the eighth interrogatory, I refer to my last previous answer, and say that it was my duty to remove or superintend the removal of all swabs of the presence of which in the patient's body I was aware.

11. Was a swab measuring 10 ins. by 8 ins. left in the deceased's abdomen? If yes, how, and in what way, do you say it came to be left there?—In answer to the eleventh interrogatory, to the first part thereof I say yes, and to the second part thereof I say that I do not know.

No other evidence was tendered about the operation, and no expert evidence was led for the plaintiff. At the close of the plaintiff's case, counsel for the defendant submitted there was no case, but, on the judge putting him to his election between standing on his submission and calling evidence, he chose the latter course.

It is difficult to see how the principle of *res ipsa loquitur* can apply generally to actions for negligence against a surgeon for leaving a swab in a patient, even if in certain circumstances the presumption may arise. If it applied generally, plaintiff's counsel, having, by a couple of answers to interrogatories, proved that the defendant performed the operation and that a swab was left in, would be entitled to ask for judgment, unless evidence describing the operation was given by the defendant. Some positive evidence of neglect of duty is surely needed. It may be that a full description of the actual operation will disclose facts sufficiently indicative of want of skill or care to entitle a jury to find neglect of duty to the patient. It may be that expert evidence in addition will be requisite. To treat the maxim as applying in every case where a swab is left in the patient seems to me an error of law. The very essence of the rule, when applied to an action for negligence, is that, upon the mere fact of the event happening, for example, an injury to the plaintiff, there arise two presumptions of fact, (i) that the event was caused by a breach by somebody of the duty of care towards the plaintiff, and (ii) that the defendant was that somebody. The presumption of fact arises only because it is an inference which the reasonable man, knowing the facts, would naturally draw, and that is, in most cases, for two reasons, (i) that the control over the happening of such an event rested solely with the defendant, and (ii) that in the ordinary experience of mankind such an event does not happen unless the person in control has failed to exercise due care. The nature even of abdominal operations varies widely, and many considerations enter into it, the degree of urgency, the state of the patient's inside, the complication of his disorder or injury, the condition of his heart, the effects of the anæsthetic, the degree and kind of help which the surgeon has—for example, whether he is assisted by another surgeon—the efficiency of the team of theatre nurses, the extent of the surgeon's experience and the limits of wise discretion in the particular

circumstances—for example, the complications arising out of the operation itself, and the fear of the patient's collapse. In the present case, all the above considerations combine to present a state of things of which the ordinary experience of mankind knows nothing, and, therefore, to make it unsafe to beg the question of proof. I cannot see how it can be said that the first essentials of the rule, if it can be called a rule, apply. It is not necessary to enter upon any analysis of the rule which, as LORD SHAW said in *Ballard v. North British Ry. Co.* (1), at p. 56, nobody would have called a principle if it had not been in Latin. LORD ATKIN in *McGowan v. Stott* (2), at p. 360, treated it as equivalent to a statement that, on the facts in evidence, the plaintiff has satisfied the burden of proof sufficiently to shift it on to the defendant. LORD DUNEDIN said in *Ballard's* case (1), at p. 53 :

... whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.

He then took as a primary illustration, at p. 53, the class of cases

... dealing with injury occurring to a servant owing to defective plant, which he was obliged to use and which it was the duty of the employer to supply.

Where complete control rests with the defendant, and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply. In the article on Negligence by GODDARD, L.J., in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 23, p. 671 *et seq.*, there is a very clear exposition of the law. The initial sentence indicates the necessary limitation of the rule :

An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence "tells its own story" of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies.

For support of this passage, the first case cited was *Scott v. London Dock Co.* (3). There bags of sugar had fallen on the plaintiff, a Customs officer, from an upper storey of a warehouse. No other evidence was given for the plaintiff. The majority of the court formulated their judgment thus, at p. 601 :

There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The person to draw "the proper and natural inference immediately arising" when the defendant's counsel submits there is no case is the judge, not the jury. How can the ordinary judge have sufficient knowledge of surgical operations to draw such an inference, or, to apply the phrase in the judgment in *Scott v. London Dock Co.* (3), what does he

know of "the ordinary course of things" in a complicated abdominal operation? And, if he does not know, is expert evidence admissible to supply the judicial lack of knowledge? However, even if the rule can apply in more surgical cases than I think, there is an additional reason why it cannot apply in the present case. The action was brought, not only against the surgeon, but also against the nurse, and a hospital operation depends on the joint efforts of surgeon and nursing staff. Against which defendant, surgeon or theatre sister, did the presumption arise? There is a further point also. In the present case, counsel for the plaintiff put in the defendant surgeon's answers to interrogatories, and, in so far as they described the operation, the plaintiff made the description part of his case. How can it be said that the rule continued to apply after that?

For these various reasons, I do not think that the principle, if it be one, had any application in the present case. As, however, the defendant's counsel did not elect to stand on his submission that there was no case, it is unnecessary to express any final opinion on the questions involved in his submission. He called the appellant surgeon and the nurses, and led expert evidence from two highly distinguished surgeons, one of whom, the visiting surgeon to the Park Hospital, performed the second operation, with the defendant as his assistant, and located the disastrous swab. Nothing in the case was really left to presumption. None the less, the opening speech of counsel for the plaintiff, with its doctrine of *res ipsa loquitur*, especially when reinforced by the judge's explanation of that doctrine, and the use the judge made of the newspaper report of the 1931 decision of the Court of Appeal, may well have created a deadly atmosphere for the surgeon in the minds of the jury. This adverse impression may even, in a curious way, have been inadvertently aggravated by one line of defence to the *res ipsa loquitur* attack which Mr. Morris pressed at the trial. His instructions had no doubt made him aware that the defendant and his two experts all held strongly to the view that it is contrary to the patient's interest and, therefore, inadvisable, to put on the surgeon the burden of counting the swabs—that is, the large ones, the only ones used inside the abdomen—a process which necessarily means counting both in and out, for there may be as many as several dozen used, and thus to distract the surgeon's attention from his proper task and prolong the operation may be gravely dangerous or even fatal to the patient. Both defendant and experts in due course gave evidence to this effect, and expressed the surgical opinion that for these reasons the duty of counting should, and does, rest solely with the nursing staff in attendance, and primarily on the theatre sister. This, in their minds, carried its corollary that, after the surgeon has removed all the swabs of which he is aware, has asked the sister, "Is the count correct?" and has been told that it is, he is entitled to rely on her answer, sew up the peritoneum, end the surgical shock to the patient's system, and send him back to bed for repose. It was no doubt partly because of

this medical opinion that defendant's counsel at the trial opened with great emphasis, and proved in much detail, the counting system at the hospital, and laid much stress on it before us. Nevertheless, I think he did it also partly in order to demonstrate to the jury the inapplicability of the *res ipsa loquitur* presumption to a surgical case like the present.

- A I return to the operation. An understanding of it is necessary in order to appreciate what appear to me to be the errors of the summing up. It disclosed the duodenal ulcer which the surgeon had diagnosed, with a hole in it the size of a threepenny piece, but the operational position when the abdominal cavity was opened up was one of difficulty and risk. The
- B cavity was full of stomach contents, mostly fluid, but some solid, all of which had escaped into it through the hole in the ulcer. There was an obvious danger of sepsis from these contents if infected by the ulcer. The intestines are usually in a state of continuous movement, but the movement was here much intensified by reason of the fact that throughout
- C the operation the patient was taking the anæsthetic very badly, and had great difficulty in breathing. The diaphragm was pressed down at each breath, and with each pressure further contents of the stomach were forced out into the abdomen. In addition, the whole contents of the abdominal cavity were maintained in a state of violent motion throughout
- D the operation. The remedial work itself consisted, on the one hand, in lifting the stomach so as to stretch the duodenum, and thereby make it accessible to the surgeon, the stomach being held up, resting upon a large swab, in the hands of Nurse Edmunds, and, on the other hand, in the suturing of the hole in the duodenum, which, of course, was done by the surgeon
- E himself. This part of the operation called for great dexterity, on account of the position and size of the hole, and the commotion going on in the whole cavity, but was successfully performed, and nothing turns on this aspect of the surgeon's work.

- I now come to the issue of liability. It arises out of the necessity of
- F packing off the organs by means of large swabs, which had subsequently to be removed by the surgeon before closing the peritoneum. To explain the packing-off process, a full-size model of the body of an adult male lying on his back on the operating table, with the abdomen completely open so as to expose all the different organs, coloured differentially and
- G made separately detachable for demonstration purposes, was before the judge and jury in the court below, and was shown and explained to us on the appeal. During the operation, the patient lay similarly on his back. The frontal wall of the abdomen was opened by a longitudinal cut 6 ins. long to the right of the navel. The sides of the wound were
- H turned back and there held by means of numerous clips known as Spencer Wells clips, with or without swabs attached. In addition, some two dozen of these clips were used for clamping the larger blood vessels. Small swabs were in use in the initial stages of the opening up, but not after the abdominal cavity itself was opened, and nothing turns upon their use. As soon as that was done, the next necessity, in order to expose the

duodenum to view and make room for the surgeon to work upon it, was to pack off—that is, to push back—the adjacent organs likely to interfere. The duodenum is the short tube which leads the contents of the stomach into the small intestine. It lies right at the back of the stomach and almost against the spine, the diaphragm being immediately above it when the person is standing upright. The risk of organs adjacent to the duodenum disturbing the operation was particularly great in the case of the smaller intestine, some 20 ft. or so in length, which lay folded back and fore on the top of, at the side of, and under, the stomach, in continual movement as usual, but aggravated by the violent breathing, the intestine tending always to slide into any contiguous open space. The next most important organ to be packed off was the liver, lying, as it does, to the right of, and actually against, the stomach. This was done by inserting a swab between the stomach and the liver and just under the liver. The swabs used for packing off are the ordinary large swabs—pieces of loosely woven and absorbent cotton material in double thickness, 10 ins. by 8 ins., cut square, and bound at the edges with a looped tape 4 ins. or 5 ins. long firmly sewn on to one corner. When used as a packing swab, the material is folded back and fore into a wad, and this is wedged under or against the part which is to be packed off from the intended scene of operation. The object of the tape is to make the locality of the swab continuously ascertainable during the operation. This is effected by attaching to the end of the tape a steel clip about 5 ins. long, known as a Spencer Wells clip. It is like a pair of scissors, with two finger holes at one end and a central pivot, but, at the other end, instead of cutting blades, it has transversely corrugated arms, which, when closed, bite together tightly on the tape, and prevent its being pulled out, the arms themselves being held fast in the closed position by means of a spring catch in the handle end, so devised as not to come undone unless deliberately opened. The loop of tape is long enough to allow the steel clip to lie or hang always outside the margins of the abdominal wound, and so to remain visible. The presence below of a packing-off swab is thus indicated by a clip above, as in a harbour a ground mooring is indicated by a buoy. In a duodenal operation, several of these large swabs may be used for packing off the various organs, and the surgeon thought he used some 8 in the operation in question. In addition, 25 or 30 other large swabs, each held by its Spencer Wells clip, were, he thought, used by him for mopping up loose fluid, etc., in the penultimate stage, but these were always held in the surgeon's hand, and the risk of one of these being left in may be ruled out. There were Spencer Wells clips holding blood-vessels at bleeding points, and these, sticking out or lying on each side of the wound to the number of perhaps three dozen, would, of course, from outside, be indistinguishable from those attached to packing-off swabs. It is the function of the surgeon himself to place all the packing-off swabs in their initial position, and to keep replacing them, or adding others, as the movements of the patient's abdomen, and particularly of the in-

testines, cause swabs to be displaced or others to be needed. The defendant, in re-examination, described how the intestines might easily during the course of the operation have caused the packing-off swab to move away from under the liver, or at least have covered it up. The passage is worth quoting :

A Just explain that a little more fully. How does the movement of the intestine move the swab ?—Well, the small intestine and the large intestine are moving throughout the operation. It moves normally in all of us at any time. In this case there were also unusual movements going on because of the difficulties in the anæsthetic. He was all the time tending to thrust out the intestines with every breath he took, so that it took some little time to pack off the intestines. That packing off will do for a time, but the intestines worm their way round and it is necessary to put in another. That lasts for a minute or two, and again the intestine will come round, and you pack off again. So all the time the movements are going on.

B ATKINSON, J. : But in the place where you found this particular one ultimately, it could not have got there by intestinal movement ?—No, but it may have been covered by intestinal movement.

I thought it was behind the liver ?—No, in between the liver and the duodenum. There are intestines underneath the liver. Every nook and cranny of the abdomen is full.

C Was it hidden by the intestines when you found it ?—Yes, it was.

The judge's erroneous impression that it was placed behind the liver—that is to say, in a remote spot—is not unimportant. Where it was in fact placed—namely, between the liver and the stomach, and just under

D the liver—it was close to the duodenum, and just in the centre of the space that had been kept open by means of the packing-off swabs during the examination and suturing of the duodenum. Assuming, as on the whole I think we should assume, that, unnoticed by anyone, the tape of the swab had somehow slipped out of its Spencer Wells clip, and
E that the clip had likewise slipped off the patient and fallen down without being noticed, this swab was in such a key position for the purpose of packing off that it appears to me highly probable that it was in fact covered by intestine, as suggested in the defendant surgeon's first answer to the judge in the passage I have just quoted from the evidence. The bearing
F of this point on the issue of negligence I will discuss presently.

Before discussing the nature and extent of the surgeon's duty in respect of removing the swabs, it is essential to call attention to certain other medical features characteristic of major abdominal operations, and peculiarly present in the actual operation in question on this appeal.

G Piecing together the evidence of the defendant surgeon and the two distinguished and experienced surgeons who gave evidence for him, I gather the following points. They are expressed partly in my own words, but I think that I state the effect of the evidence accurately. (1) It is subjectively of supreme importance that the surgeon's mind should be
H free throughout the operation to concentrate on his main task, with all its difficulties, problems, surprises and risks, and that it should not be disturbed or diverted. It is objectively of equal importance. (2) that a patient should not be kept under anæsthetic a moment longer than is necessary, (3) that there should be no pause in the continuity of the operation, even at the time of the count, (4) that his organs should be

moved and touched as little as possible, and (5) that any extension of the field of operation which involves handling of the organs should be avoided because of the risks (a) of increasing the surgical shock, (b) of causing subsequent adhesions, and (c) particularly in abdominal cases, of sepsis spreading. The medical evidence below was unanimous in the opinion that, for these reasons, the actual task of counting the swabs ought not to be put on the surgeon, and the judge ultimately accepted that view. All three surgeons also stated that it is not in fact the practice for the surgeon to count, and that the whole task of counting is in practice assigned to, and performed by, the nursing staff present in the theatre, whose duty it also is to conduct the supply of swabs. After sewing up the hole in the duodenum, the defendant surgeon had next to mop up—that is to say, clean out—the abdominal cavity by soaking up the loose stomach contents with large swabs held in his hand. In this case, it was a very serious task. The materiality of this phase of the operation is that it inevitably both prolonged and extended the operation, and made it more than ever important not to delay over the next stage, when he came to it—namely, the removal of the packing swabs. For that reason I quote his evidence about the process of mopping up. His counsel was treating the process too lightly, and skipping it, but the defendant corrected him, and said :

Having closed the perforation, the next step in the operation is to remove, as far as possible, these escaped stomach contents. With the movements of the patient, that have been going on at his home and in the ambulance, they are all over the abdomen, and, in order to make quite certain, I go over every possible area. I have a routine way of mopping out the abdominal cavity. The large swabs, with Spencer Wells attached to the tape, are handed to me by Staff Nurse Ashburner, and I first of all mop out underneath the right ribs and then underneath the left ribs, and then the lower left of the abdomen and then the right of the abdomen—in other words, in a clockwise direction.

If you miss any foreign matter that should not be there, and close up the wound, is there any danger of peritonitis?—Not so much a danger of peritonitis, but a danger of a localised abscess. It is not possible for any surgeon to take every drop of escaped stomach contents out of the peritoneal cavity. The interior of the abdomen is full of nooks and corners. They may be quite small, and it is not possible to get at them all. There will be some stomach contents left in some, and, to make certain I do not leave anything, I go through a routine procedure.

Is that a matter that requires the whole of your concentration?—It does, and it may require many swabs, all dependent on how much has escaped, and, with a perforation the size of a threepenny piece, as there was in Thomas Mahon, there is a considerable amount of escaped stomach contents. The swabs used rapidly get soiled.

He then explained that he would use 25 or 30 large swabs, attached to Spencer Wells clips, and stated his own objections to his counting :

Would it be possible for you, under those circumstances, to keep a mental count of the number of swabs that have gone into the body and the number of swabs that have come out?—It would not be impossible. It is not the usual thing to do. If I knew I had to keep a mental count of the swabs, the operation would take longer, because at the same time I am concentrating upon what I am doing inside the abdomen. I would have to keep an eye on how many swabs are going in, how many swabs I take out, and also where Nurse Ashburner is putting the swabs.

You would also want to know in each case whether the swab had been used before or not?—Yes.

There was no risk of mopping-up swabs getting left in, as they never left

his hand. The mopping up finished, he then proceeded to remove all the packing swabs with Spencer Wells clips attached, and, to use his own phrase, all the swabs of which he was aware. The one inadvertently left in was, when discovered in the second operation, lying just under the liver, close to the stomach, approximately in the very place where

A the defendant had placed one for packing off the liver in the first operation. It was suggested that it might have moved elsewhere during the first operation and then moved back after the surgeon had finished removal of swabs. As we are ordering a new trial, I say nothing about that suggestion, and, for the purpose of discussing the proper directions

B to the jury on the defendant's duty in relation to removal of the packing swabs, I think it is right to assume (i) that the swab found in the second operation was the actual one inserted by him under the edge of the liver in the first operation, (ii) that, during the removal stage of the first operation, this swab was still in about the same position as that in which

C he had placed it, and (iii) that in the process of removal he missed it. The defendant surgeon could think of only two ways in which a packing swab in fact placed by him in the position where the missing one was ultimately found—I will call it the liver swab—might, at the time when he was removing the packing swabs in the first operation, have been

D missed. The first was the one I have already mentioned—namely, that the tape of the swab had slipped out of the Spencer Wells clip, and that the swab itself had, as a result, got covered up by intestines. The second was that one of the bundles of swabs (supposed to contain 5 each) brought to the operating table had in fact contained 6—that is

E to say, one more than it had been counted as containing—and that, without knowing it, the defendant Ashburner had handed to the surgeon, and he had taken, what each believed to be one swab, whereas in fact it was two clinging together. To make this theory at all probable, I think that it must also be assumed that the tape of the second swab, both

F swabs lying at that stage, I suppose, flat and extended, had somehow got folded in so as to be unnoticeable. On these assumptions, the surgeon might perhaps have been led to attach the Spencer Wells clip to the one visible tape, and to that one only, and then to fold both swabs together into one wad, which he then put into position without realising that he

G had in fact put in two. The difficulty of this theory is that the swab, when disclosed at the second operation, was in fact found folded up, and I cannot see how any internal movements of the organs and liquid contents of the abdominal cavity could have washed the loose swab free from the attached swab and then folded it back again into a nice

H surgical wad, as it was when found. There was not sufficient evidence about the details of the count to justify any inference from it as to how there came to be an unattached swab at all in the abdominal cavity. The defendant surgeon said in his evidence that, after the discovery of the swab in the second operation, he “sat down to think how on earth it could have been left there.” At the trial, he thought the probable

explanation was that the clip must have slipped off, and, for the purpose of this appeal, I think that we should assume, without deciding, that that is the correct explanation. I do not think it relevant to discuss the way in which the error in the count may have occurred.

Before I discuss the judge's summing up, it is desirable to recall the well-established legal measure of a professional man's duty. If he professes an art, he must be reasonably skilled in it. There is no doubt that the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports negligence, and, in applying the duty of care to the case of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention. I will mention a few, applicable to a major abdominal operation, (i) the multiform difficulties presented by the particular circumstances of the operation, (ii) the condition of the patient, and the whole set of problems arising out of the risks to which he is being exposed, (iii) the difficulty of the surgeon's choice between risks, (iv) the paramount need of his discretion being unfettered, if he thinks it right, to take one risk to avoid a greater, (v) at the penultimate stage (swab removal), he may, particularly where the patient has been taking the anæsthetic badly, and is suffering from shock, be so anxious on surgical grounds to bring the operation to an end as rapidly as possible that, in the exercise of his discretion, perhaps unconsciously exercised, as soon as he has completed the removal of all swabs of which he is at that moment aware, he asks the sister for the count, and forthwith starts to close the wound. Supposing the circumstances I have been describing had been found to be the actual facts which obtained here, would he have been negligent? If the evidence of the two independent surgeons be accepted, that may well have been the position in the present case at the stage when the defendant was removing the packing swabs. Their evidence seems to show clearly that, in their view, the process of swab removal of itself involves feeling round with the fingers, or even the hand, where the packing swabs are lying, and that this procedure does actually amount to a search for swabs in those localities. The last answer which the defendant surgeon gave to certain questions seems to indicate that in practice it was his habit too to feel round, when removing the swabs, in the way the two surgeons described in the passages to which I have just referred:

Have you ever known of a case before where the forceps have dropped off during the course of the operation?—Off the tape?

Yes.—Yes.

That has happened?—Yes.

ATEKINSON, J.: Have you noticed that at once?—No, not immediately.

You have found a swab in looking round after?—When removing the swabs prior to asking if the count is correct.

There you get a description of the man's habit. It was probably very difficult to detect the unflagged presence of a swab lying low down between the liver and the stomach, and the surgeon's hand may easily have touched it without his recognising its presence. Moreover, in considering the weight of the detailed evidence of the defendant surgeon, A it must be remembered that the judge in his summing up gave him very high marks as a witness.

On most of the matters I have been discussing, the judge ought to have given the jury positive help, but he gave none, or almost none, and the explanation is, I think, that he had two legal misconceptions in mind. B The first was that the *res ipsa loquitur* rule raised a strong presumption against the surgeon, made doubly strong by the fact that the patient was unconscious, and did not know what the surgeon was doing in his abdomen. The second was that he believed there to be a positive rule of English law, to be enforced in all abdominal operations, imposing on C the surgeon a duty, after removing the packing swabs, "to search and to make sure he has removed all the swabs." He cited to the jury passages in support of this rule of law from two cases. The first was the South African case of *Van Wyk v. Lewis* (4), a case decided on appeal in the Supreme Court of South Africa. It was an action against a surgeon by a D patient who had been injured, but not fatally, by a swab left in her during an abdominal operation on the gall bladder. The judge had decided in favour of the defendant, and the plaintiff appealed. INNES, C.J., delivered a judgment of which I should like humbly to express my admiration. Incidentally, he took the same view of *res ipsa loquitur* in surgical E cases as that which I have already expressed. ATKINSON, J., quoted passages from pp. 446, 447 of that judgment which are wholly unexceptionable, but, in making two quotations from the judgment of WESSELS, J., at p. 470, he omitted four lines of the original which would have given balance to the quotation with the jury :

F But we must bear in mind that a surgeon is a human being and not a machine. We must take into consideration the nervous anxiety which almost every surgeon must have in conducting a difficult and what Dr. Lewis calls a ticklish operation.

His comment to the jury was as follows :

G There you get a principle laid down in that case which shows that in the view of the law there is this duty upon the surgeon to take great care to search and to make sure he has removed all the swabs. Every case has probably got to be determined on its own facts ; there may be certain unusual difficulties in cases which have all got to be borne in mind.

The judge then made three quotations from an English swab case, that of *James v. Dunlop* (5), in which a jury had found against a defendant H surgeon. As the decision laid down no new rule of law, but turned solely on its particular facts, it was never reported in any regular law reports, but an abbreviated note in the BRITISH MEDICAL JOURNAL on April 25, 1931, of the hearing of the appeal in the Court of Appeal was supplied to the judge during the trial. It appeared that the defendant in that case had made an application for a new trial on the sole ground that the verdict

was against the weight of evidence, the summing up of BRANSON, J., being admittedly open to no criticism whatever. The jury, having been thus properly directed, answered "No" to the question: "Did the defendant make such search in the wound as was reasonable and necessary?" They also answered that they were not satisfied that the sister had in fact made any answer at all about the count. The only packing-off swabs involved seem to have been a wall of three close to the gall bladder, which was the organ operated upon. The note contained an inadequate statement of the facts in evidence, and only extracts from the judgments. GREER, L.J., was reported as saying during the appellant's argument:

If only three swabs were used the surgeon would know quite easily without asking the nurse whether all were out.

The argument in the Court of Appeal (as reported in the *BRITISH MEDICAL JOURNAL*) was almost confined to the contention that the surgeon is wholly protected by the nurse's count, and a submission that the jury ought, on the evidence, to have found that she did in fact make answer that the count was correct. The court naturally refused to disturb the verdict. We had the advantage of being furnished with complete copies of the judgments, and I observe that SCRUTTON, L.J., summarised and approved the summing up of BRANSON, J.:

I approach the case, therefore, from that point of view. No fault can be found with the way in which the judge summed up the case to the jury. He explained to them that doctors do not guarantee success in operations, that there is no warranty that the doctor will succeed in the operation he undertakes. He explained to them the measure of care and skill which the doctor owes to the patient—not such skill as the most eminent man in the profession will show, but the ordinary average skill of an educated practitioner, trained in the profession that he undertakes. That was very clearly left to the jury.

Later, he brings out very clearly how in that case the swabs kept their rough texture, so as to remain recognisable in the abdomen, and throughout those pages he makes it plain that his views were all based on the particular facts of that case. The other Lords Justices did the same. No general rule of law applicable to operations in general was laid down. The judge quoted two passages from SCRUTTON, L.J., and one from GREER, L.J., but made no attempt to explain to the jury that the full meaning of what the Lords Justices said there could only be understood if they were read in the light of the facts and arguments of the particular case. He gave them no such warning, but used the quotations in a way which I think was misleading. Had the real issue been whether the nurse's count wholly relieved the defendant from the duty of care in regard to the removal of swabs, the quotations would have been apt enough. However, the issue below was whether or not, in all the circumstances of the operation, the doctor had failed to exercise reasonable care in regard to the removal of the packing swabs, and in the judge's comments there is no hint of that distinction. What he said was this, again making use of the words "making sure":

There is the law, quite simple to understand. The doctor is not entitled to rely on the count of the nurse; that he has his duty to perform. You have to look

at it as though they have not a system of counting. The nurses are there to help them, but the doctors have to discharge their duty by making sure that they have got rid of all the swabs put in.

A Coupled with his use of the *res ipsa loquitur* doctrine, that passage seems to me misleading. After a long direction upon the difference between looking for the packing swabs and feeling for them, on which I shall have to say a few words in a moment, almost the last direction the judge gave was this :

B On the other hand, members of the jury, if the plaintiff has satisfied you that, on the defendant's own evidence, he really ought to have done something more after all, the leaving of swabs is a very serious thing, because it may lead to death, as it did here, and it is not enough merely for you to have taken away all that is there. " You really ought to do something to make sure, and you yourself admit in this operation it was perfectly simple to feel round, and you are quite satisfied that, if you felt round, you would have found it." The plaintiff says : " Are you not convicted on your own evidence ? "

C The full effect on the jury of the phrases I have quoted from the summing up cannot be estimated unless the use of the two legal decisions made by the judge in the course of the hearing be also borne in mind. It seems to me that the effect on the jury must have been to make them believe that there is a general rule of law requiring a surgeon, after removing all the swabs of which he is aware, then to make sure by a separate search. If they did believe that, then, as the defendant had admittedly made D no such search after removal of swabs and before asking the question of the nurse, they were bound to conclude that he had failed in his duty. This is the way the judge put it to them. After an encomium on the honesty and candour of the defendant surgeon's evidence, the judge said :

E What did he do when he had done the operation and came to take out the swabs ? What he himself told us was this : " Did you remove all the swabs to the tapes of which forceps were attached ?—Yes.

Did you remove all the swabs of which you were aware ?—I did." He moved all he could see, or all he could exactly know the position of. That was described by SCRUTTON, L.J.—removed all the swabs he thought he had put in.

F His Lordship then discussed two aspects of the evidence. The first was whether the defendant did any feeling, as well as looking. I am not satisfied, after reading the material evidence through carefully several times, and analysing it, that it was ever definitely brought home to the defendant's mind that he was charged with a failure to feel, as well as to look, at the time of removing the swabs. I think that his mind was G always on the question of a search after he had done his removal. I read the following passage from his evidence :

With the packing-off process, of course, you ought to be very careful to see you have all those swabs out ?—Yes.

H How do you think this one was overlooked ?—I really cannot say. There has been a miscount somewhere. Having been told that the swabs were all counted off, I then proceeded to close up. I did not then proceed to look round to find any more.

But, before asking about the count, you had satisfied yourself that there was no swab there, if you had looked round properly ?—I take out all those I can see, that I was aware of.

Later, he is again asked about " looking," and later again considerable time is spent in cross-examination devoted to the topic of looking. The

point of feeling is included incidentally, but in a question about looking. The point is later put separately, but the defendant obviously answered under the impression that he was being asked as to the possibility of making a complete search after the removal stage by feeling round in all the eight places where he had put packing swabs. In seven, at least, of these, he knew for certain, when in the witness-box, that he had put A his hands and felt for each swab in the process of removal. He says that he could have so searched the whole abdomen in the course of one minute, and concedes quite readily that, had he made such a hypothetical search, he would probably have found the missing swab. However, Mr. Rowson, for the plaintiff, evidently was afraid to ask the crucial B question "Did you feel under the liver by the stomach during the removal stage?" and that question never got asked either by Mr. Rowson or by the judge or by Mr. Morris. Had it been asked, it seems to me that one of three answers would have been elicited—namely, (i) that he remembered feeling there, or (ii), that he was sure he must have felt C there, because it was the pivotal packing-off position for the whole operation, and he could not have omitted to feel there, the more certainly so because it was a spot which was continually being hidden by the moving intestines, or, on the other hand, (iii) that he had it very much in mind, and must in fact have felt there, unless, possibly, not realising D that the Spencer Wells clip to this swab had dropped off, and having removed the other seven on which the clips remained, together with a whole host of other Spencer Wells clips, he was under the impression at the end that he had removed that liver swab with its Spencer Wells clip, and, in his anxiety to stop the strain on the patient, simply did E not remember that he had not felt in that one spot. I feel convinced that it was never really brought home to the defendant at the trial that he had got to address his mind to that question, and I cannot agree with the conclusion of my colleague, GODDARD, L.J., whose judgment to the precisely opposite effect I have had the privilege of reading. In spite of F that closely reasoned and forceful judgment, I still think that the defendant was never brought face to face with the real issue, and the jury were not properly directed as to what that issue was.

The only other matter on which I desire to say anything is on the relevance of any count by the nurses in regard to the surgeon's duty G concerning the removal of packing swabs. His duty is undoubtedly to exercise care in the removal of the swabs, giving proper weight to the rare, but not impossible, risk of a swab having lost its Spencer Wells clip. This risk, it is worth remembering, is one which depends, not on the surgeon, but on the nurses. It is their duty to see that each Spencer H Wells clip is in good order and that its safety catch is made fast when the swab to which it is fastened is placed in the surgeon's hands. So, too, the check afforded by the count depends on the nurses. Those two risks are wholly external both to the surgeon and to the patient. If an error has been committed, the surgeon can neither control it nor

know it. None the less, I do not doubt that, over and above all the many signs of danger to the patient which are forcing themselves on his attention, the surgeon has to keep in his mind those two risks of error by the nurses. On the other hand, I do not think that the surgeon should be deprived of all support from the count. In a difficult case,

- A where he is anxious, for the patient's sake, to close the operation at the earliest possible moment, the fact that he is about to receive a check from the theatre sister, whom he knows to be careful, is one of the imponderable factors which he may properly have in mind. Indeed, to have regard to it may sometimes save a patient's life. Remembering always that want
- B of care is a matter of degree, and that the jury can find negligence only if, in the light of all the circumstances, they are satisfied that the surgeon has fallen short of the standard of a reasonably careful surgeon, in those circumstances, can it be said that the judge gave them a sufficient direction? I do not think so. There must be a new trial.

C

MACKINNON, L.J.: Five persons were concerned in the operation on Mar. 4—Mr. Osborne, the surgeon, the anæsthetist, Nurse Ashburner, as chief or theatre nurse, Nurse Edmunds, and Nurse Callaghan. The plaintiff, having no means of knowing what happened in the theatre, was

- D in the position of being able to rely on the maxim *res ipsa loquitur* so as to say that some one or more of these five must have been negligent, since the swab was beyond question left in the abdomen of the deceased. In fact, she sued Mr. Osborne, the surgeon, and Miss Ashburner, the chief nurse. One or other of them, or perhaps both, must have been
- E negligent, but it was for the plaintiff to establish her case against either or both. At the trial, the verdict of the jury was that Mr. Osborne was negligent but that Nurse Ashburner was not. Mr. Osborne appeals against the verdict, asking either that judgment may be entered for him or that there may be a new trial. The proper question as regards
- F Mr. Osborne was whether, on the night in question, he had exercised the reasonable degree of skill and care that a surgeon in his position ought to exercise—whether he had done anything that, exercising such skill and care, he ought not to have done, or left undone anything that, exercising such skill and care, he ought to have done. This question involves
- G matters of fact as to which neither the court nor the jury has knowledge. The facts must be proved by the evidence of experts. No such evidence was called for the plaintiff. However, Mr. Osborne, and two other eminent surgeons, Mr. Bryce and Professor Morley, gave evidence for the defence. Unhappily, the judge did not base his question to the
- H jury upon the evidence that was given as to the practice of surgery. At an early stage of the case, there was handed up to him a newspaper report of a previous case that came before the Court of Appeal in April, 1931. The newspaper report contains only some portions of what was said in their judgments by SCRUTTON, GREER and SLESSER, L.JJ. Since we have been furnished with a shorthand note of the whole of their

judgments, it is manifest that the newspaper report is entirely misleading. That was a similar case of a swab being left in the abdomen. Expert evidence was there given for the plaintiff by a surgeon. He said that, in the particular circumstances of that case, the defendant had not exercised the proper degree of skill of a surgeon in searching for swabs before closing up the abdomen. Some part of the evidence of this expert is quoted *verbatim* by SCRUTTON, L.J., and I observe that several times he qualifies his evidence that the defendant ought to have found the swab with the words "in this particular operation." The question in the appeal was whether or not the verdict against the defendant was so much against the weight of evidence that a new trial should be ordered. The decision of the court was simply that, on the evidence in that case, this was not established. A B

Unfortunately, having only the newspaper report of part of the judgments, the judge treated that case as having laid down a proposition of law binding in other similar cases. At the close of the plaintiff's case, no evidence having been called for her on the surgical question, counsel for defendant submitted that there was no case made out. If he had been bold enough to persist in that contention, I think that the judge would have rightly overruled it. In fact, however, he abandoned it, and called his evidence. When the submission was made, however, ATKINSON, J., remarked : D

I should have thought it was extremely difficult, if not impossible, for me to say there was no case, in view of the things said by SCRUTTON and GREER, L.JJ., in this case [*James v. Dunlop* (5)].

Actually, the truth was that in that case all that the Lords Justices said was that the expert witness had given evidence, as patently he had, and that it was evidence on which the jury could reasonably come to the verdict which they gave. To use that as laying down a proposition of law that, in a case where no expert has given any evidence, it must be treated as if he had, in the same words as in the previous case, is manifestly erroneous, and is perhaps a signal instance of the grave danger of allowing a case to be cited from a mere newspaper. E F

Unhappily, however, the judge's mistaken belief that in *James v. Dunlop* (5) the Court of Appeal enunciated a rule of law, and not merely decided a question of fact on the evidence in that case, persisted. During the cross-examination of Mr. Bryce, one of the defendant's experts, he read to him one of the remarks of one of the Lords Justices as to the facts proved in that case, and asked if he agreed with it. Later, he said to him, "I do not know how far you agree with the Court of Appeal," and read another remark as to the facts proved in that case. In the course of a discussion with counsel as to the questions to be left to the jury, he said, "The Court of Appeal have been perfectly plain about that," and quoted two sentences of SCRUTTON, L.J., and two sentences of GREER, L.J. A little later he said to defendant's counsel : G H

The jury may agree with Mr. Rowson. They may think the Court of Appeal was right.

The jury, as I was told in answer to my question, were in court, and heard this discussion. In the summing up, the judge said :

Now, what is the law on the point ? The first case I am going to refer to is one decided in South Africa. . . . The other case is a case in our own Court of Appeal. . . . The only important part is the law that was laid down by the Court of Appeal, and the law laid down by the Court of Appeal is this.

A He then read two passages from the newspaper's report of the remarks of SCRUTTON, L.J., and one from the remarks of GREER, L.J., and concludes :

B There is the law, quite simple to understand. . . . That is the law, and you have to take it from me, just as I have to take it from the Court of Appeal.

I repeat that the Court of Appeal in *James v. Dunlop* (5) laid down no rule of law whatever. To quote the remarks of the Lords Justices as to the surgeon's duty—being remarks only upon the evidence given in that case—as being directions in law in this case, in which no such evidence was given, is plainly a misdirection. However, there remains the question whether or not that misdirection was material, so that the verdict for the plaintiff should be set aside, and that question does remain, for this reason. The actual question put to the jury at the end of the summing up was : “ Did the defendant Osborne make a reasonably sufficient search for swabs ? ” In itself, that question is correct, and, if the jury had been directed to consider that question in the light of such evidence as to the duty of the surgeon as had been given in this case, and without paying attention to any remarks made by anyone, however eminent, as to evidence given in another case eight years ago, no criticism of the summing up could be made.

E As I have said, no surgical evidence was called for the plaintiff. Counsel for the defendant, however, not having persisted in his submission at the close of the plaintiff's case, did call Mr. Osborne, and two experts, Mr. Bryce and Professor Morley. As a result, the plaintiff was entitled to rely upon any evidence given by them as to the nature and extent of the defendant's duty as a reasonably skilful surgeon, and then to contend that, upon some admission by the defendant, that duty had not been fulfilled by him. The evidence was that, at the beginning of the operation, the surgeon cut a line 6 ins. long to the right of the navel and through the peritoneum. The abdomen within is filled with the various organs. In order to get at the object concerned—namely, the hole in the duodenum to be sewn up—the other organs have to be kept off by the use of these packs. In this case, this was the more necessary because the patient had taken the anæsthetic badly, and the intestines were in a constant state of movement from his breathing. About 8 packs altogether had to be so used. The routine is that each pack (a square of gauze of about 9 ins.) has a tape sewn to its corner. As each is handed to the surgeon, a Spencer Wells clip is clipped to the tape. Part of the tape and the attached clip remains outside the body, and affords a guide to the existence of the swab within when the time comes to remove it.

This is the more necessary because the swab within may be displaced by the movement of the intestines from where it is first inserted, and, by becoming discoloured and slimy, may be in itself elusive. The danger of a swab being overlooked is, however, in this and in all other hospitals, further guarded against. A clip may drop off the tape, and its signal be therefore lost. It is physically possible (and has been suggested as the explanation of the disaster in this case) that, when, as it is thought, one swab is handed to the surgeon, there may be two squares of gauze stuck together, but with the tape of one not hanging out. The routine is, therefore, that a careful count of all the swabs used is kept by the theatre sister. At a certain stage, when the surgeon thinks he has extracted all the swabs, he asks the nurse if all the swabs have been accounted for. If she says "Yes," he proceeds to sew up the abdomen. If she says that one or more is not accounted for, he will search for it, and not close up the opening till it is found. The method of this check at this hospital—with a numbered rack and blackboard—was elaborate, but I need not recount the details. It is the surgeon's duty to put in the swabs. It is his duty to take them out. Mr. Osborne said that, after the duodenum had been sewn up, he took out all the swabs which he could see or of which he was aware. This presumably meant all to which he was guided by the tapes and clips. He took them out, not by pulling on the tapes, but by inserting his fingers to take hold of the swabs themselves. It is not immaterial that, on the evidence of Mr. Bryce and Professor Morley, it is not desirable for the surgeon to grope within with his hands more than is essential. The patient has necessarily suffered shock by the operation, and, as Professor Morley said :

Unnecessary manipulation or searching might very easily add to the shock of the patient.

When Mr. Osborne had removed all the swabs of which he was aware, he asked Nurse Ashburner if all the swabs were accounted for. She replied that they were. He thereupon proceeded to close up the opening. In fact, Nurse Ashburner's reply must have been inaccurate, since the one found in the man in June cannot have been accounted for. Yet, with a certain lack of logic, the jury found that Miss Ashburner was not guilty of any negligence. As regards this system, with the check of the number of swabs, Professor Morley, the expert, of the highest qualifications, was asked :

Supposing a surgeon removes all the packing swabs of which he is aware, and supposing he then asks the theatre sister whether the swabs are all accounted for, in your experience, is that a usual or unusual procedure for the surgeon to adopt ?—It is the usual custom, both in this country, on the Continent, and in America.

That being the evidence, it is, I think, material to remember the words of MAUGHAM, L.J., in *Lindsey County Council v. Marshall* (6), at p. 540 :

An act cannot, in my opinion, be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind. . . . A defendant charged with negligence can clear himself if he shows that he has acted in accord with general and approved practice.

That being the evidence, it might well be thought that there was no evidence upon which a reasonable jury could find that the defendant had been negligent. However, there was one further point made—namely, that, before asking the question of the nurse, in addition to taking out the swabs that had tapes visibly attached, Mr. Osborne ought to have felt about with his hand in the region of the opening to search for a swab or swabs not indicated by a tape or clip. It is said that, first, there was evidence that this was his duty, and, secondly, there was an admission by him that he did not do it. I think that there was some evidence to go to the jury that it was the duty of the surgeon to make some search for swabs by feeling in the vicinity of the opening before asking the question of the nurse. Then, was there any evidence that Osborne failed to do this? As to that, the only evidence must be his own admission. There is a suggested admission by Osborne that he failed to feel round the vicinity of the wound. Mr. Rowson's questions are clear, but the witness did not answer them. Mr. Rowson asked about the "simple matter of running your hand round inside." The witness answered about "looking around every nook and cranny" and "searching the whole abdomen." The question "If you had done *that*, have you the slightest doubt but what you would have found the swab?" is lamentably ambiguous. By "*that*," no doubt, Mr. Rowson meant the simple running the hand round. The witness may well have thought that it meant "searching the whole abdomen," which he had spoken of in his last answer. His answer, "I think I would have found it," cannot be taken to mean "if I had made a simple feel around," nor is the comment in the summing up a fair comment on that part of his evidence.

My conclusion is that, though it cannot be said that there was no evidence for the jury that Osborne failed to do that which the experts admitted he should do, the actual evidence on the point was distorted. Here again there is the misfortune that the jury were not directed that they must take the standard of care and diligence of a surgeon from those who could alone, from their expert knowledge, inform them of it, but were rather encouraged, if not directed, to disregard their evidence in the light of some remarks of eminent people as ignorant of the science of surgery as they were themselves, remarks mistakenly taken to be, and stated to the jury to be, a binding rule of law laid down by the Court of Appeal. In the result, I think that this judgment and verdict must be set aside, and there must be an order for a new trial.

GODDARD, L.J. : The defendant in this action is the resident surgeon at a Lancashire hospital, and appeals against a judgment entered against him at Manchester Assizes following on the verdict of a jury who found that he had been guilty of negligence in the performance of an operation on the plaintiff's son, and that such negligence caused the patient's death. He appeals on the ground that there was no evidence to support the jury's

finding of negligence and on the ground of misdirection. The nature of the action is one with which the courts are by no means unfamiliar, and no doubt it raises questions which, for the consideration of a jury, are difficult. An abdominal operation was performed, in this case, for a perforated duodenum, an organ of the body lying close to the liver. The patient survived the operation, but it was afterwards discovered that one of the packing swabs used during the operation had not been removed. This was found on a subsequent operation being performed, which disclosed a large swab packed tightly under the liver, and it was conceded that it was one of those used in the first operation, which must have been placed there by the defendant and left there by him when the body of the patient was sewn up. Unhappily, the patient did not survive the second operation. The defendant is a surgeon of high qualifications, and is regarded by his brethren in the profession as a skilful and careful surgeon. As a witness, he was candid and frank in the highest degree, and everyone must concur in the tribute paid to him by the judge in his summing up as to the way in which he gave his evidence. The circumstances of the operation were difficult, owing to the condition of the patient. That a swab or an instrument may get overlooked is one of the well-known risks of an operation, and, indeed, it has been described as the bugbear of abdominal surgery, but, for all that, the question that has to be determined in this court is whether or not there was evidence upon which a jury could find that in this particular operation the defendant had fallen short of the standard of care required of him. If there was such evidence, given, of course, a proper direction from the judge, even though I myself might have come to a different conclusion of fact (as to which I express no opinion), I cannot disturb the finding. At this hospital, a system has been devised which is designed, as far as possible, to eliminate the risk of a swab being left in a patient's body. All large swabs used for packing are provided with tapes. They are done up in bundles of five, and are counted by two persons when they are done up. Then, when they are taken to the operating theatre, the theatre sister counts them on the operating table. She has so many bundles of large, and so many of small, swabs, and the number of each is marked on a blackboard. Before a swab is handed to the surgeon by the sister, a Spencer Wells clip, which is the size of a fairly large pair of scissors, is attached to the tape. This is designed to prevent the swab becoming hidden in the body, the clip acting as a flag or signal showing where the swab is. As each swab is removed, it is placed on a rack under the blackboard, which has five hooks for large and five for small. As soon as each rack of either size is full, the theatre sister's attention is called by the assistant nurse, who is spoken of as the runner, and, after the sister has checked this by observation, the swabs are discarded into a trough. Thus, at the end of the operation, all that one has to do for counting purposes is to check the last bundle of five. Before the surgeon begins to sew up the patient, he asks the sister if the count is right.

If he gets an affirmative answer, he proceeds. In the comparatively rare case of a negative reply, a search is at once made, and, if the missing swab be not found on the table or floor, the patient's abdomen has to be searched. However no system has yet been devised, and perhaps none ever will be, that will rule out the possibility of human error. That a

- A mistake was made in the count in this case is beyond controversy. It is conceded that the defendant asked the sister if all the swabs were accounted for, and that she told him that they were. In fact, one was still in the patient's body. Apart from a mistake in the count, how comes it that a swab can be missed ? It is because swabs are liable to get hidden
- B under the intestines and to take on the colour of the abdomen that the device of providing the swabs with tapes to which clips are attached is adopted. However, there is a risk, which, from the evidence in this case, is well known to surgeons, that during the operation the clip may, without its being noticed, become detached. There is also the risk that,
- C in the hurry of an operation, a swab to which a clip has, by mistake, not been fastened may be passed to the surgeon, who, intent on a critical phase of his work, may not notice the omission. If either of these things happens, if the swabs have been properly counted, the attention of the surgeon will be called to the fact by the sister reporting that there is a
- D swab short, and it is for this reason, as I understand it, that the surgeon contends in this case, as surgeons often have before, that he is entitled to rely on the nurse's count. He says, with a degree of reason that none can deny, " I cannot be expected in the course of a critical operation, with a patient's life in my hands, to keep count of all the swabs that I use
- E and all the clips that I must employ to staunch bleeding arteries. An operation must be team work, and each member of the team has his or her allotted task. To the nurse it belongs to count these things, and, if she says the count is correct, I am entitled to rely on her." Is that a true statement of his position, and of the respective responsibilities of
- F surgeon and nurse ? I would not for a moment attempt to define *in vacuo* the extent of a surgeon's duty in an operation, beyond saying that he must use reasonable care, nor can I imagine anything more disastrous to the community than to leave it to a jury, or to a judge, if sitting alone, to lay down what it is proper to do in any particular case without the
- G guidance of witnesses who are qualified to speak on the subject. Nevertheless, this much can, I think, be said with certainty. As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that degree of care which is reasonable in the circumstances, and that must depend on the evidence. If, on the whole of
- H the evidence, it is shown that he did not use that standard of care, he cannot absolve himself, if a mistake be made, by saying : " I relied on the nurse." If authority be needed for a proposition which I confess to me seems obvious, it is to be found in *James v. Dunlop* (5), with a transcript of which we were supplied. The facts, I agree, were very different. The surgeon who gave evidence there was careful to limit his evidence to that

particular operation—the removal of gall stones. However, remarks were made both by SCRUTTON, L.J., and by GREER, L.J., which appear to me to be of general application, and which, if I may humbly say so, exactly express my own opinion. SCRUTTON, L.J., said :

Before there is any count, there is a duty on the doctor. His duty is to put in the necessary swabs, according to the ordinary course of the operation, to enable the operation to be safely carried out. He puts them in, and it is his duty to use reasonable care to put them in the proper places, and, having put in those comparatively few large swabs (because this question does not seem seriously to arise about small swabs, it is the large walling swabs which are the important matter, some three or four of them), it is his duty to take them out, and that is quite independent of any check or count. He puts them in, and he must take them out. He is the person who knows where he put them in, and he is also the person who knows the amount of movement that can be reasonably expected—I cannot help thinking that it is comparatively slight—in the swabs that are put in. A B

I think that in using those words SCRUTTON, L.J., was referring to the duty of the surgeon in general, and clearly not merely to the particular operation. Then GREER, L.J., after saying that it is a part of the operation, as it must be of any operation, to insert the swabs—which no one would doubt—says : C

Therefore it is quite clear that all these gentlemen [the surgeons] recognise what is only common sense—that, if it is a necessary part of the operation to insert the packs, it is also a necessary part of the operation to remove them. The removal of the packs involves a search after the operation is over by means of the finger of the operator, to ascertain whether the packs have or have not been removed. Surely it further follows that that part of the operation is to be done with the same care and skill as every other part of the operation. The surgeon is not entitled to say : “I need not exercise any care and skill with regard to the removal of the packs, because I have a check upon me in the counting which is being made by the nurses.” He may say possibly, though it is unnecessary to decide it in this case : “I am absolved from counting. I need not count how many I put in or how many I take out, because that count is being done by some other person.” But, assuming that to be so, that does not absolve him from the duty to exercise reasonable care in the search he has to make with his finger before he puts any question to the nurse with regard to the count. The duty of the nurse to count cannot absolve the surgeon from his duty to exercise reasonable care. D E

As I say, these passages seem to be of general application, and, as GREER, L.J., said, only common sense. Exactly the same view of the surgeon’s responsibility seems to have been taken by the Court of Appeal in South Africa in *Van Wyk v. Lewis* (4). However, the extent or nature or method of the search to be made in any particular case must depend on evidence, and I do not suppose that, when GREER, L.J., spoke of a search by means of the finger of the operator, he was intending to lay down that it must in every case be by finger. In the case under citation, the evidence was that it should have been by finger. It may be that in some cases a search by the eye would be enough, or would be the only permissible method, because of the condition of the patient. It may be, I do not know, that in other cases, a probe would be necessary. This must be a matter to be proved. I venture to think, however, that it is clear that, unless there be evidence that the nature of the case was such that no search of any description—be it by eye, finger or mechanical means—was possible, a surgeon cannot show that he used reasonable F G H

care in that part of the operation which consisted in taking out the swabs by saying: "I relied on the nurse's count." Before I leave this part of the case, I do not want it to be thought that I am intending to say either that the nurse's count is of no value or that no reliance is to be placed on it by the surgeon. On the contrary, if he omitted to ask the nurse
A if the count were right, on the evidence in this case, I should think that he would be omitting a very necessary precaution, because the result of the count will help him to ascertain if he has missed anything. While to omit the precaution afforded by a count may well be negligent, it does not follow that he fully discharges his duty by merely asking, and being
B told, that the count is right.

I now turn to the evidence in the case. The plaintiff, beyond proving facts necessary to establish damage and putting in answers to interrogatories, called no further evidence. She proved by the interrogatories that the swab had been left in at the operation performed by the
C defendant, and that was enough to call upon him for an explanation. Here, as I understand that the court is not unanimous on the point, I think it right to say that, in my opinion, the doctrine of *res ipsa loquitur* does apply in such a case as this, at least to the extent I mention below. The surgeon is in command of the operation. It is for him to decide
D what instruments, swabs and the like are to be used, and it is he who^e uses them. The patient, or, if he dies, his representatives, can know nothing about this matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say it is proper, though in particular circum-
E stances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called upon for an explanation. That is, he is called upon to show, not neces-
F sarily why he missed it, but that he exercised due care to prevent its being left there. It is no disparagement of the devoted and frequently
G gratuitous service which the profession of surgery renders to mankind to say that its members may on occasion fall short of the standard of care which they themselves, no less than the law, require, and, if a patient on whom had befallen such a misfortune as we are now considering were not entitled to call upon the surgeon for an explanation, I
H cannot but feel that an unwarranted protection would be given to care-
lessness, such as I do not believe the profession itself would either expect or desire. Mr. Morris, on behalf of the defendant, then made certain submissions:

He [the surgeon] must of course do the best he can. He must make what search
H he can, and search either by sight or by touch.

That seems to me to show that counsel had quite clearly in mind the matter which became all-important in the trial. The search, he says, must be either by sight or by touch. I emphasise this particularly, because, if the case presented for the defendant was, "Before asking the nurse if the count was right, I searched by sight, and I relied on what

I saw," and if there was evidence on which the jury could find that he ought to have searched by touch, then, apart from any question of misdirection, I do not think that the verdict can be disturbed. We are now asked to say, as I understand the case for the appellant: "Yes, but inferentially he must have searched by touch also." On this, all I can say is that, as I understand the evidence, the defendant never attempted to say that he relied on touch, nor to say that he ever touched the particular place where the offending swab was found. It is often possible by skilful, but none the less perfectly fair, advocacy to create in the Court of Appeal an atmosphere entirely different from that which prevailed in the court below. If a litigant has chosen to take up a definite attitude before the jury, and to fight his case on a certain line, he ought not, in my opinion, to be heard to say on appeal: "But, if you scrutinise the evidence, you will find this or that from which something can be inferred, which all along I intended to be part of my case, though perhaps it was never stressed to the jury." From a perusal, I hope both careful and anxious, of the evidence, and from Mr. Morris' frank answers to certain questions I put to him during the hearing of the appeal, I am satisfied that the defendant took up, and intentionally took up, a perfectly clear attitude, and it was this: "I took out all the swabs the clips on which I could see, and I was aware of no others. I relied on what I saw—that is, the clips. Having done that, I put the question to the nurse, and I was entitled to be satisfied by her answer." In other words, his counsel having said that he must search either by sight or by touch, he says: "I searched by sight." I have already commented on the admirable candour of the defendant as a witness, and I cannot avoid the conclusion that the reason why he never said that he searched by touch was that he knew he did not, and that his case as presented to the jury was that he considered it was unnecessary for him to have done so. Let us examine the evidence on this point:

You can see the forceps hanging out?—Yes.

In this case, did you remove all the swabs which you could see?—I did.

Did you remove all the swabs to the tapes of which forceps were attached?—I did.

Did you remove all the swabs of which you were aware?—I did.

He then added that his attention would not be drawn to the fact that a pair of forceps had fallen off. Then he says:

Having removed all the swabs of the presence of which I was aware inside the abdomen, I said to Staff Nurse Ashburner, "Are the swabs correct?" which is the formal way used in the hospital, meaning, can she account for all the swabs used and not used during the operation.

Here I may say that later he said that the falling off from a swab of a forceps is so frequent that he would have no cause to remember it. Then in cross-examination he agreed that the swab was found on the subsequent operation in a position in which he would most likely have placed it as a packing-off swab. Then he is asked:

But, before asking about the count, you had satisfied yourself there was no swab

there, if you had looked round properly ?—I take out all those I can see, that I was aware of.

Later he is asked :

Did you look before you asked [whether the count was correct] ?—I looked in the immediate vicinity of the wound, and took out all the swabs I could see.

A Did you look in the position where the swab was found at the second operation ?—I expect I did. I looked as far as I could see.

Later again he is asked :

You do not look, apart from those that have the forceps hanging on to them ?—Not unless the answer is that the swabs are not correct.

B With the greatest deference, because I know that the court is not agreed on this point, I cannot see any ambiguity or misunderstanding as to the position, nor do I for myself see that Mr. Rowson could have put his case, which all along had been that there was no sufficient search, more clearly to the defendant.

C We now come to the matter which the judge—rightly, as I think—stressed in his summing up, and on which there was so much discussion before us. During the course of the evidence, Mr. Rowson asked :

Would it not be a perfectly simple matter to look inside, to run your hand round and see whether all the swabs had been removed from a place where you put as many as 8 ?

D That, they say, refers to the fact that, in the immediate neighbourhood of the operation, 8 swabs had been used for packing off. The defendant answered that as follows :

E Having got the answer that the swabs are correct, if I am going to look round every nook and cranny, it means I am never going to trust any of my staff in counting the swabs.

He was then asked :

That is not an answer to my question. Would it not be a perfectly simple matter to run your hand round where you had put a number of swabs, such as 8 used as packing, to see that they were all gone ?—Yes. I could make a search. It takes perhaps a minute to search the whole abdomen.

F If you had done that, have you the slightest doubt but what you would have found that swab ?—I think I would have found it.

You would have found it ?—I think I would have found it had I searched for it. Yes.

G Here again I see no reason for supposing that there was any misunderstanding. Mr. Rowson's question was, I think, one which admitted of no doubt as to its meaning. It is true that the defendant added to his answer, "It takes perhaps a minute to search the whole abdomen," which would have had great force had this swab been found in some part of the abdomen remote from the site of the operation, but he was being asked—and I do not doubt he understood it—about a search in the immediate neighbourhood of the operation, where the 8 packing swabs were put. This confirms my opinion that it was never any part of the defendant's case that he searched by touch at all. He searched by sight, and, if he did not see a clip, he assumed there was no swab, and then, getting an affirmative answer from the nurse, he was satisfied.

However, a jury would not, I think, be entitled to assume that something more than a search by sight was necessary, unless there was evidence that it was. I have already said that I do not think that *James v. Dunlop* (5) lays down as a matter of law that a search by touch is always necessary, though it may be that there are few cases in which it is not. I need not, however, discuss this further, because, in my opinion, there was quite enough in the evidence given by both Mr. Bryce and Professor Morley to warrant the jury finding that the search spoken of by the surgeon was not enough. In the course of the evidence, the judge asked Mr. Bryce :

I suppose it is not asking too much that the surgeon should carry in his mind where he has put the swabs for packing. He will know roughly where he has put them ?—Yes.

Is there any difficulty in asking him to feel with his hand to make sure all the 8 swabs he knows he has put in have been removed ?—No, my Lord. He could feel. He may have put more than one swab in the same position . . .

There is no difficulty in feeling round to make sure all the swabs have gone ?—He might feel round and still miss a swab.

He might. I am asking if there is any difficulty in feeling ?—Not in the immediate vicinity of the wound.

They are all swabs that have forceps attached. That may be a sort of trap, because, if it fell off, that is a thing to bear in mind ?—Yes.

Therefore it is not safe to say : “I have removed everything that has a pair of forceps attached to it. I know something might have fallen off. One might have gone, and, therefore, I will just have a feel to make sure.” There is no difficulty about that ?—No.

Then, says the judge :

That is the point of this case, or may be, you know.

With that I respectfully agree. If there had been any ambiguity up to this point, though I do not think that there was any more than the judge did, there would have been none after it, and, as will be seen hereafter, the defendant was recalled later. Then Professor Morley is asked :

It is not unusual for the surgeon to run his hand round where he has put the packing swabs when he has removed them ?—No. I should always do it automatically in the process of removing them . . . It would be my usual practice in removing the swab to feel in the immediate neighbourhood.

It would add too much to the length of this judgment to quote all the professor's evidence on this. I content myself with calling attention to his further answers. In view of the fact that the defendant was recalled, it is, however, important to observe what took place in the professor's re-examination. That part of the evidence of the professor was read where it was said, and is still said, that he admitted he had made no search by touch, and that, if he had, he would have found the swab, and the judge emphasised that Mr. Rowson had asked him about a search in the neighbourhood of the wound, and had not suggested a search of the whole abdomen, those words being introduced by the defendant. If the defendant, therefore, had anything to clear up, he had ample opportunity to do it when he was recalled. He was recalled for this reason. The evidence of the surgeons was that the way to remove a swab was to

put the hand down to the place where the swab was and remove it, not merely to pull it out by pulling the clip attached to the tape, and they said that in so doing they would automatically feel round the place where the swab was, and so would feel if there was anything else there. The defendant was recalled to say that he did not pull on the tapes but put
A his hand in, but again he never suggested that he felt round, or that, by putting his hand in, he must have detected anything else there. Moreover, what evidence is there that he ever put his hand in the place where this swab was found except that he put the swab in before starting the operation? The whole difficulty, as it seems to me, is that admittedly
B there was no clip attached to it when it was found. Either, therefore, the clip had become detached during the operation, or by some mischance he put in a swab to which a clip had not been attached. If, therefore, his search was conducted by sight only, his sight being guided by clips, it seems to me to follow that he would never have put his hand
C there at all. There is, of course, the hypothesis that by accident two swabs were placed there, being in some way folded together, and that he got one out but not the other. One cannot speculate on these things, and nowhere does the defendant say that he did remove one from under the liver. It may well be that after the lapse of time he cannot remember,
D and, being an honest witness, will not say that he did. In fact, however, there is no evidence that he did, nor has he ever said or suggested that he relied on touch at all. It was said during the argument before us that the defendant must have removed a swab from this place, and that it was so near the seat of the operation that no careful surgeon could
E have failed to have felt there. For myself, I cannot be influenced by any such consideration. It is just momentary lapses that give rise to these actions, and, if no one ever forgot to do that which he ought, we shall have no actions for negligence in these courts. In my opinion, there was enough evidence upon which the jury could find that the
F defendant did not make such a search as the evidence showed the nature of the case required, or, put in another way, that the defendant had given no sufficient explanation as to why the swab was not removed.

I have now to consider the summing up. Here, again, one must take the charge as a whole, and I do not think that, when the whole is read,
G there is any foundation for saying that the judge led the jury to think that a surgeon was bound in all events to remove every swab. I think that he made it clear that the defendant was only liable if the failure was due to a want of reasonable care. He distinctly and emphatically told the jury that it was their task to say what was the proper thing,
H bearing in mind all the evidence given, and that they were then to say if they were satisfied that there was a want of care. I quite agree that once or twice he uses expressions such as: "Doctors have to make sure that they have all the swabs out." However, that must be taken with the rest of what he said, and several times he emphasised that the question was the exercise of reasonable care. He told them in terms that, if,

notwithstanding a reasonable search, the swab remained in the body, the defendant would not be liable. He did emphasise—and, in the view I take of the evidence, I think that he was right to do so—that the defendant never suggested that he did any feeling round. The part of the summing up most criticised by Mr. Morris was that in which the judge is said to have dealt with the defendant's evidence as though he had made an admission of negligence. What I think, fairly read, that the judge meant was that the defendant had admitted that he made no search by touch, and, for reasons which I hope I need not repeat, I entirely agree that the defendant did make such an admission. The judge did not suggest, and nor do I, that the defendant was admitting that he had been negligent, but, if, in his evidence, the defendant agrees that he did not do something which, on the evidence, he ought to have done, I see nothing wrong in the judge saying, "Well, is not the defendant convicted on his own evidence?" provided, of course, that he has made it clear to the jury, as I think he did, that the jury must be satisfied that it was part of his duty to do that which he says he did not. Has there ever been, I wonder, a summing up of a long and difficult case, by even one of the greatest masters of our law, which does not contain some sentence which, taken by itself, is open to criticism? The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side, and I can find nothing in this summing up which can fairly be said to be a misdirection. It was said that the judge read passages from *James v. Dunlop* (5), and put them to the jury as matters of law, when that case decided only questions of fact. Here again I have already said that I do think that both SCRUTTON and GREER, L.JJ., did state in their judgments matters which were of general application to a surgeon's duty. True it is that GREER, L.J., said that what he was saying was only common sense, but, for all that, it may be good law as well.

I have only to add that, as it was agreed that a question relating to the nurse should be put to the jury, in circumstances I need not detail, I do not understand the view of the judge—nor, indeed, that of the plaintiff's counsel—that there was no evidence against her. As it was her duty to count, and as the count *ex hypothesi* was wrong, I should have thought that there was abundant—indeed, overwhelming—evidence against her. However, this will not help the defendant. If it be said that the nurse who was asked if the count were right was not the only one who counted, but that some swabs were, or may have been, counted by another nurse, it would follow that an assurance from one only that all was right was of no value at all. I need hardly say that, knowing that SCOTT and MACKINNON, L.JJ., are of a different opinion, I state my own conclusions with diffidence, but, having formed a clear opinion, wrong though it may be, I feel bound to adhere to it, and, in my judgment, the appeal should be dismissed.

SCOTT, L.J. : I should have added at the end of my judgment, in view of the terms of R.S.C., Ord. 39, r. 6, that my reason for saying there must be a new trial is that, in my opinion, the misdirection occasioned a substantial miscarriage of justice. There must be a new trial. The costs of the appeal and the re-trial will depend on the result of the new trial.

Appeal allowed and new trial ordered. Leave to appeal to the House of Lords.

Solicitors : *Hempsons* (for the appellant) ; *Gibson & Weldon*, agents for *Whittle, Robinson & Bailey*, Manchester (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

NATIONAL ELECTRIC THEATRES, LTD. v. HUDGELL.

[CHANCERY DIVISION (Morton, J.), **February 10, 13, 14, 1939.**]

Landlord and Tenant—Improvements—Business premises—Demolition of all buildings demised and rebuilding—Declaratory judgment—Jurisdiction of Chancery Division—Landlord and Tenant Act, 1927, (c. 36), ss. 1, 2, 3, 16, 17, 21.

By two leases made in 1911 and 1918, certain pieces of land, and the buildings thereon, known as the The Grand Hall, Finchley, were demised for 99 years from 1910. Each of the leases contained covenants on the part of the lessees that they would not, without the lessors' written consent, use or permit to be used the holding for any other purpose than as a hall duly licensed for entertainments or meetings, but such consent was not to be unreasonably withheld. The lease of 1918 contained a further covenant that the lessees would not erect or permit to be erected anything in the south-west corner of the land demised in such a way as to prevent persons having access to the windows of a shop on the adjoining holding or so as to interfere with access and use of light and air to and for such windows. The premises, down to 1938, had been licensed as a cinematograph theatre, and were used accordingly, but in that year the Middlesex County Council refused to renew the licences for the building, as it then stood, for any form of public entertainment. The plaintiffs, the assignees of the two leases, desired to demolish the existing premises and erect upon the holding a row of shops with flats over them, and sought a declaration that the proposed works were an improvement within the meaning of the Landlord and Tenant Act, 1927, s. 3 (1), and a declaration under sect. 3 (2) that the proposed works "were reasonable and suitable to the character of the holding." It was admitted that the proposed works would enable the holding to be used profitably, and would greatly increase its value for letting purposes and otherwise. The defendant, the owner of the fee simple of the property comprised in the leases, was opposed to the scheme :—

HELD : (i) the right to access and use of light of the shop on the adjoining holding contained in the wording of the covenant and the context could not be limited to certain of the windows. The *prima facie* meaning of the words "the windows of the shop and premises belonging to the lessors" applied to all the windows.

(ii) the improvements contemplated by the Landlord and Tenant Act, 1927, s. 3 (1), include demolishing an existing building and rebuilding on the site, and the proposed works were an improvement within the meaning of that subsection.

(iii) a declaration that the proposed works "were reasonable and suitable to the character of the holding," could not be granted as the facts were not agreed. The determination of this question had been given by the legislature to certain defined tribunals, of which the Chancery Division of the High Court was not one, and it was for such a tribunal to decide the matter.

[EDITORIAL NOTE.] This is the first decision upon what is an improvement within the Landlord and Tenant Act, 1927, s. 3. The matter is one of great importance, since the Act gives a tenant the right to compensation in respect of such improvements at the termination of the tenancy. In the present case, the suggested improvement amounted to the demolition of the demised premises and the rebuilding of quite different premises upon the site. It is easy to envisage circumstances in which a site could thus be covered by buildings of a value out of all proportion to the value of the demised premises. On the other hand, by reason of the requirements of the local authority, the premises here proposed to be demolished had become useless to the present or any other tenant, and the only way to use the site profitably was by rebuilding. Although complete rebuilding seems a very wide construction to put upon the term "improvement," such a construction was, upon the facts, reasonable enough in this case, and, upon a full consideration of all the statutory provisions, the judge has found it possible to adopt that construction. Certain phrases in the statute clearly show that there must be a limit to the liability thus put upon the landlord, and, in view of these provisions, the result will, no doubt, not be an impossible one from the landlord's point of view. The present proceedings include a point on the practice relating to declaratory judgments, but upon this the law is taken as well settled, and is not discussed.

AS TO IMPROVEMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 289-292, paras. 327-329; and FOR CASES, see DIGEST, Supp., Landlord and Tenant, Nos. 2306a-2306r, 2995b-2995f.]

Cases referred to :

- (1) *Woolworth (F. W.) & Co., Ltd. v. Lambert*, [1937] Ch. 37; [1936] 2 All E.R. 1523; Digest Supp.; 155 L.T. 236.
- (2) *Lambert v. Woolworth (F. W.) & Co., Ltd. (No. 2)*, [1938] Ch. 883; [1938] 2 All E.R. 664; Digest Supp.; 107 L.J.K.B. 554; 159 L.T. 317.

ACTION by a company against the owner in fee simple of their leasehold premises. The company intended to demolish the existing building and erecting on the site premises of a completely different character, which would greatly increase the site's letting value. It was contended that this operation would be an improvement within the Landlord and Tenant Act, 1927, s. 3. The landlord opposed the scheme.

Cyril Radcliffe, K.C., and *G. A. Rink* for the plaintiff company.

D. Ll. Jenkins, K.C., and *A. F. Maurice Berkeley* for the defendant.

Radcliffe, K.C. : A substantial alteration of an existing building by way of improvement, while retaining the existing structure, is not the limit of what is meant by improvement in the Act. It is not tinkering with or embellishing existing structures which is alone in contemplation. *Woolworth (F. W.) & Co., Ltd. v. Lambert* (1) dealt with subject-matter not quite the same as this. Judging from the evidence, this is the best and most advantageous use of the site.

Jenkins, K.C. : These works are not improvements within the meaning of sect. 3 of the Act of 1927. An improvement is a process which, when

applied to a thing, renders that thing better than it was before. The continuity of the subject-matter is an essential thing if it is to be an improvement. It must continue to exist, and it must be better than it was before. This transaction can be an improvement only if we regard it as merely a question of improving the value of this piece of leasehold property, the site then being regarded as the subject-matter, and this is not an improvement within the meaning of Part I of the Act. If the plaintiffs are right, there is no limit to the improvements which the tenant can carry out and force upon the landlord at the end of the term. This Act was not designed to enable a tenant to launch out into some completely new business, which cannot be said to be embraced by "reasonable improvements." It would be an entirely new departure. [Counsel referred to *Lambert v. Woolworth (F. W.) & Co., Ltd. (No. 2) (2).*]

Radcliffe, K.C., in reply: The subject-matter is the holding. No one is proposing to destroy it. An improvement is a work which, when executed, makes a net addition to the value of the holding as a whole. It is not necessary for a subsequent tenant, in order to get the compensation, to carry on the trade or business in respect of which the improvement was made.

D MORTON, J.: By two leases dated May 12, 1911, and Dec. 5, 1918, respectively, certain pieces of land, with the buildings thereon, which are now known as The Grand Hall, Finchley, in the county of Middlesex, were demised to Ashby's New Hall, Ltd., for a term of 99 years from **E** June 24, 1910. Each of these leases contained covenants on the part of the lessees that they would not without the lessors' written consent use or permit to be used the holding for any other purpose than as a hall duly licensed for entertainments or meetings, but such consent was not to be unreasonably withheld. The lease of Dec. 5, 1918, contained a further covenant that the lessees would not erect or permit **F** to be erected anything on or near the south-west corner of the land thereby demised in such a way as to prevent any person or persons having access to the windows of the shop and premises belonging to the lessors adjoining the demised land on the south side thereof, or so **G** as to interfere with the access and use of light and air to and for such windows.

The plaintiffs in this action, National Electric Theatres, Ltd., are the assignees of these two leases by virtue of an assignment dated May 2, 1921. The defendant, Mrs. Fanny Hudgell, is at present the **H** owner of the fee simple of the property comprised in these leases, subject to the term granted by the leases. The plaintiffs in this action ask for three declarations, and the issues which arise with regard to the first of these declarations are, I think, not only important to the parties to the action, but also of general public importance to landlords and tenants. The three declarations claimed are as follow. First of all,

the plaintiffs claim that certain works which they propose to carry out on the demised premises

... will constitute (a) an improvement within the meaning of the Landlord and Tenant Act, 1927, s. 3.

I may say at once that these works involve the demolition of the cinematograph theatre, known as The Grand Hall, which at present stands on the demised land, and the erection upon the demised land of a row of shops with flats over them. That raises an interesting question whether anything which involves the entire demolition of all the buildings upon the site can be an improvement within the meaning of the Landlord and Tenant Act, 1927. The second declaration asked for is a declaration that the proposed work will constitute an improvement which is reasonable and suitable to the character of the holding, within the meaning of sect. 3 (1) of the Act. Thirdly, the plaintiffs claim a declaration with regard to the true construction of the covenant in the lease of 1918 which I have just read. They claim a declaration that, on the true construction of that lease, the windows of No. 14, Market Parade—the adjacent premises of the lessors—referred to in the covenant against certain erections on or near the south-west corner of the land demised, are only the windows facing High Road, Finchley (or some of such windows), and do not include any of the windows at the rear of No. 14, Market Parade, aforesaid.

I propose first to deal with the question of construction which arises under the third claim, because that is an isolated part of the case. The position of the premises is as follows. The land demised by the lease of Dec. 5, 1918, is a piece of land having a frontage of 60 ft. to the Great North Road and extending back to a depth of 125 ft. on to a right of way at the back of the premises. The Great North Road lies on the west frontage of this piece of land. Immediately to the south of the demised piece of land there is Marshall's fishmonger's shop, which has a shop frontage projecting into the street and a window in that shop front which faces partly on to the Great North Road and partly northwards across the front of The Grand Hall. There are other windows in Marshall's premises. There are windows on the upper floors facing on to the Great North Road, and there are also windows towards the rear of the premises, three of which face north across the demised piece of land and three of which face east. The covenant refers to the windows of the shop and premises belonging to the lessors adjoining the demised land on the south side thereof—that is, Marshall's premises—and, *prima facie*, there is no limit upon the windows in these premises, which are referred to in the covenant.

For the plaintiffs, it is contended that the meaning of the words "the windows of the shop and premises" is limited by the context, and, if that is so, then the meaning of the subsequent words "such windows," which clearly refer again to the same windows, must also

be limited by the context. They rely upon these portions of the covenant—first of all, the words with which the covenant begins :

... and also will not erect or permit to be erected anything on or near the south-west corner of the said land hereby demised ...

A They say that the words “the south-west corner” indicate that the windows which are intended to be protected by the covenant are only the windows facing High Road, Finchley. Then they rely also, in conjunction with those words, upon the words :

... in such a way as to prevent any person or persons having access to the windows of the shop and premises belonging to the lessors adjoining the demised land on the south-west side thereof.

B They point out that the only way in which a building on the demised land could prevent access to the windows on the adjoining land would be if it were to come right out level with the shop front, and thereby prevent access by the public to the windows of the shop front, which faces north along the Great North Road. They also rely upon the sub-

C sequent words “or so as to interfere with the access and use of light and air to and for such windows,” and they point out that, if a building is erected at or near the south-west corner of the land demised, the only windows of which the access of light and air would be interfered with

D by such a building would be the windows to which I have referred on the Great North Road side of the building. I think that there is some force in these arguments, but I have come to the conclusion that the context in this covenant is not sufficient to enable me to limit what would be the *prima facie* meaning of the words “the windows of the shop and premises belonging to the lessors,” words which would themselves appear

E to apply naturally to all the windows. It seems to me that, if a building were to be erected, let me say, for example, facing the Great North Road, level with the line of frontage of Marshall’s premises, and extending, that is to say, 20 ft. along the Great North Road for 50 ft. back, such a

F building would be a building on or near the south-west corner of the land, and such a building would interfere with the access to the windows to which I referred, facing north along the Great North Road, and might also interfere with the access and use of light and air to the windows in the back part of the premises, to which I have referred. I cannot feel that the

G words upon which the plaintiffs rely are sufficiently strong to enable me to put the limitation upon such a phrase, which in itself is so clear, as “the windows of the shop and premises.” For those reasons, I do not propose to make the third declaration for which the plaintiffs ask.

H I now turn to the first and second declarations, and, in dealing with the first one, I propose to read certain paragraphs of the statement of claim which are admitted. It is admitted that the plaintiffs are the assigns of the leases to which I have referred, and that the defendant is the present owner of the fee simple, subject to the terms granted by the leases. Para. 3 of the statement of claim is as follows :

The holding [the premises demised by the two leases] was at all material times down to Mar. 31, 1938, duly licensed as a cinematograph theatre, and was used

accordingly. On that date the music and cinematograph licences in respect of the holding expired, and the Middlesex County Council has refused to renew the same and has intimated that it would not hereafter license the present buildings on the holding for any form of public entertainment. Further, the Middlesex County Council would refuse to license, for any form of public entertainment, any building on the holding which did not leave a very substantial part of the holding vacant as passages on to which exits from such building would open.

Pausing there for a moment, I observe that that which is admitted in the defence shows that the building cannot be used as a cinematograph theatre, or for any form of public entertainment whatsoever, unless and until it is so altered or rebuilt that satisfactory exits can be provided. The present building I do not think it is unfair to describe as a derelict building, as it stands. I omit para. 4, which deals with another part of the case. Para. 5 is as follows :

In the circumstances, the plaintiffs are desirous of carrying out the following works (hereinafter called "the proposed works") on the holding namely the demolition of the existing buildings on the holding and the erection of new buildings containing lock-up shops with residential flats over them, in accordance with a plan and specification which were submitted to the defendant on or about Oct. 23, 1937, and Nov. 1, 1937. The said new buildings will (according to the said plan and specification) be of the same general type as those in the neighbourhood of the holding, and be in all respects of at least equal quality with such neighbouring buildings. The proposed works would enable the holding to be used profitably, and would forthwith greatly increase the value of the holding for letting purposes and otherwise. Further, the proposed works are of such a nature as to be calculated to add to the letting value of the holding at the termination of the said term. The defendant does not own any other property in the neighbourhood which could be affected by the proposed works.

Thus the plaintiffs' holding under the two leases is a piece of land having a frontage of 120 ft. for each piece, with a frontage of 60 ft. to the Great North Road and a depth of 125 ft., with a cinematograph theatre upon it which cannot now be used for any form of public entertainment. If the proposed works are carried out, the holding will consist of the same piece of land, having upon it a row of new shops, with residential flats over them. It is admitted that the works to be carried out would enable the holding to be used profitably, and would forthwith greatly increase the value of the holding for letting purposes and otherwise, and that they are works which are calculated to add to the letting value of the holding at the termination of the term. All these allegations are admitted. So far, the change, to use for the moment a neutral word, is clearly for the benefit of the tenant, and it seems equally clear that the landlord's rent would be more amply secured throughout the term. It seems to me that these works would be an improvement of the holding in any ordinary use of the word "improvement." Supposing, for example, the plaintiffs were to say : "We have pulled down the cinematograph theatre, which is no longer any use for this purpose. We have substituted for that a row of shops with residential flats over them. The result is greatly to increase the letting value of the holding, and to increase also the letting value of the holding at the end of the term." It would surely be a natural use of the words if the plaintiffs said : "We have carried out an improvement on our holding." To take a still stronger example, supposing that the holding consisted of a piece of land with a

row of extremely badly built and possibly insanitary shops, and that the lessees of that holding pulled down those shops and erected a row of modern well-built shops, with every sanitary convenience, that would surely, in the ordinary use of the word "improvement," be an improvement of the holding.

- A However, I must turn to the Act to see whether what is proposed to be done is an improvement within the meaning of sect. 3. Part I of the Act is headed :

Compensation for improvements and goodwill on the termination of tenancies of business premises.

- B Sect. 1 (1) provides as follows :

Subject to the provisions of this part of this Act, a tenant of a holding to which this part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . be entitled, at the termination of the tenancy, on quitting his holding, to be paid by his landlord compensation in respect of any improvement (including the erection of any building) on his holding made by him or his predecessors in title, not being a trade or other fixture which the tenant is by law entitled to remove, which at the termination of the tenancy adds to the letting value of the holding.

- C Pausing there, I think that the words "including the erection of any building" are of some importance, though they are far from being conclusive. It is possible to read these words as being limited to the erection of a building on some part of the holding which is vacant, but it is also possible to read them as applying to the erection of a building in place of a building which previously stood on the holding. I shall have to turn shortly to the provisions of sect. 17, in order to see what is a holding to which this part of the Act applies, but I will continue sect. 1 (1) for the moment :

- E Provided that the sum to be paid as compensation for any improvement shall not exceed (a) the net addition to the value of the holding as a whole which may be determined to be the direct result of the improvement. . . .

- As regards these words, it would appear that the Act is dealing with net additions to the value, and is contemplating that the works to be carried out might in some respects be detrimental, and in other respects beneficial, to the holding, but compensation is to be paid to a sum not exceeding the net addition to the value.* Then the section continues :

- F . . . or (b) the reasonable cost of carrying out the improvement at the termination of the tenancy, subject to a deduction of an amount equal to the cost (if any) of putting the works constituting the improvement into a reasonable state of repair, except so far as such cost is covered by the liability of the tenant under any covenant or agreement as to the repair of the premises.

- G I have read and carefully considered subsects. (2) and (3), but I do not think that they throw any light on the question which I have to determine. I think that, before passing to sect. 2, I should turn to sect. 17 in order to see with what this part of the Act is dealing. Sect. 17 (1) provides as follows :

The holdings to which this part of this Act applies are any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on thereat any trade or business, and not being agricultural holdings within the meaning of the Agricultural Holdings Act, 1923.

It is not disputed that the holding which is relevant in the present case is a holding to which Part I of the Act applies. The holding is one used wholly for business purposes. The wording of the subsection is a little curious, especially if one reads it in conjunction with sect. 16. The subsection starts, "The holdings to which this part of this Act applies are any premises," so that at that stage the legislature appears to be treating holdings and premises as being synonymous in meaning. On the other hand, one reads in sect. 16 :

Where the landlord is liable to pay any taxes (otherwise than by deduction from rent) or rates (including water rate) in respect of any premises comprised in a holding. . . .

I think that the juxtaposition of the two phrases is curious, but it does not lead me to the conclusion that, when the word "premises" is used in the Act, it necessarily follows that the legislature is dealing at that point only with the building. Sect. 2 begins as follows :

A tenant shall not be entitled to compensation under this Part of this Act. . . .

Then it sets out certain circumstances in which a tenant is not to be entitled to compensation. I need not read subsect. (1). Subsect. (2) provides as follows :

Where an offer of the renewal of a tenancy by the landlord under this section is accepted by the tenant, the rent fixed by the tribunal shall be the rent which in the opinion of the tribunal a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises, having regard to the terms of the lease, but irrespective of the value attributable to the improvement in respect of which compensation would have been payable.

I can quite see that a tribunal endeavouring to apply that subsection in the present case—indeed, in many cases—might have a very difficult task to perform, but I cannot find that that subsection leads me to the conclusion at which Mr. Jenkins, for the defendant, would have me arrive. I do not think that there is contained in that subsection any indication that an improvement cannot consist of a demolition or rebuilding, or any indication that, if business premises can be demolished and rebuilt, they must be used for the purposes of the same business, which is another of Mr. Jenkins' contentions. I do not think that I need read subsect. (3).

I now turn to sect. 3, which is the section I have to construe. Sect. 3 (1) provides as follows :

Where a tenant of a holding to which this part of this Act applies proposes to make an improvement on his holding, he shall serve on his landlord notice of his intention to make such improvement, together with a specification and plan showing the proposed improvement and the part of the existing premises affected thereby, and if the landlord, within 3 months after the service of the notice, serves on the tenant notice of objection, the tenant may, in the prescribed manner, apply to the tribunal, and the tribunal may, after ascertaining that notice of such intention has been served upon any superior landlords interested and after giving such persons an opportunity of being heard, if satisfied that the improvement (a) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy ; and (b) is reasonable and suitable to the character thereof ; and (c) will not diminish the value of any other property belonging to the same landlord, or to any superior landlord from whom the immediate landlord of the tenant

directly or indirectly holds, and after making such modifications (if any) in the specification or plan as the tribunal thinks fit, or imposing such other conditions as the tribunal may think reasonable, certify in the prescribed manner that the improvement is a proper improvement.

Then there follows a proviso, which is, I think, not material. The parties in this case have not thought fit to go through this procedure in regard
 A to the improvements which they were contemplating in 1937. They have come to me asking for the two declarations which I have mentioned, and, as regards declaration (a), it is, I think, a question of construction, and the parties were entitled to come to the court and say: "Please decide whether this is an improvement within the meaning of the section,
 B because, of course, if the court holds that it is not, there will be no use in going through the complicated procedure which is described in the rest of the section."

The first comment which I have to make on this subsection with regard to the first declaration asked for is that that with which we are
 C dealing is an improvement on the holding. It is not an improvement off the holding. It is, as I see it, work which is contemplated to be carried out upon the holding, and I do not think that it can refer only to work upon buildings. Otherwise the erection of a new building upon an unoccupied piece of land could not be an improvement, and I think
 D that it is clearly intended that the erection of a new building on an unoccupied part of the land may be an improvement. Then there is the phrase: "and plan showing the proposed improvement and the part of the existing premises affected thereby." Mr. Jenkins has relied strongly upon this as showing that the improvements contemplated
 E cannot extend to the demolition of all the buildings on the land demised. I agree that it is to some extent an indication of that, but I do not myself feel that it is inconsistent with the view that improvements can include demolition and rebuilding. You might, for example, have a number of buildings upon one plot which you might desire to demolish, and might
 F send to the landlord a plan showing the part of the premises you were going to demolish and what you were going to erect in place of them.

The next subsection, subsect. (2), provides as follows:

In considering whether the improvement is reasonable and suitable to the character of the holding, the tribunal shall have regard to any evidence brought
 G before it by the landlord or any superior landlord (but not any other person) that the improvement is calculated to injure the amenity or convenience of the neighbourhood.

Mr. Radcliffe, for the plaintiffs, relies upon that as showing that changes of a substantial character are clearly contemplated by the section, and it appears from subsect. (1) (b), which I have already read, that there
 H may be works which are improvements but are not reasonable and suitable to the character of the neighbourhood—again, I think, an indication that substantial works are contemplated by the section. By subsect. (4) it is provided as follows:

Where no such notice of objection as aforesaid to a proposed improvement has been served within the time allowed by this section, or where the tribunal has

certified an improvement to be a proper improvement, it shall be lawful for the tenant as against the immediate and any superior landlord to execute the improvement according to the plan and specification served on the landlord, or according to such plan and specification as modified by the tribunal or by agreement between the tenant and the landlord or landlords affected, anything in any lease of the premises to the contrary notwithstanding.

Thus, in appropriate circumstances, any provisions in the lease prohibiting such works are swept away. A

I shall refer later to another subsection of sect. 17, but for the moment I propose to turn to sect. 21 in order to see what is the tribunal which is referred to in sect. 3. Sect. 21 (1) provides as follows :

The tribunal for the purposes of Part I of this Act shall be the county court within the district of which the premises or any part thereof are situated acting under and in accordance with this section : Provided that (a) if before commencing proceedings in the county court the claimant or applicant and all persons affected agree that the claim or application should be heard by the High Court ; or (b) if on an application being made to the High Court within the prescribed time the matter is transferred to the High Court in accordance with and subject to the provisions of the County Courts Act, 1888, s. 126, the High Court shall, in respect of the matter, be the tribunal for the purposes of Part I of this Act. B
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Then follow certain provisions in regard to the matter being referred to a referee for inquiry and report. By subsect. (7) it is provided as follows :

Rules of the Supreme Court may be made regulating proceedings under this Act commenced in or transferred to the High Court, and those rules may provide that on the hearing of a summons for directions, the court or a judge thereof may, without any application for the purpose being made by any party, order the matter to be referred for inquiry and report to such one of the said panel of referees as may be selected by the court or a judge thereof, subject to such directions (if any) as the court or judge may think fit to give. . . . D

Then there is a provision which I need not read. The rules in question are contained in R.S.C., Ord. 53D, and provide, in a manner which I need not describe in detail, that the matters transferred to the High Court under this section are to be heard in a particular manner by the King's Bench Division. E

I now turn to sect. 17 (4), which has been strongly relied upon by Mr. F Jenkins, and which provides as follows :

In the case of premises used partly for purposes of a trade or business and partly for other purposes, this part of this Act shall apply to improvements only if and so far as they are improvements in relation to the trade or business.

That subsection does not apply to the premises in question in the present case, because they are used wholly for business purposes. Mr. Jenkins relies upon the subsection, however, as indicating that the Act has in mind alterations of premises which will still result in the same business being carried on throughout. This subsection does not lead me to any such conclusion. I think that the subsection is not drawing distinctions between one part or another, but is contrasting the improvements in relation to the trade or business for which the premises are partly used and improvements in relation to the other purposes for which the premises are used, and is applying the Act only to a form of holding. I do not think that it throws any real light on the problem which I have to G
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consider. For my part, I see no reason for reading into the words "an improvement on the holding" any condition that some part of the original bricks and mortar of the buildings upon the holding must be retained. I find difficulty in seeing what could be said if that were the true meaning of the words. For example, would it be possible for a

A man first of all to improve a cracked wall in a building by replacing it with a new wall, then to treat each of the other three walls, which in turn became cracked, in the same way, then to replace the roof, which had become defective, and finally to replace the foundations, and instal new drainage? By these means he would have carried out, I should have

B thought, a series of improvements which would have the result in the end of entirely replacing by something quite new that which was there. It appears to me that, in the ordinary meaning of the words, an improvement would cover what is intended in the present case. I cannot find anything in the Act which limits it, nor can I find in the Act the other

C limitation suggested by Mr. Jenkins—namely, that, if an improvement does cover a demolition and rebuilding when you are dealing with business premises, it must be a demolition and rebuilding for the purpose of the same business. That would be a most important limitation, and, if it had been intended by the legislature, I think that it would have

D been set out in the Act in plain terms. I do not find anything in the sections to which I have referred, or in the other portions of the Act, to lead me to the conclusion that that limitation exists.

Mr. Jenkins points out that the construction of the Act for which the plaintiffs contend may lead to grave hardship. For instance, an

E investor might invest a small sum in a comparatively modest property, which was subject to a lease, and the lessee might pull down this small property and erect, for example, an expensive block of shops with flats over it and thereby impose upon the landlord against his will an obligation to pay a very substantial sum by way of compensation at the end of

F the lease. That might be the result of the Act in certain cases, but I have simply to interpret the Act as it stands. Further, there is a safeguard inserted in sect. 3 itself, because the improvement cannot be carried out under the section unless the tribunal is satisfied that it is reasonable and suitable to the character of the holding. I do not propose

G to express any view upon the construction of the word "reasonable," or on the construction of the words "suitable to the character of the holding," for reasons which I shall shortly state, but, at any rate, there is this same safeguard for a landlord. For the reasons which I have given, I propose to declare that the proposed works will constitute an

H improvement within the meaning of the Landlord and Tenant Act, 1927, s. 3. I should add, before I pass to the second declaration, that counsel have not been able to refer me to any decision on the point which I have had to determine. I have been referred to certain observations of the Court of Appeal in *F. W. Woolworth & Co., Ltd. v. Lambert* (1) and in *Lambert v. F. W. Woolworth & Co., Ltd. (No. 2)* (2), but the Court

of Appeal was dealing in each of those cases with a very different subject-matter—namely, the construction of sect. 19 (2) of the Act. This is a section by which, in certain types of leases containing a certain type of covenant, a proviso is deemed to be inserted in a lease. I cannot find that the decisions upon that part of the Act are of any real assistance to me in the task which I have to perform, directed, as they are, to some different subject-matter. A

I now come to the second claim. The plaintiffs ask me to declare that the proposed works will constitute an improvement which is reasonable and suitable to the character of the holding, within the meaning of sect. 3 (1) of the Act. In the course of Mr. Radcliffe's opening, I expressed doubts as to whether or not I could properly determine the question raised by this claim, and these doubts increased in the course of the evidence which was called on the first day of the hearing. This issue seemed to me to involve the determination of questions of fact, as to which there was a serious dispute between the parties. The plaintiffs allege in para. 4 of the statement of claim : B

The said present buildings on the holding cannot be used for any purpose which would produce a reasonable income after the payment of rent and all other outgoings. Alternatively, if the said buildings can be used for any income-producing purpose, the net income which would (after paying all outgoings) result from such use would be very much smaller than the net income which could be obtained (after paying all outgoings, and paying or making a reasonable allowance for interest on the expenditure to be incurred) if the said buildings were demolished and the buildings hereinafter referred to were erected in their place. The holding is so small that if any new building were erected on the space remaining after leaving vacant such passages as are referred to in para. 3 hereof, such building would not be big enough to enable it to be used, at a reasonable profit, for entertainments or meetings. C

By para. 2 of the defence, the defendant denies each and every one of these allegations, so that, before I could determine the issue raised by this second claim, I should have to arrive at a conclusion on these disputed questions of fact, and I should then have to consider whether or not, in the light of these facts, the improvement was reasonable and suitable to the character of the holding. That is a task which has been given by the legislature to certain defined tribunals, of which the Chancery Division of the High Court of Justice is not one. I think that, if I assumed jurisdiction, I should at once be faced with a difficulty. I would proceed, in determining the question of fact, or of mixed fact and construction, to take into account the matters which are referred to in sect. 3 (2). The fact is that, if I embarked upon the task of deciding these issues at all, I should really be deciding a hypothetical question. I should have to assume, first of all, that notice of his intention to make the improvement had been served by the tenant on the landlord. That had not been done in the case of the improvements which I am considering. Then I should have to assume that the landlord had objected to these improvements. Then I should have to assume that I was the tribunal to which was allotted the task of deciding the matter, and that would not be the fact. The court has always set its face against deciding hypothetical questions, and I decline to answer this question. D
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H

I realise that, in endeavouring to bring the matter before the court, the parties were trying to save delay and expense, and I should have been glad if I could have seen my way to assist them by deciding the second point, but I think that it would be wrong to do so. The position is quite different in regard to the first declaration, when, on agreed facts, I am asked to decide whether or not certain works are an improvement within sect. 3. The decision of such a question might well be a necessary preliminary, or a convenient preliminary, to the taking by the tenant of the steps which are described in sect. 3.

As regards the second question, the facts are not agreed, and I do not know what principle I ought to apply to the decision of the question, or whether I ought to treat myself, on the series of assumptions I mentioned, as being in the place of the tribunal selected by the Act to determine it. For these reasons, I do not propose to make the declaration which is asked for in para. 1 (b) of the claim.

Solicitors: *W. G. R. Saunders* (for the plaintiffs); *Merton Jones, Lewsey & Jefferies* (for the defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

D

colled. *Re SWORDS.* [1952] 2 All E.R. 231. **ORROCKS, TAYLOR v. KERSHAW.**

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **January 13, 16, 17, 18, February 16, 1939.**]

Executors—Probate—Grant—Omissions from will—Omission altering sense of what remains.

The testatrix by her will devised and bequeathed the residue of her estate upon trust for sale upon trust to pay the income to a named beneficiary during her life and after her death in trust for such "charitable institution or institutions or other charitable or benevolent object or objects" in a named town as her trustees should select. Probate of the will had been granted in May, 1929, and in 1938 an application was made to the Probate Court to have the probate corrected by the omission of the word "or" in the words "charitable or benevolent":—

HELD: there was no jurisdiction to strike out the word "or," since the result of such striking out would be to alter the meaning of what remained.

G

[EDITORIAL NOTE.] The matter here dealt with is the power of the court upon the grant of probate of a will, and not the power of a court of construction. It has been decided that, in addition to the omission of offensive, scandalous, or libellous matter, the court has a limited power to omit a word included by a clerical error, but that no fresh word can be inserted in its place. Therefore, in the present case—the

whole desire of the applicants being to secure the wording "charitable and benevolent" in place of "charitable or benevolent," which has been decided to be void for uncertainty—the court could not be asked to delete "or" and insert "and." The application had to be restricted to the deletion of the word "or." This the court refused to do, since the omission, by making the wording "charitable benevolent," would alter the sense of the words of the will. The matter seems not to have been expressly decided in any case, and it is noteworthy that the court

rejected as irrelevant an argument to the effect that the omission of "or" would avoid an intestacy, since the question before the court upon such an inquiry was as to the words the testatrix intended to use, and not as to whether or not those words produced an effective result in law. In other words, the court is the court granting probate, and not the court construing the will—the court of construction, as it is called.

AS TO OMISSION FROM WILL ON GRANT OF PROBATE, see HALSBURY, *Hailsham* A Edn., Vol. 14, p. 210, paras. 349, 350; and FOR CASES, see DIGEST, Vol. 23, pp. 137, 138, Nos. 1360-1372.]

Cases referred to :

- (1) *Hunter v. A.-G.*, [1899] A.C. 309; 8 Digest 291, 687; 68 L.J.Ch. 449; 80 L.T. 732; *revisg.* S.C. *sub nom. Re Hunter, Hood v. A.-G.*, [1897] B 2 Ch. 105.
- (2) *Re Best, Jarvis v. Birmingham Corpn.*, [1904] 2 Ch. 354; 8 Digest 297, 744; 73 L.J.Ch. 808.
- (3) *Caldwell v. Caldwell* (1921), 91 L.J.P.C. 95; 8 Digest 297, 745.
- (4) *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; 44 Digest 580, 4011; 51 L.J.P.C. 53; 46 L.T. 463.
- (5) *In the Goods of Duane* (1862), 2 Sw. & Tr. 590; 44 Digest 229, 540; 31 L.J.P.M. & A. 173; 6 L.T. 788.
- (6) *Harter v. Harter* (1873), L.R. 3 P. & D. 11; 23 Digest 135, 1341; 42 L.J.P. & M. 1; 27 L.T. 858.
- (7) *In the Goods of Boehm*, [1891] P. 247; 23 Digest 137, 1355; 60 L.J.P. 80; 64 L.T. 806.
- (8) *In the Goods of Schott*, [1901] P. 190; 23 Digest 137, 1357; 70 L.J.P. 46; 84 L.T. 571.
- (9) *Morrell v. Morrell* (1882), 7 P.D. 68; 23 Digest 136, 1348; 51 L.J.P. 49; 46 L.T. 485.
- (10) *Houston v. Burns*, [1918] A.C. 337; 8 Digest 297, 739; 87 L.J.P.C. 99; 118 L.T. 462.
- (11) *Guardhouse v. Blackburn* (1866), L.R. 1 P. & D. 109; 23 Digest 111, 1044; 35 L.J.P. & M. 116; 14 L.T. 69.

APPEAL by defendants from a decree of SIR BOYD MERRIMAN, P., dated June 22, 1938. The facts are fully set out in the judgment of the court delivered by SIR WILFRID GREENE, M.R.

C. E. Harman, K.C., and *H. W. Barnard* for the appellants.

Noel Middleton, K.C., and *R. Bush James* for the respondents.

Harman, K.C. : This is not a case in which the testatrix would have said that it was not her will if she had read it through. In *Hunter v. A.-G.* (1), LORD DAVEY says that certain words are pitfalls and that the word "benevolent" is one of them. The court sometimes corrects a mistake by leaving words out of a will because it is clear, on the face of the will, that the testator could not have intended to use them. This, however, is a mistake which the Probate Court had no jurisdiction to correct. The testatrix had made a large number of wills, and was what has been called an experienced testatrix. She made wills from 1877 onwards. In 1912, she left the residue of her estate to Mrs. Kershaw. Soon afterwards, Mrs. Kershaw became a Roman Catholic. She was not an object of the residuary bequest in the next will, but Mrs. Marsh, Mrs. Kershaw's daughter, was appointed residuary legatee. The testatrix

made wills in 1915, 1916, 1918, 1921 and 1922, and in these wills there was an increasing provision made for Miss Taylor, the companion of the testatrix. Shortly before May 8, 1925, the testatrix sent for her solicitor to make a new will. That will was prepared and executed. The testatrix died on Mar. 25, 1929, and her will was proved in common form on May 7, 1929. The debts, funeral expenses, and all the legacies have long since been paid. The administration was finished, and the executors, as such, were discharged from their task. They, however, held property as trustees. In June, 1937, the mistake was discovered, and these proceedings were commenced. One cannot strike out a word because the testatrix would not have put it in if she had had a better knowledge of the law. In *Harter v. Harter* (6), it was held that the Court of Probate cannot correct a will, either by the omission of words or by the insertion of other words, however clearly an error can be established, unless words have been inserted by fraud or mistake without the knowledge of the testator. In *Rhodes v. Rhodes* (4), the court doubted whether the words could be left out even if they had been inserted inadvertently. In *Morrell v. Morrell* (9), it was held that a word could be struck out because it had been introduced into the will without the authority of the testator, and that the grammatical sense of the will would be unaltered by striking it out. By striking out the word "or" in the present case, however, the grammatical sense is altered. In *In the Goods of Bæhm* (7), the alteration was made on motion, and by consent. This case is material, but it is open to review in this court. SIR BOYD MERRIMAN, P., relied upon it in the present case. There is no case in which there has been an alteration made in a will so as to alter the grammatical meaning of a sentence. The law is correctly stated in *Harter v. Harter* (6). [Counsel referred to *In the Goods of Duane* (5), *Re Best*, *Jarvis v. Birmingham Corpn.* (2) and *Houston v. Burns*. (10).]

Middleton, K.C. : The real dispute in this case is largely a question of onus. The difficulties which arise in the Probate Division may frequently be solved by remembering that the onus in the Probate Division is a constantly shifting one. The function of the Probate Court is to ascertain what document or documents the testator intended should constitute his will. The court is entitled to take into account everything which is relevant to the preparation of the document, from the giving of instructions down to the moment when the document was a completed will. The onus of proof of knowledge and approval of the contents of the will must be discharged by the person putting forward the document. In the present case, there is grave doubt whether the will containing the word "or" correctly represents the intentions of the testatrix. The intention of the testatrix would be carried out if this word were to be omitted. The Probate Court cannot omit a word unless it is satisfied that an error has been made, but, when it is so satisfied, it will omit the word, subject to certain restrictions. The Probate Court is never concerned with the ultimate result. In *In the Goods of Bæhm* (7), it was

found that the words were inserted by mistake, and it was held that they must be struck out, whatever the effect of striking them out might be. The court will always adhere to the fixed proposition laid down in *Guardhouse v. Blackburn* (11). If the court looks at the mind of the testatrix in the present case, it will be seen that she had in mind an intention to give charitable bequests, and that intention will be effected by affirming the order of the court below. [Counsel referred to *Morrell v. Morrell* (9) and *In the Goods of Schott* (8).] A

Harman, K.C., in reply: If, by taking away something, one alters the sense of a will, one is admitting a will which was not executed. [Counsel referred to *Harter v. Harter* (6) and *Rhodes v. Rhodes* (4).] B

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: This is an appeal by the defendants in a probate action from a decree of SIR BOYD MERRIMAN, P., admitting to probate in solemn form the will and codicil of the testatrix, Miss Marie Margaretta Horrocks, omitting from the will as signed and attested one word, and revoking a previous grant of probate in common form, which had issued without the omission of that word. The respondents to the appeal, who were plaintiffs in the action, are the two persons appointed as executors by the will of the testatrix, one of them, Mr. Houghton, being the solicitor who prepared the will. The defendants are the next of kin of the testatrix. As the question in issue affects the validity of a gift in favour of charity, the Attorney-General was cited, but he did not appear, either at the trial or before us, since he was content to leave the matter in the hands of the plaintiffs. C D E

The testatrix was an elderly lady, delicate in health, but of pronounced opinions, particularly with regard to ritualistic practices in the Church of England, of which she strongly disapproved. She had made a number of wills at different times. Mr. Houghton, a solicitor practising in Preston, where she lived, had regularly acted for her for a number of years, and was regarded by her as an old friend. She was well off, and her residuary estate, the disposition of which is the subject-matter of the present controversy, has turned out to be worth about £18,000, although, at the time when the will was made, its estimated value was about £6,000. F G

The will now in question was signed by the testatrix on May 14, 1925. By it she revoked all former wills and appointed the present respondents executors and trustees. The expression "my trustees," when occurring in the will, was defined as meaning and including the named executors and the survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of the will. She then proceeded to bequeath a large number of pecuniary legacies, many of them charitable, and, after making certain other provisions not material to be here stated, devised and bequeathed the residue of her real and personal estate to her trustee, upon the usual trust for sale, H

and upon trust to pay the income of the net residue to the respondent Miss Eunice Taylor during her life and after her death :

... in trust for such charitable institution or institutions or other charitable or benevolent object or objects in Preston and district as my acting trustee or trustees may in his or their absolute discretion select and to be paid to or for such institutions or objects if more than one in such proportions as my said acting trustee or trustees may think proper provided that in exercising such discretion my trustee or trustees shall have regard to my wishes that I do not desire any portion of my residuary estate to go to the support of ritualistic practices which are contrary to the doctrines of the Church of England.

The other provisions of the will have no bearing on the present question. On Dec. 31, 1937, the testatrix made a codicil to her will. Its provisions are, for present purposes, immaterial. The testatrix died on Mar. 29, 1929, and the will and codicil were proved in common form in the Lancaster district registry by the respondents on May 7, 1929.

We were informed by counsel for the appellants, and it was not disputed, that the debts and testamentary expenses of the testatrix, and the legacies bequeathed by her, have long since been paid, and that, at the date of the matters next to be mentioned, the respondents held the residuary estate as trustees upon the trusts declared by the will.

At some time during the first half of 1937—that is to say, some 12 years after the date of the will—Mr. Houghton, it is alleged, discovered what is described as a typist's error in the will. This error is said to have consisted of the use of the word "or" instead of the word "and" in the phrase "charitable or benevolent" which appears in the passage already textually quoted from cl. 7 of the will. The respondents thereupon instituted proceedings by notice of motion, with the object of having the probate corrected by the omission of the word "or." They supported their application by an affidavit by Mr. Houghton. The appellants objected to having an issue of such importance decided on motion, and, accordingly, the writ in this action was issued on Nov. 24, 1937, claiming to have the common form grant revoked and probate in solemn form of the will and codicil with the omission of the word "or."

During the discussion which took place after his judgment had been delivered, SIR BOYD MERRIMAN, P., expressed a doubt as to the propriety of the appellants' action in objecting to have the matter decided on motion. With all respect to him, we are unable to share this doubt. The allegations made 12 years after the event called for strict and convincing proof. We think it most undesirable that a serious question such as the present should, at any rate in the absence of consent by all parties interested—all of them being *sui juris*—be decided otherwise than by action.

At the trial, the only witnesses called by the petitioners were Mr. Houghton himself and Mr. John Lucas, one of his clerks, and an attesting witness to the will and codicil. The only relevant matter that is to be found in the evidence of Mr. Lucas is his statement that the will was not read over to the testatrix before she signed it. No evidence was called on behalf of the respondents.

The alteration made in the will by the decree of SIR BOYD MERRIMAN, P., has far-reaching consequences. The phrase "charitable or benevolent" as applied by testators to gifts in favour of institutions or purposes is all too familiar. It is a trap into which the unskilled draftsman not infrequently falls, with the result that the gift fails for uncertainty: *Hunter v. A.-G.* (1), at p. 323. The whole object of the action A out of which this appeal arises is the avoidance of that result, and, if the respondents are right, that result will be avoided, since a gift for purposes or institutions under the description "charitable and benevolent" (and the phrase "charitable benevolent" can only have the same meaning) is a perfectly good gift, being confined to such charitable pur- B poses as are benevolent: *Re Best, Jarvis v. Birmingham Corpn.* (2), approved by the House of Lords in *Caldwell v. Caldwell* (3). However, the fact that a testator, or the draftsman employed by him, is mistaken as to the legal effect of the language which he uses is, of course, no ground for altering the will for the purpose of procuring the legal result desired, C and the contrary was not suggested. The respondent's case, however, is not that Mr. Houghton fell into a trap which he did not know to be a trap—such a case would admittedly have been hopeless—but that he himself dictated to a typist words—namely, "charitable and benevolent"—which avoided the trap, and that the typist to whom he dictated D blundered by substituting "or" for "and," either in the shorthand note itself or in its transcription.

Apart from any question of law as to the power of the Court of Probate to make the alteration desired, a case of this description, as we have already said, requires convincing evidence to support it, particularly in E view of the far-reaching modification of the will, as regards both construction and legal validity, which the alteration effects. In our judgment, the evidence given in this case is not of a character which the court ought to accept as adequate. On this ground alone, we are prepared to allow the appeal. However, there is also another ground upon F which, in our judgment, the appeal ought to be allowed—namely, that this alteration is one which the court has no jurisdiction to make. The jurisdiction of the Court of Probate to grant probate of a will textually different from the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to G which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator, or of the draftsman H employed by him, as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words, and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act. These matters are elementary, and there is no dispute about them.

The question in the present case is whether or not, assuming that the word "or" was inserted by a typist's error, as is alleged, the court has jurisdiction to strike it out. It cannot substitute the word "and." No claim is made for the excision of the word "benevolent" as well as for that of the word "or." Indeed, no such claim could have been made, since the word "benevolent" was deliberately chosen by Mr. Houghton. Bearing all these considerations in mind, we turn to an examination of the question formulated above.

- The fact that the words of the will as signed may lead to an intestacy while the omission of the word "or" will prevent this result is, in our opinion, irrelevant. The court is concerned with the words which the testatrix intended to use, not with the question whether or not those words will produce an effective result in law. The position would be precisely the same if the words "charitable or benevolent" were sufficient to create a valid gift. The word "charitable" was deliberately chosen by Mr. Houghton and approved by the testatrix. As Mr. Houghton said, "My instructions were 'charitable,' and my intentions were 'charitable,'" and (upon the assumption of fact on which we are considering the question) he told the testatrix that she had left the residue for charitable purposes. The word "charitable," however, comprises the whole field of charity as understood by the law. Under the words "charitable or benevolent," considered solely from the point of view of construction, and disregarding as irrelevant the fact that in law they are ineffective by reason of uncertainty, the trustees had the whole of that field open to their discretion. The effect of adding the words "or benevolent" did not alter the situation in this respect. They merely added another field—namely, so much of the field of benevolence as was not already included under the word "charitable." If the case had been that the words "or benevolent" ought to be struck out, the word "charitable" would have remained, with its full signification, as was intended by the testatrix. However, the effect of striking out the word "or" and leaving the word "benevolent" is, as we have already pointed out in the earlier part of this judgment, to qualify the word "charitable," and to cut out from its signification so much of the field of charity as is not benevolent. In other words, the omission of the word "or" alters the effect of the word "charitable," which was approved by the testatrix, and which she must be taken to have intended should have its full signification. It is as though a proviso were to be inserted to the effect that the discretion of the trustees was not to be exercised in favour of a charitable object unless it was also benevolent. The result would be that the one thing as to which the intentions and instructions of the testatrix were clear would be defeated.

Does the jurisdiction of the Court of Probate extend to the making of an alteration having this result? In our opinion, it does not. It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is

equivalent to making a new will for the testator, and on principle we do not consider that this is permissible. No case was cited to us in which the Court of Probate had ever assumed jurisdiction to strike out words with such a result. The point has never, so far as we are aware, been the subject of express decision. LORD BLACKBURN, in delivering the judgment of the Privy Council in *Rhodes v. Rhodes* (4), referred to it **A** in a passage which we will quote at length. He said, at p. 198 :

When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though he executed the instrument, yet that from fraud he executed that which was not his will there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that in *In the Goods of Duane* (5), the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will **C** alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument ; and there seems much difficulty in treating the will after its sense is thus altered as valid within the Wills Act, 1837, s. 9, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of SIR JAMES HANNEN in *Harter v. Harter* (6) has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it. **D**

The suggestion here made by the Privy Council as to the possible reason why the court might be unable to reject words, when to do so would **E** alter the sense of what remained, is one which commends itself to us.

Numerous authorities were cited to us illustrative of the jurisdiction exercised by the Court of Probate in these matters. We do not think it necessary to refer to any of these authorities except two upon which the respondents particularly relied. It is sufficient to say of them that the **F** cases in which the court has decreed probate with the omission of words, phrases or clauses have all been cases where the matter omitted was, so to speak, self-contained, and its omission did not alter the sense of what remained. The first of the two cases to which we have referred is *In the Goods of Bæhm* (7), a decision upon a motion in which all parties **G** consented to the application. By a slip of the draftsman, the name of one of the testator's two daughters, Georgiana, was inserted twice, so that the same daughter was given two legacies, one of which was intended to be given to the other daughter, Florence. SIR FRANCIS JEUNE, J., granted probate of the will omitting the name Georgiana where it had been **H** wrongly inserted and leaving blanks in its place. He realised the possibility that the effect of this might be to render the rest of the clause meaningless, as it would have been if a court of construction had proved unable to get over the difficulty, a matter with which he was not concerned. It is one thing to strike out a word which leaves what is left

devoid of ascertainable content, and, therefore, inoperative. It is quite another thing to strike out a word when, by doing so, the meaning of what is left is qualified and cut down. It is clear from the reference of SIR FRANCIS JEUNE, J., to *Rhodes v. Rhodes* (4) that he did not conceive himself to be doing something which altered the sense of what remained.

The other case is *In the Goods of Schott* (8), also a decision of SIR FRANCIS JEUNE, P. In that case, the residuary disposition in the will directed the trustees "to stand possessed of the net revenue of the said proceeds" upon certain trusts. Probate was asked for with the substitution of the word "residue" for the word "revenue." SIR FRANCIS JEUNE, P., refused to make this substitution, but granted probate with the omission of the words "revenue of the said." Here again the effect of the omission was not to alter the sense of what remained. Neither of these authorities appears to us to assist the respondents. The appeal will, therefore, be allowed, and the decree of SIR BOYD MERRIMAN, P., varied by striking out the words relating to the omission. In the court below, the costs of all parties were directed to be paid out of the estate. The notice of appeal does not ask for this direction to be altered, and it will stand. With regard to the costs of the appeal, we think that the fair course is to make a similar order.

Appeal allowed and order varied.

Solicitors: *Sheard, Breach & Co.* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Houghton, Reveley, Craven & Wilkins*, Preston (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re MACLENNAN, FEW v. BYRNE.

[CHANCERY DIVISION (Bennett, J.), February 3, 7, 8, 17, 1939.]

Annuities—Annuity of clear sum after "deduction of income tax"—No reference to standard or current rate of tax—Rate computed in relation to reliefs and allowances.

Under the testator's will, the first defendant was given an annuity of £3,000, and the second and third defendants an annuity of £250 each, free of all death duties. Thereafter the first defendant, during her life, was given the residue of the income of the testator's residuary estate remaining after payment of the annuities. The testator died in 1917, and in 1930 the first defendant by an indenture charged the residue of the income to which she was entitled during her life in such manner that the second and third defendants were each to be entitled to such an annual sum as, together with the respective annuities of £250 each, would, "after deduction of income tax but not sur-tax leave in their hands the respective sums of £500 each clear of all deductions for income tax but not sur-tax." The question now arose whether the two annuitants were entitled to such a gross sum as, after deduction of income tax computed in relation to all reliefs and allowances to which they were respectively entitled, would leave a clear sum of £500 in their hands,

or to such a gross annual sum as, after deduction of income tax at the standard rate, would leave a clear sum of £500 in their hands:—

HELD: the deduction was one computable in relation to all reliefs and allowances to which the annuitants were respectively entitled, and not in relation to the standard rate.

[EDITORIAL NOTE.] The form of clause generally used in the case of a grant of an annuity free of tax is well known, and refers to deduction of tax at the current rate for the time being or at the standard rate. In the present case, the clause has no reference to the current or standard rate, and the question was asked whether the deduction was computable in relation to all reliefs and allowances to which the annuitant was entitled. This question is answered in the affirmative. One or two questions appear to have been left over for the present, the more interesting being the question how far a married woman not separately assessed can be made to obtain a separate assessment. This would involve a further consideration of the principle considered in *Re Kingcome, Hickley v. Kingcome*, [1936] Ch. 566; [1936] 1 All E.R. 173; Digest Supp.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-389; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to:

- (1) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.
- (2) *Re Jones, Jones v. Jones*, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417.

ADJOURNED SUMMONS to determine whether certain annuitants were entitled to an annual sum free of tax computed, as far as deduction of tax was concerned, in relation to the standard rate of income tax, or computed in relation to reliefs and allowances to which the annuitants were respectively entitled.

A. H. Droop for the plaintiffs.

R. F. Roxburgh, K.C., and *B. G. Burnett-Hall* for the first defendant.

H. O. Danckwerts for the second and third defendants.

E. B. Stamp for the remaining defendants.

BENNETT, J.: Under the will and codicils of the testator Donald MacLennan, who died on Aug. 4, 1917, the trustees of his will stand possessed of the investments representing his residuary estate upon trust out of the income thereof to pay to the defendant Lady Byrne £3,000 per annum during her life free of all death duties and subject thereto (in the events which have happened) to pay an annuity of £250 free of all death duties for the benefit of and to each of the testator's son and daughter, the defendants Mr. Donald James Henry MacLennan and Mrs. Juanita Elaine Baird Boyd, and subject as aforesaid (in the events which have happened) to pay two further annuities of £40 each free of all death duties with a proviso by virtue whereof each of those annuities (including the annual sum of £3,000) is liable to cease to be payable to the annuitant and will in such case become subject to a discretionary trust on the happening of any act or event whereby such annuity if belonging to the annuitant absolutely would become vested in or charged in favour of some

other person or persons or a corporation and upon further trust to pay to Lady Byrne during her life the residue of the income of the testator's residuary estate remaining after payment of all the aforesaid annuities or annual sums and after the death of Lady Byrne upon divers trusts declared by the will.

- A By an indenture dated Oct. 16, 1930, and made between Lady Byrne, of the first part, the defendants Mrs. Boyd and Mr. Maclennan, of the second part, and the trustees of the testator's will, of the third part, Lady Byrne, in pursuance of an order of the Chancery Division of the High Court of Justice made on Oct. 1, 1930, charged the residue of the
- B income to which she was entitled under the testator's will during her life in the following terms :

- C Lady Byrne as settlor pursuant to the said order of Oct. 1, 1930, and by way of family arrangement and with the concurrence of Mrs. Boyd and Mr. Maclennan testified by their being parties to and executing these presents hereby charges all that the residue or balance of the annual income to arise or accrue during the life of Lady Byrne from the residuary estate of the testator and remaining after payment out of the entirety of the said income of the annual sums or annuities payable thereout as hereinbefore recited (and so that nothing herein contained shall be construed as conferring any estate interest claim or right whatsoever in or to the said annual sum of £3,000 payable to Lady Byrne under the said will) with the payment by the will trustees in priority to all other payments thereout and as a first charge thereon of the following annual sums (to rank *pari passu*) for the benefit of Mrs.
- D Boyd and Mr. Maclennan as hereinafter provided that is to say first such an annual sum as together with the amount of the annuity of £250 payable to or for the benefit of Mrs. Boyd under the will of the testator would (if such annual sum and annuity respectively were payable to Mrs. Boyd absolutely) after deduction of income tax but not sur-tax leave in her hands the sum of £500 clear of all deductions for income tax but not sur-tax and secondly such an annual sum as together with the amount of the annuity of £250 payable to or for the benefit of Mr. Maclennan under the will of the testator would (if such annual sum and annuity respectively were payable to Mr. Maclennan absolutely) after deduction of income tax but not sur-tax leave in his hands the sum of £500 clear of all deductions for income tax but not sur-tax each such annual sum to commence from Oct. 1, 1930, and to be payable during the joint lives of Lady Byrne and the annuitant (meaning thereby Mrs. Boyd in the case of the first annual sum and Mr. Maclennan in the case of the second annual sum) and to be deemed to accrue due from day to day but to be payable by as near as may be equal quarterly payments the first payment of each annual sum to be
- F made on Jan. 1, 1931.

The first question asked by the originating summons is as follows :

- G Whether upon the true construction of the said deed of charge . . . each of the defendants Juanita Elaine Baird Boyd and Donald James Henry Maclennan is entitled to be paid (a) such a gross annual sum as when added to the annuity of £250 given to her and him by the said testamentary instruments will leave in her or his hands the clear sum of £500 after payment of the income tax to which she or he is assessable in respect of a gross annual sum which after deduction therefrom of income tax at the standard rate would leave a net sum of £500 or (b) such a gross annual sum as when added to the said annuity of £250 will leave a net sum of £500 after deduction of income tax at the standard rate from the said gross annual sum and the said annuity of £250.

- H The real point is whether the sum with which Lady Byrne has charged her income is to be ascertained by reference to, amongst other things, the income tax payable by Mrs. Boyd and Mr. Maclennan respectively, calculated and apportioned in accordance with the principles laid down by ROMER, J. (as he then was), in *Re Pettit, Le Fevre v. Pettit* (1), or whether the sum with which she has charged her income is such an

annual sum as, when added to the annuity of £250, will leave a net sum of £500 after deduction of income tax at the standard rate from the gross annual sum and the sum of £250. The question, I think, really turns upon what is meant by the words "income tax." Do those words mean the tax payable by these two defendants respectively after they have obtained all relief and allowances to which they respectively are, or may be, entitled, or do they mean, as these two defendants contend, income tax at the standard rate? There is no reason in law why the charge should not have the first of the two meanings put upon it, if that be the true construction of the language. The question is entirely one of interpreting the language used. There is nothing in the terms of the charge to assist in the interpretation of the words "income tax," unless it be the phrase "clear of all deductions." It is plain, I think, that the word "deductions" was not used in any exact sense, because the word is applied to sur-tax as well as to income tax, so that that word does not really assist.

The decision in *Re Jones, Jones v. Jones* (2) turned entirely on the words "current rate," which EVE, J., held to mean "standard rate." All the reasoning of ROMER, J., in *Re Pettit, Le Fevre v. Pettit* (1) seems to me to apply with equal force to the present case. I propose to decide that the charge means what it says, that income tax means income tax, and not income tax at the standard rate, and that the income tax is to be ascertained in accordance with the principles laid down in *Re Pettit, Le Fevre v. Pettit* (1).

Declaration accordingly.

Solicitors: *Few & Co.* (for the plaintiffs); *E. B. V. Christian & Co.* (for the first defendant); *J. E. Lickfold & Sons* (for the second and third defendants); *Warren & Warren* (for the remaining defendants).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

Re CAMBERWELL (WINGFIELD MEWS) No. 2 CLEARANCE ORDER, 1936, APPLICATION OF BUTLER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), February 14, 15, 1939.]

Public Health—Housing—Clearance order—Buildings consisting of dwelling-houses on first floor and garages and stores on ground floor—Separate occupations—Whether garages and stores should be included in clearance order—"Housec"—Housing Act, 1936 (c. 51), s. 25, Sched III, para. 2.

The property in question consisted of a number of buildings built on three sides of a narrow *cul-de-sac*. These buildings were a continuous series of buildings on two floors, separated by divisions. The upper floors were used as dwelling-places, and access to them was obtained by staircases and doors opening on to the open space, and not connected in any way with the ground floor. The ground floor was used throughout for either garages or stores, all in separate occupation. The local authority made a clearance order in respect of both the dwellings on the first floor and the garages and stores beneath. It was contended that there

was no power to make an order in respect of the garages and stores. The resolution of the local authority and the order as confirmed by the Minister stated, *inter alia*, "that the other buildings (if any) in the said area are for a like reason dangerous or injurious" :—

HELD : the buildings in the area fell within the definition of "houses" in the Housing Act, 1936, s. 25, and the garages and stores were, therefore, rightly included in the order.

A (ii) the fact that there were no other buildings, other than houses, in the area did not affect the validity of the resolution and order.

Decision of DU PARCQ, J. ([1938] 2 All E.R. 279) affirmed.

[EDITORIAL NOTE. The decision of DU PARCQ, J., in the court below is affirmed, but the reasoning by which this result is reached is not quite the same as that of DU PARCQ, J. The latter treated the garages and stores as "other buildings" and the upper parts as dwelling-houses. The Court of Appeal have treated the whole premises as a "house" within the meaning of the term as used in those parts of the Housing Act, 1936, which relate to clearance orders.

B AS TO CLEARANCE ORDERS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 536, 537, para. 1138; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502g-502u.]

C Cases referred to :

(1) *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot*, [1937] 3 All E.R. 539; Digest Supp.; 157 L.T. 142.

(2) *Errington v. Minister of Health*, [1935] 1 K.B. 249; Digest Supp.; 104 L.J.K.B. 49; 152 L.T. 154.

D (3) *Cohen v. West Ham Corpn.*, [1933] Ch. 814; Digest Supp.; 102 L.J.Ch. 305; 149 L.T. 271.

(4) *Grant v. Langston*, [1900] A.C. 383.

(5) *Re Falmouth (Well Lane, Sedgmond's Court and Smithwick Hill) Clearance Order, 1936, Halse's Application*, [1937] 3 All E.R. 308; Digest Supp.; 157 L.T. 140.

E (6) *Morgan v. Kenyon* (1913), 110 L.T. 197; 38 Digest 182, 225.

APPEAL of the applicant, the surviving mortgagee, from an order made by DU PARCQ, J., dated Mar. 23, 1938, and reported [1938] 2 All E.R. 279, whereby the judge dismissed an application to quash the Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, which was confirmed by the Minister of Health on Sept. 8, 1937. The facts and arguments are fully set out in the judgment.

F. R. Evershed, K.C., and *H. A. Hill* for the appellant.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Valentine G Holmes* for the respondent.

Evershed, K.C. : For the purposes of clearance orders and closing orders, buildings are generally divided into two categories—namely, (i) houses, and (ii) other buildings. There are three possibilities. One is to say that the buildings in the present case are houses. The word "house," not being specifically defined, is a word of ordinary acceptation as to its meaning, and nobody would describe these premises as houses. The second possibility is to describe them as "other buildings," which is the correct description of the premises in this case. If that be the correct description, it must necessarily follow that the order complained of is bad, because there cannot be, under the Housing Act, 1936, a clear-

ance area composed exclusively of other buildings. The third possibility is to divide the premises into two, and this was the course adopted by DU PARCQ, J., who said that the first floor consisted of houses and that the ground floor consisted of other buildings. One result of that would be that there might be a clearance area which at no point touched the surface of the earth. My alternative argument is that, as regards the ground floor premises—which, on this hypothesis, are other buildings—the clearance area resolution, which is the foundation of the order which was subsequently made, will be found to be bad. The reason for that is that there was a failure to comply with the terms of the Act, in that the other buildings, as such, have not been shown to be dangerous or injurious to health. Even if they were rightly included in the clearance area resolution, they must, by the words of the schedule, be excluded from the order. The answer was found by the judge by a particular reference to the schedule. The proviso says that Sched. III, para. 2, shall not apply to a house or other building, as the case may be, if it is found that the house or other building is partly used as a dwelling and partly for another purpose. It is necessary to treat these buildings as divided into two—partly houses and partly garages. Thus, the proviso says that the garages shall be excluded from the clearance order. I do not accept the proposition that it is not proper to divide premises such as these horizontally and say that they are partly houses and partly other buildings. The extent to which the Minister has to form an independent opinion upon the matters which were the subject of the resolution was considered in *Errington v. Minister of Health* (2) and *Cohen v. West Ham Corpn.* (3). If the court finds that the garages are properly included in the clearance area, they should be excluded by reason of the proviso. If the court takes the view that the proviso upon which DU PARCQ, J., relied covers the present case, one gets in this case a totally different result as regards compensation from that of compulsory purchase, which one gets under sect. 40. It is a little difficult to envisage the possibility of a clearance area which does not touch land. [Counsel referred to *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot* (1) and *Grant v. Langston* (4).]

Hill : Until this case arose, the proviso to sect. 40 (2) was regarded as relating to what may be called a composite building. Once the judge has decided that the proper thing to do is to draw the line horizontally, the building must not be treated as a house.

The Solicitor-General : The order of the Minister, confirming the resolution, was outside his powers. One has, therefore, to turn to the relevant section, to see if its terms have been complied with. The first requirement is that there shall be an official representation, or some other information. There was an official representation. The local authority says that it has considered it. Therefore, the first two requirements of the section have been complied with. The local authority considered the matter with regard to an area where the houses were unfit

- for habitation. It is conceded that there is no answer to that if the local authority is right in this particular case. The medical officer gave evidence upon the footing that the buildings were all houses, and he said that they were unfit for habitation. The local authority has put forward its order in terms which are ambiguous. There are two possible
- A** views about this area. One is that the premises are houses. The other is that they are premises of which the upper portions are houses and the lower portions are other buildings. The Minister gave his confirmation without putting forward any views of his own. In view of the decision of DU PARCQ, J., the true view is that they are houses, and nothing else.
- B** The reasoning which is to be referred to is that of SWIFT, J., in *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot* (1). That case is identical with the present one, there being no distinction between the facts of the two cases. It is contemplated that what is to be achieved in the present case is the clearance of buildings
- C** from a site. If people are found living in premises, *prima facie*, those premises are houses. The only difficulty which arises is found in Sched. III, para. 2, of the Act. The proviso to that paragraph was intended to deal with structures of a composite kind. The proviso says that, where there is a composite structure of this kind, then, where any part
- D** of it is used for living premises, compensation is not to be given. The premises come out, but must go back, because in part they are being used as a dwelling-house. The provisions of the schedule show that the intention of the legislature was that the site should be cleared. There is ample evidence on which the premises can be found to be houses.
- E** There is a further requirement of sect. 25 to be satisfied, and that is that the most satisfactory way of dealing with the matter is the total demolition of all buildings in the area. There is, therefore, some check upon the local authority, in that the Minister has to be satisfied on that matter. [Counsel referred to *Re Falmouth (Well Lane, Sedgmond's Court and*
- F** *Smithwick Hill) Clearance Order, 1936, Halse's Application* (5).]

Evershed, K.C., in reply : One starts with the fact that the minds of the council were not directed to the proposition that the garages should be separately considered. In the present case, it is evident that the council acted upon the recommendation of the medical officer,

G and there is no evidence that the council had any other evidence on which to act. Even if one takes into account the subsequent observations of the medical officer, there is nothing in the report to give one any ground for saying that the garages were dangerous or injurious to health. The reference to the narrowness of the

H mews relates to the dwelling-houses, and not to the garages. It will not do to say that, because people are found dwelling in premises, the premises are *prima facie* houses. The Act contemplates other premises in which people may be dwelling, and is intended to procure the amelioration of slum areas. A vital part of the present case is that the two parts of the premises have never been enjoyed as a single entity. The two parts

are separately occupied and separately rated. There is no internal intercommunication. This is a case in which the property owner is being deprived of his property without compensation and without being put into a position to do any necessary repairs. [Counsel referred to *Morgan v. Kenyon* (6).]

SIR WILFRID GREENE, M.R. : The appellant, who is a mortgagee, challenges the validity of a clearance order made under the Housing Act, 1936, and the ground of his challenge is that the order is not within the powers of the Act, that being one of the two grounds upon which the court has jurisdiction to quash the order under Sched. II, para. 2 (ii), of the Act.

The history of the order may be shortly stated. On Jan. 15, the local authority concerned, the Camberwell Borough Council, passed a resolution under the Housing Acts which were then in force, a resolution under what is now represented by sect. 25 of the Act of 1936. On Nov. 26, 1936, they made the present order, which was confirmed by the Minister of Health, after inquiry, on Sept. 8, 1937. At the dates when the resolution was passed and the clearance order made, the Act of 1936 had not yet come into force. It came into force on Jan. 1, 1937—that is to say, between the date of the clearance order and the confirmation by the Minister—but it is agreed that we are to treat the present controversy as though it were governed entirely by the Act of 1936, by reason of the provisions of sect. 189 of that Act. Accordingly, I shall refer to the sections of the Act of 1936, mentioning just one matter—namely, that, in the Acts which were in force at the time of the resolution and the order, the expression used was “dwelling-house,” and, in the Act of 1936, that has been replaced by the word “house” in the relevant sections.

The property in question consists of a block built in a narrow *cul-de-sac* round three sides of a rectangle, and it consists of a continuous series of buildings on two floors, separated by divisions. The upper floors are used as dwelling-places, and access to them is obtained by staircases and doors opening on to the yard or open space, and not connected in any way with the ground floor. The ground floor is used throughout either as garages or I think in some few cases as stores, which are—I think all of them, or at any rate most of them—in separate occupation.

The section of the Housing Act under which clearance resolutions are passed is now sect. 25 of the Act of 1936, which provides as follows :

(1) Where a local authority upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district (a) that the houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants, and (b) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area; the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is

not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act.

That is all that I think I need read of that section. It is to be observed that the buildings to which the section refers fall into two classes: The

- A first class consists of houses, and, as I have said, the Act in force when the present resolution was passed, and the order made, referred to them as "dwelling-houses." The other class is "other buildings in the area." The matter on which the local authority is to be satisfied in the case of houses may be one of two, (i) unfitness for human habitation for the
- B reason given, and (ii) the quality of being dangerous or injurious to the health of the inhabitants by reason of their bad arrangement or the narrowness or bad arrangement of the streets. In the case of "other buildings," on the other hand, the latter matter is the only one which is relevant, for obvious reasons.

- C Once the council, as the local authority, has passed the necessary resolution, it will proceed to take a further step in order to make it effective, and there are two alternative steps which it may take, (a) "by ordering the demolition of the buildings in the area," for which purpose, of course, a clearance order is required :

- D . . . or (b) by purchasing the land comprised in the area and themselves undertaking or otherwise securing the demolition of the buildings thereon.

The ultimate result of both alternatives is demolition of the buildings in the area, and it is provided by sect. 26 (5) as follows :

- E When a clearance order has become operative, no land to which the order applies shall be used for building purposes, or otherwise developed, except subject to such restrictions and conditions, if any, as the local authority may think fit to impose.

Sect. 40 contains provisions for compensation to be paid where the method adopted is that of purchase. That compensation is to be assessed in accordance with the Acquisition of Land Act, 1919, subject to certain special provisions, the principal one of which for the present purpose is contained in subsect. (2), which provides that the compensation is to be :

- F . . . the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building byelaws for the time being in force in the district.

It is, therefore, contemplating the clearance of the site.

- G I need not go in detail into the provisions of the Act which provide for confirmation of the order by the Minister, the making of objections and the appeal to this court, but Sched. III contains an important provision. The clearance resolution under sect. 25 may extend to cover three classes of buildings. Not necessarily so, but it may. The first
- H class will be houses which "by reason of disrepair or sanitary defects are unfit for human habitation." The second class may be houses which

. . . by reason of their bad arrangement, or the narrowness or bad arrangement of the streets [are] dangerous or injurious to the health of the inhabitants of the area. . . .

The third class may be :

Other buildings, if any, in the area [which] are for a like reason dangerous or injurious to the health of the said inhabitants. . . .

That is the scope, or may be the scope, of the resolution. When the order is made, however, it does not necessarily follow that buildings of all three classes will be brought under its operation. The one obvious reason for that provision is that the mere demolition of certain buildings in the area may remove the vice which affected other buildings, and led to their being brought into the resolution. For instance, a street may be very narrow, and that narrowness may affect both sides of it. The houses on one side may be unfit for human habitation, but the houses on the other side may be used for purposes other than human habitation, and may be in themselves unobjectionable. The result of clearing the houses may be to remove the danger due to narrowness of the streets and to leave the other buildings free from any objection. That is the sort of thing which might occur, and which leads to this provision, which provides for an exclusion from the order of certain buildings which may have been included in the resolution. The relevant paragraph is Sched. III, para. 2, which provides as follows :

There shall be excluded from the order any houses or other buildings properly included in the clearance area only on the ground that by reason of their bad arrangement in relation to other buildings, or the narrowness or bad arrangement of the streets, they are dangerous or injurious to the health of the inhabitants of the area.

That, therefore, would have the effect, if it stood alone, of excluding from the order buildings of the second and third classes which I mentioned a moment ago. However, there is a proviso to this effect :

Provided that the foregoing provisions of this paragraph shall not apply to a building constructed or adapted as, or for the purposes of, a dwelling, or partly for those purposes and partly for other purposes, if any part (not being a part used for other purposes) is by reason of disrepair or sanitary defects unfit for human habitation.

The result of that is that a building which was included in the resolution on the ground of danger or injury to health will be brought under the order if it falls within the language of the proviso. I think that those are all the provisions of the Act to which I need refer in detail.

The question which arises for consideration at the outset of this case is whether the buildings in this area fall within the word "houses" in sect. 25, or whether they fall within the words "other buildings" in the same section, or whether they fall partly within the one and partly within the other, in which case the result would be that the upper floors would be "houses," and the ground floors would be "other buildings." Mr. Evershed, on behalf of the appellant, claims that these buildings do not fall within the description "houses," but fall within the description "other buildings." The Solicitor-General, on behalf of the Minister of Health, maintains the contrary. DU PARCQ, J., as he then was, decided in favour of the third contention, and held that these buildings were composite buildings, and that, for the purposes of the Act, they must be treated as divided horizontally, leaving the ground floor under the class "other buildings" and the upper floor under the class "houses."

In my opinion, the contention of the Solicitor-General in this case is right. It seems to me that these buildings properly fall under the word "houses" in the section. Whether or not a particular building falls under that word is a mixed question of law and of fact—fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word "houses" to those facts involves the construction of the Act. However, as so frequently happens in dealing with Acts of Parliament, words are found used—and very often the commoner the word, the greater the doubt it may raise—the application of which to individual cases can only be settled by the application of a sense of language in the context of the Act, and, if I may say so, a certain amount of common sense in using and understanding the English language in a particular context. There may, of course, be cases which fall very near a borderline, where it is impossible to lay down any exhaustive definition as to what is or what is not a house. Every case must be considered in the light of its own facts, but, in the present case, I am of opinion that these buildings come under the word "houses." It has been said that, in their original construction and purpose, the upper floors of these premises were not intended to be dwelling-houses, and that they have been subsequently adapted. However that may be, it seems to me that the principal matter which must be taken into consideration is the state of the premises at the relevant moment when the question falls to be decided. Their physical structure, of course, is a matter of importance, and no doubt their user is, or may be, a matter of importance. All those matters have to be considered, and then the question has to be asked and answered fairly. If those buildings had originally been built, like many buildings are nowadays, with dwelling-rooms above, and with a garage below for the inhabitant to keep his car in, nobody would suggest, I think, that they were not houses. The fact that the whole of the ground floor was occupied by a garage would not make the building any the less a house. Similarly, there are many cases where buildings in mews have been converted for a like purpose, and turned into buildings where a tenant lives in the upper floor and keeps his car in the lower part. In such a case, the fact that the lower floor was let out to somebody else who kept his car there, or that the two floors were in different tenancies, does not appear to me to be in any sense a governing consideration. When I look at the buildings as a whole, it seems to me, as I have said, that that is the proper description of the group into which they fall.

In so saying, I am fortified by the fact that a case which we are told is precisely similar in all relevant matters on its facts was decided in the same sense, and for the same reason, by the late SWIFT, J.—that is, *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot* (1). The judge there held that mews of this description fall under the word "houses" in the Act, and, as I have said, I agree with both his reasoning and his conclusion. In the present case, the judge distinguished that case, but it appears now that he did so under a misappre-

hension as to the facts, because, with regard to the present case now before this court, he says, in [1938] 2 K.B. at p. 215 ([1938] 2 All E.R. at p. 280):

... there is in this case no finding by the Minister of Health that each such composite structure is a "house." The present case is thus distinguishable from *Re Hammersmith (Berghem Mews) Clearance Order, 1936, Application of Wilmot* (1).

The papers in *Wilmot's* case (1) have been examined, and it appears that there was not in that case any such finding by the Minister of Health as the judge thought. The result is that the reason given by the judge distinguishing *Wilmot's* case (1) does not exist. A

There is just one matter that I should have mentioned—I merely mention it to show that I have not forgotten it—and that is that the definition section, which is sect. 188, provides as follows: B

"House" includes any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith.

That definition does not, I think, throw any light upon the present controversy.

If my view be right, that is an end of this case, but it is necessary to see the way in which the local authority and the Minister of Health, in dealing with these matters, have treated the case. The resolution was one which, in terms, followed the wording of sect. 25 (1) (a). That is to say, it was resolved that the dwelling-houses in the area were unfit: C

... or are by reason of their bad arrangement, or the narrowness ... dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious. . . D

The fact that that resolution contemplates the possibility of some of the buildings not being dwelling-houses or some of the dwelling-houses not being unfit for human habitation does not appear to me to affect the validity of that part of it which, on a true construction of the Act as applied to the facts, deals with dwelling-houses, and, if the view that I have expressed is correct—namely, that all the buildings are "dwelling-houses," that being the appropriate phrase at that date—the reference to the other matters covered by the section appears to me to be mere surplusage, and not to affect the validity of the opening part of the resolution. The order itself, which was confirmed by the Minister, is a little different. It starts off by saying that the dwelling-houses are, for the reasons stated, unfit for human habitation, or are, by reason of their bad arrangement and the like, dangerous or injurious, and then it has in brackets: "and that the other buildings in the area are for the like reason dangerous or injurious to the health of the said inhabitants." There again I think that the observations which I have just made with regard to the resolution apply, and the fact that these additional matters are introduced into the order does not affect its validity in so far as the subject-matter to which it refers falls under the words "dwelling-houses" or "houses." The operative part of the order deals with the entirety—namely, all the buildings specified in the schedule thereto. That comprises all the buildings, the ground floor and upper floor. It directs that they shall be demolished, and provides for vacation. E
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- It is pretty clear to my mind that the local authority in making that order, and the Minister in confirming it, were proceeding on the footing that the buildings in question were houses. I do not myself see any room for the view that they were proceeding on the basis that the buildings were to be divided horizontally. There is no suggestion there
- A** to that effect, and it is worth pointing out that the medical officer of health on whose representation the original resolution was passed at a later date set out categorically his criticism of the buildings in a document, and that throughout that document it is quite clear that he is treating the buildings as dwelling-houses on two floors, comprising, to take his
- B** own description : " Stable on ground floor used as garage, and 3 rooms on first floor." The council, of course, is entitled under the section to act on any information in its possession, including its own knowledge, and I am certainly not going to assume that the council which passed the resolution and made the order did not know the condition of a sub-
- C** stantial block of buildings in its own area sufficiently to enable it to form some opinion or to guide it in its decision. It appears to me, therefore, that the resolution and the order are perfectly valid, notwithstanding the fact that, if my view be correct, there are no buildings other than houses in the area.
- D** I must say one word, out of respect to the judge, on the grounds of his decision. As I have said, he took the view that these buildings were, so far as regards the upper floor, " houses," and, so far as regards the ground floor, " other buildings," with the result that they were divided horizontally. That view led to a difficulty under Sched. III, para. 2,
- E** which I have read, because it raised the question whether, on that view, the ground floors ought to have been excluded altogether from the order, because, the ground floors being, on this hypothesis, " other buildings," they could only be included in the resolution on the ground that they were dangerous or injurious to health for the reason stated, and, having
- F** been included for that reason only, they would fall to be excluded from the order under the first part of Sched. III, para. 2, and would only be kept in the order if the proviso to that paragraph applied to the case. The judge held that, on its true construction, the proviso did apply to the case, with the result that the whole of the buildings were properly
- G** in the clearance order. Certain difficulties in that construction were pointed out by Mr. Evershed, but, in view of the opinion which I have formed on the case, I do not think it necessary to go into them. Nor do I think it necessary to decide that the Act does not contemplate anything in the nature of horizontal division. If that were the true con-
- H** struction of the Act, I think that it would reinforce, if reinforcement be necessary, the view which I have already expressed as to the meaning of the word " houses " as applied to the facts of the present case. Although I do not think it necessary to express any concluded opinion as to whether or not such a horizontal division is contemplated by the Act, it must not be taken from that that I agree with the view of the

judge that such may be the case. There are various considerations which will have to be borne in mind if and when such a question arises. For instance, the language and scheme of sect. 25 seem to suggest that the unit that is being considered is a building and that that building falls into one or other of two classes—namely, “house” or “other building.” In other words, it is suggested that those two descriptions are exhaustive. A That is one matter that will have to be considered. Again, the difficulty of bringing part of what is substantially one building under the word “building” would have to be considered, as would the question of whether or not “building” is an apt word to use in relation to part of a building. Then, again, the very word “clearance” points to demolition of buildings, and it would have to be considered whether or not it would be apt to describe the demolition of part of what is substantially one building. Then, again, sect. 26 (5), in referring to the subsequent user, after clearance, describes the clearance order as applying to land, and the purchase, if the local authority proceeds by way of purchase, C is a purchase of land. The valuation provisions provide for the valuation of land acquired on the basis of the value of the site cleared of buildings, and so on. I mention those matters because they have been referred to in argument, and, as I have said, they, and others, will require careful consideration if and when a case arises where the court has to decide, D in reference to a particular building, whether such a horizontal division as is suggested is permissible. I express no opinion about that, but the ground upon which I base my decision is the first one I mentioned—namely, that, on the facts of this case, and on the true construction of the Act, the premises in question fall within the word “houses.” In E the result, I come to the same conclusion as did the judge, although for different reasons, and the appeal must be dismissed with costs.

MACKINNON, L.J. : I agree, and I do not think that I can usefully add anything.

GODDARD, L.J. : I agree.

Appeal dismissed, with costs.

Solicitors : *Barnes & Butler* (for the appellant) ; *The Solicitor, Ministry of Health* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] G

Re GORHAM'S CHARITY.

[CHANCERY DIVISION (Crossman, J.), February 15, 1939.]

Charities—Assurances for charitable purposes—Assurance by will—Land—Extension of time for sale—Land vested in Official Trustee—Mortmain and Charitable Uses Act, 1891 (c. 73), ss. 5, 6. H

The testator, who died in 1933, gave certain land in Sussex with a direction to his trustees that it should be used “for the peaceful recreation of the inhabitants of Brighton.” Subsequently a scheme for the establishment of this charity was approved by the court. In 1938, the

land was vested in the Official Trustee of Charity Lands, and the question arose whether, notwithstanding such vesting, the court had jurisdiction to extend the time for sale of the land as limited by the Mortmain and Charitable Uses Act, 1891, s. 5 :—

HELD : notwithstanding the fact that the land had already vested in the Official Trustee, the court had jurisdiction to extend the time within which the land had to be sold pursuant to sect. 5 of the Act.

A

[EDITORIAL NOTE. In 1903, the question of the jurisdiction of the court to extend the time during which a sale of land devised for charitable purposes might be made was considered in *Re Ryland, Roper v. Ryland* (2), but, in the circumstances of that case, it was not necessary to consider the point here arising, although the matter was referred to incidentally. The first question in that case was whether or not the particular interest devised was land, and that question was answered in such a way that the further question which here falls to be determined did not there arise. The point is a short one, and is simply whether or not the court still has jurisdiction to extend the time after the land has vested, or has been vested, in the Official Trustee of Charity Lands.

B

C

AS TO EXTENSION OF TIME FOR SALE, see HALSBURY, Hailsham Edn., Vol. 4, p. 152, para. 199 ; and FOR CASES, see DIGEST, Vol. 8, pp. 283, 284, Nos. 593, 594.]

Cases referred to :

(1) *Re Bottle*, Unreported.

(2) *Re Ryland, Roper v. Ryland*, [1903] 1 Ch. 467 ; 8 Digest 267, 292 ; 72 L.J.Ch. 277 ; 88 L.T. 456.

D

ORIGINATING SUMMONS to extend time for the sale of charitable land. The facts are fully set out in the judgment.

Raymond Jennings for the applicants, the trustees.

E

A. Andrewes Uthwatt for the respondent, the Official Trustee of Charity Lands.

CROSSMAN, J. : This is an originating summons by the trustees of a charity known as Gorham's Gift, to which the Official Trustee of Charity Lands is the sole respondent, in which the trustees ask that the time limited by the Mortmain and Charitable Uses Act, 1891, s. 5, for the sale of the lands and hereditaments known as The Paddocks, Rottingdean, in the county of Sussex, may be extended for at least 5 years from the date of the order to be made herein, and for such further period as the court may think fit.

F

G

The circumstances in which this summons is issued are as follow. A scheme was made in 1935, and was approved by the court by order made on Dec. 10, 1935, for the establishment of this charity known as Gorham's Gift. It arose under the will of a Mr. Ambrose Gorham, who, I understand, gave his estate in Sussex in effect for the peaceful recreation of the inhabitants of Brighton. His will was dated Dec. 9, 1929, and Mr. Gorham died in 1933. Nothing else occurred. The result of the Mortmain and Charitable Uses Act, 1891, s. 5, which is the section referred to in the summons, would have been that, on the expiration of 12 months from the testator's death, the real estate which he devised for these charitable purposes — because they were duly held by

H

CLAUSON, J., in 1934 to be charitable—would have had to be sold, notwithstanding anything in the will contained to the contrary. As a matter of fact, owing to the effect in this case of the Administration of Estates Act, 1925, on the death of the testator the land vested in his personal representatives, and, until they assented to the devise of the land for charitable purposes, the position was that sect. 5 did not really come into effect at all. That has recently been pointed out in a practice note which was inserted in consequence of the case which came before BENNETT, J., quite recently, in which, following a decision of EVE, J., in *Re Bottle* in about 1929, he held that land within the meaning of the Mortmain and Charitable Uses Act, 1891, notwithstanding that a year from the death of the testator had expired, remained vested in the personal representative of the testator until he assented in writing to the property vesting in the Official Trustee of Charity Lands. Consequently, no vesting took place under this section, which I will read in a moment, until the personal representatives of the testator assented to the devise. Sect. 5 of the Act of 1891 provides as follows :

Land may be assured by will to or for the benefit of any charitable use . . .

As Mr. Uthwatt has pointed out, previous to that, land could not be devised to charity at all. A gift by will to charity of land was simply void. Then the section goes on :

But, except as herein-after provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners.

Then the next section, sect. 6, provides as follows :

So soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the Official Trustee of Charity Lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof . . .

Then there are directions as to the carrying out of the sale, and what steps are to be taken by the Charity Commissioners if the trustees do not act in accordance with the section. The only other section which I think might be thought to bear upon the question which I have to decide is sect. 8, which provides as follows :

It shall be lawful for the High Court, or any judge thereof sitting at chambers, or for the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, by order to sanction the retention or acquisition, as the case may be, of such land.

On Dec. 10, 1935, the order was made to which I have referred, approving the scheme under which this charity is at present administered. I observe that in that order, which was made by CLAUSON, J., as he then was, there is the following provision :

And it is ordered that the plaintiffs do not assent to the devise of any of the remaining part of the residuary real estate of the testator without the leave of the judge.

That followed upon the order with regard to the Telscombe property, which was the property which was to be retained permanently, and the property which was to be used for the peaceful recreation of the inhabitants of Brighton, the property other than that which is referred to as "the remaining part of the residuary real estate of the testator."

- A The object of that order appears to be to prevent any question arising as to the operation of sect. 6 prior to the time when an assent was given to the devise. If that assent could not be given without the leave of the judge, it was obviously impossible for sect. 6 to operate until an opportunity for making an application under sect. 5 had also arisen.
- B Unfortunately, in the last 12 months two applications were made to the court, one for an originating summons to extend the time limited by sect. 5 of the Act for sale of The Paddocks for 5 years, and a summons was issued in these proceedings for leave to assent to the devise of the land, it being intended, as I understand it, that those two should come on together, and that no order should be made under the summons for leave to assent until the other summons to extend the time had also been brought on. On July 29, 1938, I understand that an order was made by the master in chambers giving leave to assent to the devise of the remaining real estate, including The Paddocks, in favour of the Official
- D Trustee of Charitable Lands. The Paddocks was a property which was not part of the property to be used for the actual occupation of the charity, but was thought likely to increase very considerably in value. It was not desired that it should be sold at the present time, because this was not an advantageous time for sale, and also because a sale at the present time would have left the charity without sufficient income to keep up the various payments provided for by the scheme. On Dec. 7, 1938, the personal representatives assented to the devise pursuant to the order which was made on July 29, 1938. The result of that assent was that The Paddocks vested in the Official Trustee of Charity
- F Lands under the Administration of Estates Act, 1925, s. 36 (2), and under the Mortmain and Charitable Uses Act, 1891, s. 6. The other summons which asked for a further extension of the time for sale of The Paddocks came before SIMONDS, J., on Dec. 19, 1938. By that time, the land had vested in the Official Trustee, and the question arose whether
- G the court had any power to extend the time limited by sect. 5, the vesting in the Official Trustee having already taken place. In consequence of that, the judge adjourned the summons into court, and that is the summons which now comes before me to determine, as I must first of all determine, whether there is any jurisdiction under the Act in the events
- H which have happened—the unfortunate events, if I may say so—of the assent having been given before the originating summons to extend the time came on. The question is whether, in those circumstances, there is any jurisdiction in the court to extend the time within sect. 5.

This matter—very remarkably, I think—has never come before the court for actual decision, although I think that it has been a live question

for a great many years. In 1903, however, a matter came before BYRNE, J., in *Re Ryland, Roper v. Ryland* (2), when the question was raised as to whether certain interests under a will were land within the meaning of sect. 5, and whether they vested in the Official Trustee, and whether an extension of time was necessary. In that case, the court decided that part of the interest under the will was land, and vested in the Official Trustee, and part was not land, and did not so vest. In the course of the argument, BYRNE, J., said, at p. 472 :

If the court has power after the lands have vested in the Official Trustee to postpone or extend the time for sale, it would, I think, be proper and convenient in the present case to extend the time.

There the judge spoke of the matter as a question whether the court had power, and counsel appearing for the Charity Commissioners, Mr. Vaughan Hawkins, who was a very experienced person in these matters, in the course of the argument said : " Possibly, but the question is," and then he stated what the real question was—namely, whether or not this particular interest was land. That having been said in the course of the argument, the judge, after deciding what part of the interest given by the will was land within the Act and what part was not, went on as follows, at p. 474 :

Then there is one other point which I may mention, although it is not now before me for decision. I am not prepared to say that when the property is in the hands of the Official Trustee of Charity Lands there is not power, either in the Charity Commissioners or in the court, as the case may be, to enlarge the time for sale of the land, notwithstanding the fact that the year has elapsed and the land has vested. I do not, however, decide that point, as it is not before me.

Unfortunately, the judge did not decide the point, and it is now necessary for me to decide it, because from that time until now there appears to be no decision of the court upon the question.

Mr. Jennings, who appears for the trustees of the charity, contends that, in these circumstances, notwithstanding that this land, The Paddocks, has vested in the Official Trustee under sect. 6, or in consequence of sect. 6—I think that it is suggested that it has vested under the Administration of Estates Act—an application can still be made under sect. 5, and the court may determine to extend the time now for some time, which will enable the land to be kept unsold. Mr. Uthwatt, who appears for the Official Trustee of Charity Lands, and for the Attorney-General, who has been added as a respondent to the summons, I think agrees with this—that sect. 5 taken alone contains nothing which makes it necessary to obtain the decision of the court or the determination of the court extending the period within the year, which is laid down as the limit within which the land must be sold. If we stopped at sect. 5, this application would be a proper one, and the court could extend the time. It is admitted—and I think that it has been decided in previous cases—that there is no power in the court to divest the land out of the Official Trustee when once it is vested in him under sect. 6, and that that cannot be done. Whatever can be done is limited to extending the time within

which the sale ought to be carried out, or in which the duty of the Charity Commissioners is to see that a sale is carried out, but Mr. Jennings says that it is possible to read sect. 6 in such a way as not to cut down the jurisdiction which would have existed in the court under sect. 5 to extend the time, notwithstanding that the land has been vested in the Official

- A Trustee of Charity Lands. He says that sect. 6 may be read : " So soon as the time . . . for the time being . . . limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the Official Trustee of Charity Lands." Then he says that that leaves it open to
- B the court to make another limit of time. He says that, as soon as the time for the time being limited, if no extension has been made—that is to say, the one year—has elapsed, the land will vest, but that there is nothing in the words of the section which will prevent the court under sect. 5 from determining that there shall be a further extended period.
- C Mr. Andrewes Uthwatt, appearing, as I say, for the Attorney-General and the Official Trustee of Charity Lands, says that the application must be made and the order made within the period—either the year or the extended period, within whatever period is the period allowed—and that, unless it is so made, there is no jurisdiction to make any order
- D extending the time further. He points out with great force that, under sect. 6, the vesting in the Official Trustee of Charity Lands and the duty of the Charity Commissioners to take all necessary steps for the sale or completion of the sale of such lands are both matters which are to take effect immediately upon the time limited for the sale of any lands expiring.
- E As soon as the time limited has expired without completion of the sale, those two things operate together, and he says that, the land unsold having vested in the Official Trustee, the other matter—the duty of the Charity Commissioners to take all necessary steps for the sale—must operate at the same time. He says that it must have begun to operate
- F now, and that there is no power in the court to stop the Charity Commissioners from taking all necessary steps. I feel the force of that argument, and I think that it is quite clear that these two sections are very difficult to construe, but, looking at the two sections together, and considering the position as a whole, I do not think that I am justified in
- G limiting the operation of sect. 5, except so far as it is clearly expressly limited by the Act itself. I do not find anything which prevents me from saying that there is an extended period which the court may determine as the period within which the land has to be sold. That is quite apart from any question of vesting. I think that the extended period
- H within which the land must be sold may be determined by the court. I do not think that it is necessary to say that, because one period, which was limited, has expired, and the land has vested in the Official Trustee, it therefore becomes impossible to extend the time further. I am bound to pay attention, as I do, to what BYRNE, J., said. He clearly thought that it was an open question whether there was not power, either in the

Charity Commissioners or in the court, as the case might be, to enlarge the time for sale of the land, notwithstanding the fact that the year had elapsed and the land had vested. It is entirely a matter of the construction of these two sections, and I have come to the conclusion that, on the construction of these sections, the court has jurisdiction to extend the time, notwithstanding that the land has vested in the Official Trustee under sect. 6 of the Act. A

Question as to whether, in the particular circumstances of the case, the time should be extended referred to chambers.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. O. Dodd*, Brighton (for the applicants); *Treasury Solicitor* (for the respondent). B

[Reported by F. HONIG, Esq., Barrister-at-Law.]

EMPIRE MEAT CO., LTD. v. PATRICK. C

[KING'S BENCH DIVISION (Oliver, J.), February 13, 15, 16, 1939.]

Master and Servant—Contract of service—Restrictive covenant—Covenant against solicitation—Radius agreement—Validity—Manager of butcher's shop.

The defendant was employed by the plaintiffs as sole manager of one of a number of butchers' shops owned by the plaintiffs. By a clause in his service agreement, it was provided that, in the event of the termination of the agreement from any cause, the defendant would neither enter into nor carry on nor in any way assist or be concerned in the carrying on, either directly or indirectly, of the business of a butcher or meat-seller, either on his own behalf or on behalf of any other person or persons, corporation or company, nor would he enter into the employ of any person or persons, corporation or company carrying on or concerned in carrying on such business, or any similar business, for 5 years and within a distance of 5 miles from the place of business where the plaintiffs had employed the defendant. The defendant gave the plaintiffs one week's notice of termination of his contract, and opened up a rival butcher's shop 8 doors from where he had been previously employed:— D

HELD: (i) a radius agreement will only be justified as not being in undue restraint of trade, as contrasted with a covenant against solicitation of old customers, where there is no other way of protecting the employer's trade connection. F

(ii) as the names and addresses of the customers were, for the most part, known to the defendant only, he was, from the customers' point of view, in the position of the proprietor of the business. A radius agreement was, therefore, in the circumstances, justified. G

(iii) it is unnecessary to the validity of a radius agreement in restraint of trade that it should specify the acts—namely, the improper use by the servant of the knowledge which he has acquired in his master's service—against which it is directed. H

[EDITORIAL NOTE. There are, it is said, two distinct forms of covenant providing against competition by an employee after the termination of his employment. One is a covenant against solicitation of the employer's customers, and the other is what has been called a radius agreement, prohibiting the employee from being employed, or starting a business of his own, within a certain area. It is of the essence of a covenant against solicitation that the customers should be known, and, in the case of certain retail shops where people just come into the shop, make

their purchase and go away again, it is impossible to identify the great majority of the customers. In such a case, a covenant against solicitation is in practice useless, and a radius agreement becomes the only practical method of securing such protection as the law allows to an employer. The present case goes on to consider the extent of that protection in the circumstances of the case.

AS TO RADIUS AGREEMENTS, see HALSBURY, 1st Edn., Vol. 27, Trade pp. 569-580, paras. 1105-1115; and FOR CASES, see DIGEST, Vol. 43, pp. 19-30, Nos. 120-234.]

A Cases referred to :

(1) *Attwood v. Lamont*, [1920] 3 K.B. 571; 43 Digest 20, 131; 90 L.J.K.B. 121; 124 L.T. 108.

(2) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; 43 Digest 24, 154; 85 L.J.Ch. 210; 114 L.T. 618; *affg.*, [1915] 2 Ch. 57.

B (3) *Konski v. Peet*, [1915] 1 Ch. 530; 43 Digest 49, 497; 84 L.J.Ch. 513; 112 L.T. 1107.

(4) *Fitch v. Dewes*, [1921] 2 A.C. 158; 43 Digest 34, 276; 90 L.J.Ch. 436; 125 L.T. 744; *affg.*, [1920] 2 Ch. 159.

(5) *Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724; 43 Digest 22, 143; 82 L.J.K.B. 1153; 109 L.T. 449; *revesg.*, [1913] 1 K.B. 65.

C (6) *Putman v. Taylor*, [1927] 1 K.B. 741; 43 Digest 47, 480; 96 L.J.K.B. 726, 137 L.T. 291; on appeal from [1927] 1 K.B. 641.

ACTION for damages for breach of a clause in restraint of trade in a service contract and for an injunction against further breaches. The defendant contended that the clause was invalid as being in undue restraint of trade. The facts are fully set out in the judgment.

A. T. Denning, K.C., and Robert Ives for the plaintiffs.

R. C. Vaughan for the defendant.

E OLIVER, J. : In this case, the plaintiffs, the Empire Meat Co., Ltd., sue the defendant, Charles Horace Patrick, in the following circumstances. The plaintiffs are proprietors of a number of butchers' shops, including a number in Cambridge. One of these, at 62, Mill Road, was managed by the defendant from about 1919 until he left in Oct., 1938. When he had been there about 9 or 10 years, a contract was entered
F into containing a stipulation which is set out in para. 2 of the statement of claim :

G That in the event of the termination of this agreement from any cause he will neither enter into or carry on or in any way assist or be concerned in the carrying on either directly or indirectly of the business of a butcher or meat-seller, either on his own behalf or on behalf of any other person or persons, corporation or company, nor will he enter into the employ of any person or persons, corporation or company carrying on or concerned in carrying on such business or any similar business within a distance of 5 miles from the place of business of the said company situate at 62, Mill Road, Cambridge, for 5 years.

H Just prior to the making of this contract, the defendant had bought a shop some 8 doors away from No. 62 in which he established his wife in a millinery business, and this was made the occasion of the plaintiffs taking steps to protect themselves against the possibility of the defendant seeking to start a rival butcher's business on their goodwill. The plaintiffs' shop was entirely run and managed by the defendant, who knew and interviewed all the customers, delivered the accounts, accounted for

the cash, and kept the books. He was assisted in the shop by one Read, and there were two rounds boys, who delivered the meat. Only the names and addresses of credit customers ever got into the books at all, or were even known to the plaintiffs' officers. Considering that nearly two-thirds of the turnover was with cash customers, it would follow that to a most unusual extent the goodwill of the business was in the hands of the defendant. In June, 1938, the defendant's wife was ill, and had to give up the millinery business. In September her store was sold, and in October the defendant, having given one week's notice, left the plaintiffs' service. On Oct. 22, he opened a rival butcher's shop at his wife's old shop, 8 doors from No. 62, Mill Road. There went with him to the new business the assistant, Read, and one of the two rounds boys. There also went with him, and it is not to be wondered at, about half the trade of the plaintiffs' shop. The value of the business was reduced from one making a profit of £6 per week to one making a loss of £3 per week. It is now contended by the defendant that the restrictive clause in the contract was too wide, and void as being in restraint of trade. Both counsel assisted me greatly with a full and able review of the authorities. The principles of law governing the question before me have grown up gradually from a series of decisions. The measure of protection permitted differs in different cases. For example, a purchaser of a business is entitled to a far wider degree of protection against his vendor than is an employer against his servant, although, as was pointed out by YOUNGER, L.J. (ATKIN, L.J., concurring), in *Attwood v. Lamont* (1), the principle was not fully established till *Herbert Morris, Ltd. v. Saxelby* (2). A purchaser may protect himself against competition, and an employer may not. He may only guard himself against the appropriation by his late servant of his goodwill which he may be able to secure by his knowledge of, and personal connection with, his employer's customers. It has frequently been pointed out that all restraints of this kind are viewed askance by the law as tending to fetter freedom of trade. In *Herbert Morris, Ltd. v. Saxelby* (2), LORD PARKER puts the matter in this way, at p. 710 :

... the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary.

It will be noted that LORD PARKER uses the words "trade connection" as being in the same class as that of the words "trade secrets." The main test to be applied is that the covenantee, the employer, must show that the restriction imposed goes no further than what is reasonable to protect his business: *per* LORD YOUNGER in *Attwood v. Lamont* (1), at p. 587. There are at least two quite different forms of protective covenant in the case of employers. First, there is a covenant against solicitation of old customers. If this is drawn so widely as to prohibit solicitation of all customers, including those who have become so since

the servant left, it is bad: *Konski v. Peet* (3). There are many similar decisions. Such a covenant can be said to be obviously bad as going beyond what is necessary. Secondly, there is a covenant in what is called the form of a radius agreement, prohibiting an employee setting up in business within a given area. The present is an example of this.

- A Such a covenant necessarily involves to some extent prohibition of competition and prohibition from trading with great numbers of persons who were never customers of the employer. Mr. Vaughan at one stage nearly went so far as to suggest that recent authority, and particularly certain observations of YOUNGER, L.J., in *Attwood v. Lamont* (1), at p. 597, had sounded the knell of radius agreements altogether. In the end, however, he put it in what I conceive to be the correct way—namely, that a radius agreement can only be justified if there is no other way of reasonably protecting the employer. The argument, I think, cannot be put higher than this. The House of Lords in *Fitch v. Dewes* (4), which was decided in the year following *Attwood v. Lamont* (1), took in its stride a radius agreement of 7 miles without any limit of time. It is true that that was the case of a solicitor, but, in my view, the principle is unaffected by this circumstance. It is a matter of degree in each case. The observations of YOUNGER, L.J., must be read in the light of the facts before him, and, in particular, it should be noted what he says at p. 596 :

The appellant is a dangerous rival of the plaintiff in his own district, not by reason of any knowledge of the plaintiff's connection or customers possessed by the appellant, but by reason of his own skill.

Later, he says, at p. 597 :

- E In my judgment the appellant here is deriving no substantial advantage in what he is doing from his previous connection with the respondent's business. Even, however, if he were, the decision in his favour might do this service—it might compel employers to consider the proper limit of restraint which in any particular case they are fairly entitled to insist upon . . .

- F Apart from this, the principle upon which radius agreements can be justified has been stated again and again, and reference may be made to *Mason v. Provident Clothing & Supply Co., Ltd.* (5), where LORD MOULTON thus expresses himself, at p. 743 :

- G The nature of the employment of the appellant in this business was solely to obtain members and collect their instalments. A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was therefore that of a local canvasser and debt collector, and nothing more. Such being the nature of the employment, it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand. If the servant is employed by a rival firm in some district which neither includes that in which he formerly worked for the respondents, nor is immediately adjoining thereto, there is no personal knowledge which he has acquired in his former master's service which can be used to that master's prejudice. The respondents would be in no different position from that

in which they would be if the appellant had acquired his experience in the service of some other company carrying on a like business.

Then, in *Herbert Morris, Ltd. v. Saxelby* (2), LORD PARKER put the matter thus, at p. 711 :

An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business, and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiffs' connection, but a restraint extending over the United Kingdom was obviously too wide in this respect.

Then, in *Attwood v. Lamont* (1), LORD STERNDALE, M.R., said, at p. 578 :

According to the decision in *Herbert Morris, Ltd. v. Saxelby* (2) a master can place a restraint upon the actions of his servant only to the extent necessary to protect himself against an improper use by the servant of the knowledge which he has acquired in the master's service : see LORD ATKINSON in *Herbert Morris, Ltd. v. Saxelby* (2) and LORD PARKER in the same case. It was argued on behalf of the appellant that the result of these statements was that no restraint could be good unless it were specifically stated to be limited to the acts described. I do not agree with this contention. I think it may be necessary to have a general restraint against trading in a certain area in order to avoid such acts on the part of the servant without specifying in the covenant the particular acts against which it is directed.

To bring the matter up to date only, and not because the authority is different from that which I have read, TALBOT, J., said, in *Putsman v. Taylor* (6), at pp. 647, 648 :

I think that the result of the authorities is that stated by LORD STERNDALE, M.R., in *Attwood v. Lamont* (1), namely, that though in a contract such as this the restraint can only be justified so far as it is necessary to protect the employer "against an improper use by the servant of the knowledge which he has acquired in the master's service," yet this restraint may take the form not of forbidding such improper use but of restraining the servant generally from trading in a certain area.

It remains to consider whether this is a case such as would warrant a radius agreement. I have come to the conclusion that it is. A family butcher's business is in many respects a very personal one. It is the habit of the housewife to buy her meat personally, and she is, therefore, constantly—sometimes daily—coming into contact with her butcher. This defendant was in sole charge of the shop. He was, from the customer's point of view, almost in the position of the proprietor of the business. The goodwill of the concern, though not his property, as it had been built up on the capital and organisation, and at the risk, of the plaintiffs, attached to him personally to a large extent. Above all, in this case two-thirds of the business was done for cash, and was done by customers whose names and addresses were not recorded in any business books and whose identity was known only to those working in the shop. Mr. Vaughan strongly urged that a properly drawn solicitation covenant would have given the plaintiffs adequate protection. I do not take this view. I think that, if ever a radius agreement could be justified,

this is the case. With regard to the limit of 5 miles, it was pointed out that the great bulk of the plaintiffs' business was within 2 miles, and that in spite of a very disingenuous attempt on the part of the plaintiffs' manager to represent the business as being far more widespread. This is not the case of a great city. I do not think that in the case of Cambridge

A there was really any greater restriction in saying 5 miles than there would be in saying 2 miles. The effective restriction is against the defendant setting up in the butchering trade in Cambridge. Whether on his own account or as employee of another would be immaterial. I accordingly hold that the contract was binding on the defendant, and that he has

B broken it. Therefore, I grant the injunction in the terms of the writ.

Injunction granted, with £90 damages to date of judgment.

Solicitors: *Wilfrid Ellis* (for the plaintiffs); *Waterhouse & Co.* (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

BARKER v. MUMBY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Charles and Singleton, JJ.), **January 18, 1939.**]

D *Gaming and Wagering—Lottery—Alternative methods of betting—Optional bet—Scheme with provision for credit betting—Betting and Lotteries Act, 1934 (c. 58), s. 22.*

The respondent printed a number of cards upon the front of each of which a number of bets was set out. The names of a number of jockeys were inside each card, and the person receiving the card was invited to make credit bets on three named jockeys winning the whole or part of ante-post bets referred to on the front of the card. The backer was given an alternative of an "optional bet," whereby he was permitted to make his own selection of any three jockeys from the list for any one of the bets on the front of the card. The respondent was charged with having unlawfully printed certain tickets, in connection with a lottery, for use in the lottery, contrary to the Betting and Lotteries Act, 1934,

E

F s. 22 :—

HELD : the scheme, which contained no element of skill, was a lottery, and the offence charged was proved.

[EDITORIAL NOTE. It is well known that credit betting is not unlawful. The well-known football pools are based upon that principle. In the present case, it was attempted to show the legality of the scheme by bringing it within the description of credit betting, and thus to avoid the fact that the scheme was contrary to the provisions of the Betting and Lotteries Act, 1934.]

AS TO LOTTERIES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 525-528, paras. 928-930; and FOR CASES, see DIGEST, Vol. 25, pp. 452-459, Nos. 429-469.]

H Case referred to :

(1) *Challis v. Newman* (1937), Unreported, Apr. 27.

APPEAL by way of case stated from a decision of the stipendiary magistrate for the city and county of Kingston-upon-Hull. The facts and the arguments are set out in the judgment of LORD HEWART, L.C.J.

Each of the cards here in question set out a number of bets on the front, and inside there appeared the names of a number of jockeys. Then it was stated :

We lay you the following credit bets against your credit stake of 1*d.* [or, in the case of one set of cards, 3*d.*] that the three jockeys suggested by us [who were named] do not win whole or part of ante-post bets offered herewith.

Alternatively an "optional bet" was given, whereby a backer was allowed to make his own selection of any 3 jockeys from the list for any one of the bets on the front of the card.

W. A. Macfarlane for the appellant.

W. A. L. Raeburn for the respondent.

LORD HEWART, L.C.J. : This matter arose out of an information laid by the appellant, a detective-inspector in the police of the city of Hull, against the respondent alleging that, in connection with a certain lottery promoted in Great Britain, he unlawfully printed certain tickets for use in the lottery, contrary to the Betting and Lotteries Act, 1934, s. 22. The magistrate, having heard the evidence and arguments, dismissed the information, and the question for us is whether or not, in so doing, he came to a correct determination in point of law.

It is found in the case that the respondent had carried on business as a printer in Hull, and that, on a date during the relevant period, he printed, in the course of his business, 10,000 buff cards and 2,000 blue cards, and caused them to be sent to one Lawson, otherwise known as Ferguson, in Beech Street, Finsbury, London, knowing that Lawson, called the promoter in this case, intended to use the cards to operate, in respect of the week ending June 18, 1938, the scheme which is described on the cards. Specimens of the buff cards and the blue cards are attached to the case. The cards, it is found, were to be supplied by the promoter to agents of his, by whom they were to be offered to the public upon the terms printed on the outside of the cards. When the cards were offered to the public, they were folded and fastened at the perforated edges, just like a letter-card of the Post Office.

In that state of the evidence, there were contentions on the one side and on the other. On behalf of this appellant, it is contended that the scheme was a lottery, notwithstanding that it provided for credit betting, and that the fact that the scheme provided an optional bet procedure, of which the purchaser might avail himself if he chose to do so, did not prevent the scheme from being a lottery.

We have had this scheme minutely dissected and examined, and it seems to me that the word "lottery" is written all over it. Our attention has been directed to *Challis v. Newman* (1), an unreported case in which case I had the advantage of sitting with HUMPHREYS and SINGLETON, JJ. In the course of that case, I said :

It is quite obvious, when one reads this ticket, that the primary, and almost main, purpose of the ticket is to sell for the sum of 3*d.* a chance in a lottery—that

is to say, in a scheme for distribution of prizes by lot or chance. A man pays his 3d. He afterwards finds, when he has opened out the ticket, that he has some sort of chance of winning some money on the results then to be ascertained in a series of football matches. He has nothing whatever to do with the matter except to pay his 3d. [in this case, 1d.], and take his chance, but there is added to the ticket something which is called an optional bet. Provision is made that the man into whose hands the ticket comes may, if he pleases, make another bet of his own. The argument which was presented in the court below was that the presence of that

- A alternative so redeemed the whole scheme as to prevent this ticket from being a ticket for use in a lottery. It is a little difficult to follow the argument. The two schemes on this ticket are separate and distinct. The first, and the main, one—the one which obviously this ticket is intended to provoke and encourage—is a lottery, pure and simple. A man pays 3d., with a blind chance of something over which he has not the faintest control, but it is said that, because, side by side with that scheme, another and alternative scheme is indicated, there may be an element
- B of skill that will save the first scheme from being a lottery. It is a little difficult to follow the conception. Counsel seems to put it in one way, and the magistrate has chosen to look at it in another way. The argument of counsel seems to be that here are two schemes side by side. One is obviously a lottery, and the other may conceivably, if it is acted upon, involve a certain degree of skill. Therefore, the hypothetical and contingent degree of skill of the second scheme takes away from the first scheme its character of a lottery. The magistrate, to do him justice, has not found quite that. He has found, if I may say so with the greatest possible
- C respect, a more ingenious alternative. I will read again what he says: "I was of opinion that, as the purchaser of a coupon was entitled to exercise his own skill and judgment in either accepting the teams stamped upon his coupon or substituting for these teams of his own selection, the scheme was not a distribution of prizes by mere chance, and was not a lottery." In other words, the ingredient of skill which is to redeem the lottery is derived, not from any skill exercised by a person in pursuance of the alternative scheme, but from the skill which a person shows in
- D deciding not to try the lottery. There are offered to him two things—one a lottery, and the other a puzzle in respect of which he may exercise some skill. If he chooses to take the puzzle instead of the lottery, the judgment which he shows in that act redeems the lottery and makes the lottery itself a game of skill.

All I have to say with reference to this case is that, *mutatis mutandis*, and there is not much mutation to be made, if I understand this

E document, this case is *a fortiori* upon *Challis v. Newman* (1). I think, therefore, that this appeal ought to be allowed, and that the case ought to go back to the stipendiary magistrate with a direction that the offence charged was proved.

- F CHARLES, J. : I entirely agree with all that LORD HEWART, L.C.J., has said. I should like to add only a word or two of my own in relation to that which has been discovered during the hearing of this case. It is, to me, quite lamentable that a judgment dealing with important
- G matters affecting a considerable body of the community, dealing with matters of real importance, should remain entirely unreported. The effect of it, in my judgment, may be seen in this very case. Here the stipendiary magistrate had drawn to his attention a decision of a distinguished lawyer, LORD WRIGHT, sitting as chairman of quarter sessions in Wiltshire, I think, which may have affected his mind. If he had had
- H the advantage of reading *Challis v. Newman* (1), he would have seen that that very case was mentioned and dealt with as a case in which LORD WRIGHT expressed himself as *per incuriam*. It would have washed out his consideration of the case which the stipendiary magistrate incorporates in his special case as worth noticing and as having been brought to his attention. I am very far from saying that the stipendiary magi-

strate, if he had had the advantage of reading *Challis v. Newman* (1), would have come to the conclusion that he did—a conclusion which, I agree, was wrong.

SINGLETON, J. : I agree that this appeal should be allowed, and that the case should be remitted to the magistrate, with a direction that the offence charged was proved. I agree, too, that this is a stronger case than was *Challis v. Newman* (1). In that case, it was argued that the optional bet did involve, or might involve, a certain measure of skill. This court held, notwithstanding that possibility, that that which was put before the public was a lottery. In the present case, an examination of the tickets or documents which are exhibited to the case does not show, in my view, any element of skill whatever. It is wholly a lottery.

Appeal allowed, with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *A. Pickard, Town Clerk, Hull* (for the appellant) ; *Smith & Hudson*, agents for *Payne & Payne, Hull* (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

COLES v. ENOCH.

[KING'S BENCH DIVISION (Oliver, J.), January 11, 12, 23, 1939.]

Agency—Remuneration of agent—Commission—Contract to let premises—Prospective tenant—Communication by him to second prospective tenant—Causa causans—Chain of causation—Novus actus interveniens.

The defendant, who was the owner of empty shop premises, authorised the plaintiff to attempt to let them on the terms that the plaintiff was to be paid a commission if he succeeded in doing so. The plaintiff spoke on the telephone to A., whom he considered to be a possible tenant, but A. gave no definite answer, as he desired to consult his partner. W. overheard this telephone conversation and asked A. for information. A. merely mentioned that they were in the neighbourhood of Victoria, and added that, if his partner and himself did not want the premises, he would put W. in touch with them. W. thereupon, without communicating further with A., went to Victoria, and, finding the defendant's empty shop with a notice in the front window that it was to let, took it at a rent of £1,100 per annum :—

HELD : it was the plaintiff's action, and not the notice in the shop, which was the *causa causans* of W. becoming the tenant of the shop. There was no break in the chain of causation, and no *novus actus interveniens*. The plaintiff was, therefore, entitled to his commission.

[EDITORIAL NOTE. It is well settled that, in order to earn his commission, the agent must be the *causa causans* of the transaction going through, but probably there is no more difficult problem in practice than to determine the application of this principle to the facts of particular transactions. The present case applies the doctrine in difficult, though not unusual, circumstances, and for that reason will be found of importance in considering this question that so often arises in practice.

AS TO EFFECTIVE CAUSE IN COMMISSION CASES, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 259-261, para. 434 ; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692.]

Cases referred to :

- (1) *Green v. Bartlett* (1863), 14 C.B.N.S. 681 ; 1 Digest 504, 1738 ; 32 L.J.C.P. 261 ; 8 L.T. 503.
- (2) *Millar, Son & Co. v. Radford* (1903), 19 T.L.R. 575 ; 1 Digest 505, 1740.
- (3) *Tribe v. Taylor* (1876), 1 C.P.D. 505 ; 1 Digest 503, 1729.
- (4) *Burchell v. Gourie & Blockhouse Collieries, Ltd.*, [1910] A.C. 614 ; 1 Digest 495, 1702 ; 80 L.J.P.C. 41 ; 103 L.T. 325.

A

ACTION for agent's commission on introducing a tenant for shop premises. The facts are fully set out in the judgment.

Rodger Winn and *G. K. McCulloch* for the plaintiff.

S. Cope Morgan for the defendant.

B

OLIVER, J. : This was an action in which the plaintiff, Leslie Coles, sued the defendant Enoch for agent's commission on introducing a tenant for the defendant's shop, No. 170, Victoria Street, at a rent of £1,100 per annum. It was agreed by counsel for the parties that, if any commission had been earned, the amount was £110.

C

The facts are short and simple, but the point to be decided has given me a good deal of difficulty. On or about Sept. 29, 1937, the defendant's shop fell vacant, and he was desirous of finding a tenant. He put a notice in the front window announcing "To Let. Apply General

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Agent or Enoch." That notice gave an address in Knightsbridge. By Dec. 6, 1937, the premises were still unlet, and the defendant was naturally anxious to find a tenant. The premises occupied a prominent position, opposite Victoria Station and a few doors from a well-known cinema. In November, the plaintiff, who is an actor, noticed the

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premises, and also another empty shop a few doors away. He was interested in opening premises for pin-table games to which the public would be invited. For this purpose, it would be necessary to turn the shop into a species of arcade by removing the shop front, so that it could be truly said that the premises were at that time not obviously

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suitable for the pin-table business. He inquired first about the other premises, but, finding there were restrictive covenants as to their user, he called on the defendant. He endeavoured to obtain No. 170 for himself, but was unable to find the necessary finance. After some interviews, which need not be quoted in detail, on Dec. 6, 1937, the plaintiff, along

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with one Gill, interviewed the defendant at the latter's office. There was a dispute as to what transpired. The plaintiff and Gill deposed that the plaintiff asked to be allowed to act as the agent for letting, on the usual agency terms, and to that the defendant agreed. The defendant denied any such agency, and gave evidence that all he did

H

was to agree to pay to the plaintiff 25 per cent. of any premium on any lease that the plaintiff could arrange with a man named Rose. He admitted that he would have been quite willing to agree to pay commission on the letting, but said that the plaintiff never asked for this, and that he never in fact agreed to it. Without imputing to the defendant anything worse than a faulty memory, the inaccuracy of which was

no doubt fostered by his own interests, I have no hesitation in accepting the plaintiff's version of this interview. A letter dated Jan. 10 from the plaintiff's solicitor to the defendant, which was relied upon as being against the plaintiff's contention, was explained away to my satisfaction. I find, therefore, that the plaintiff had general authority to find a tenant for the defendant, and that he was to be paid commission if he succeeded. A On Dec. 8, after unsuccessfully approaching Rose, the plaintiff rang up a firm of Scott & Adickes, who were interested in the manufacture of pin-tables, and gave the location as being in Victoria Street, a few doors from the cinema. This description was in effect as precise as an actual address would be. Mr. Adickes, who was called, was interested, B but expressed doubts as to whether his partner, Mr. Scott, who was out at the time, would agree to take the shop. The plaintiff then asked Mr. Adickes to try to find him another tenant, as Mr. Adickes would naturally be in touch with persons interested in pin-tables. It chanced that, at the time of this conversation, a Mr. Wilkie, who ultimately C took the premises, was sitting in Mr. Adickes' room. He was interested in the subject, and in fact had spent the last 3 weeks in London looking for suitable premises for a pin-table arcade for himself. He had not tried the neighbourhood of Victoria. Mr. Adickes told him about the premises which the plaintiff had just mentioned, and said that, if he D and his partner did not want them, he would put Mr. Wilkie in touch with them. He said no more about their location than that they were "in Victoria." He in fact did not wish Mr. Wilkie to have the chance to take the premises until he and his partner had had the first opportunity. Mr. Wilkie, however, within one day—or, at most, two days— E went to Victoria and found the two empty shops. He inquired first about the one which did not belong to the plaintiff, and, finding this already let, and having seen the defendant's name and address on the notice at No. 170, he went to the defendant and took the place at a rent of £1,100 per annum. He agreed that "Victoria," as applying F to a good site for pin-tables, must mean Victoria Street and the circle of shops round the station.

Upon the above facts, has the plaintiff earned his commission? The right of an agent to a fixed commission on the introduction of a purchaser or lessee presents some curious incidents. The agent may G do a great deal of work and earn nothing, or he may do very little and earn the whole. Sometimes a vendor or lessor may make himself liable to pay two separate commissions. The qualification of the agent to earn commission has been frequently defined in various phrases, of which the following are examples. As ERLE, C.J., expressed it in *Green v. Bartlett* (1), at p. 685: H

If the relation of buyer and seller is really brought about by the act of the agent. LORD COLLINS, M.R., in *Millar, Son & Co. v. Radford* (3), phrased it thus, at p. 576:

It was necessary to show that the introduction was an efficient cause in bringing about the letting or the sale.

As was said by BRETT, J., in *Tribe v. Taylor* (3), at p. 509:

Causa proxima is not the question: the plaintiffs must show that some act of theirs was the *causa causans*.

The difficulty of the matter, as so often happens, is to apply these definitions to the facts of any particular case. On the facts before me, A Mr. Cope Morgan, for the defendant, vigorously contended that it was the notice on the shop, and not the action of the plaintiff, which was the *causa causans*. I am bound to say that it seems to me equally easy to contend exactly the opposite—that it was the action of the plaintiff which was the *causa causans*, and that the notice on the shop was the B *causa sine qua non*. I confess that I always find great difficulty in distinguishing between these two well-known phrases. He further argued, moreover, that the plaintiff must adopt the position taken up by Adickes, who, so far from introducing the premises to Mr. Wilkie, had tried, though with complete futility, to prevent him from finding C them. He contended, moreover, that the plaintiff was in no better position than that of the plaintiffs in *Tribe v. Taylor* (3). On the contrary, Mr. Winn contended that the plaintiff, with full authority, had introduced the premises to Mr. Adickes, and had instructed them, and they had agreed, to introduce the premises to others if they did not D want them themselves, that in interesting Wilkie in the matter they were taking the first step towards procuring him as a lessee, and that, although they did not at the time intend it, their action in the matter in fact caused the transaction to go through. He cited *Burchell v. Gowrie & Blockhouse Collieries, Ltd.* (4), as an instance where an agent E had been held entitled to commission though he had done his best to prevent the particular transaction from going through.

I have come to the conclusion, although not without some difficulty, that the plaintiff is entitled to succeed. He was authorised by the defendant to find a tenant, he introduced the shop to Adickes, Adickes F approached Wilkie as a possible tenant and gave him information which in fact resulted in his taking the premises. I find here no break in the chain of causation, and no *novus actus interveniens*. There will, accordingly, be judgment for the plaintiff for £110, with costs.

Judgment for the plaintiff for £110, with costs.

G Solicitors: *F. Blacket Gill* (for the plaintiff); *Norman Hart & Mitchell* (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

RIDLEY v. OSTER.

[KING'S BENCH DIVISION (Oliver, J.), February 7, 8, 15, 1939.]

Sale of land—Error in description—Freehold decontrolled properties—Small part controlled—Recovery of deposit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2) (i)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10.

In an action for the return of a deposit on the purchase of 4 freehold houses, the contract described them as "freehold decontrolled properties," and it was proved that 2 rooms in one of the houses were still controlled at the date of the contract, although the rest of the property was decontrolled :—

HELD : (i) the defendant was not in a position to convey property substantially complying with her contract to convey decontrolled premises, and therefore the contract was avoided altogether, and the purchaser was not bound to resort to the clause of compensation.

(ii) although value was an element to be taken into account in determining whether or not the error in description was substantial or material, it was not the only element, nor was it the dominant one, and, therefore, the contract could be avoided, even where there was no evidence as to the value of premises decontrolled as compared with the value of that still controlled.

(iii) requisitions must be as to title, and questions of decontrol do not go to title.

(iv) the defendant had fundamentally broken her contract, and, therefore, the plaintiff was entitled to frame his action as one for the return of the deposit.

[EDITORIAL NOTE.] LORD ELDON said in 1815 that the court is from time to time approaching nearer to the doctrine that a purchaser shall have that for which he contracted, or will not be compelled to take that which he did not mean to have. It may be true to say that, if a vendor is seeking specific performance of a contract to purchase, a purchaser to-day cannot be compelled to take that which he did not mean to have, but, by reason of the common special condition relating to misdescription, a purchaser often finds it difficult to avoid taking something which he thinks rather different from that which he contracted to purchase. No case has, in practice, presented greater difficulty than the sale of property which may or may not be controlled. In this, the first case of this nature to be reported, it is, therefore, very satisfactory to find, not only that a purchaser cannot be forced to take controlled property where it is described as decontrolled, but also that it is a case where the purchaser can obtain the return of his deposit.

AS TO REPUDIATION BY REASON OF MISREPRESENTATION, see HALSBURY, Hailsham Edn., Vol. 29, pp. 384-386, paras. 528, 529; and FOR CASES, see DIGEST, Vol. 40, pp. 251-257, Nos. 2188-2229.]

Cases referred to :

- (1) *Flight v. Booth* (1834), 1 Bing. N.C. 370; 40 Digest 106, 842; 4 L.J.C.P. 66.
- (2) *Lee v. Rayson*, [1917] 1 Ch. 613; 40 Digest 109, 866; 86 L.J. Ch. 405; 116 L.T. 536.
- (3) *Jacobs v. Revell*, [1900] 2 Ch. 858; 40 Digest 107, 844; 69 L.J. Ch. 879; 83 L.T. 629.
- (4) *Knatchbull v. Grueber* (1815), 1 Madd. 153; 40 Digest 173, 1420; *affd.* (1817), 3 Mer. 124.
- (5) *Charles Hunt, Ltd. v. Palmer*, [1931] 2 Ch. 287; Digest Supp.; 100 L.J. Ch. 356; 145 L.T. 630.
- (6) *White v. Bembridge*, [1935] 1 K.B. 244; Digest Supp.; 104 L.J.K.B. 256; 152 L.T. 62.

- (7) *Heginbottom v. Watts*, [1936] 2 K.B. 6; [1936] 2 All E.R. 153; Digest Supp.; 105 L.J.K.B. 337; 155 L.T. 14.
 (8) *Bain v. Fothergill* (1874), L.R. 7 H.L. 158; 40 Digest 265, 2306; 43 L.J. Ex. 243; 31 L.T. 387; *affg.* (1870), L.R. 6 Exch. 59.
 (9) *Barnes v. Cadogan Developments, Ltd.*, [1930] 1 Ch. 479; Digest Supp.; 99 L.J. Ch. 274; 142 L.T. 626.

A

ACTION by specially indorsed writ for the return of a deposit paid under a contract for the purchase of 4 houses, "the contract having proved abortive." In his affidavit of defence sworn under R.S.C., Ord. 14, the defendant alleged that the premises were decontrolled,

B and that requisitions raised with regard thereto were deemed waived.

Graham Swanwick for the plaintiff.

D. Weitzman for the defendant.

Swanwick: The vendor of land must convey, and must be prepared to convey, property substantially corresponding to that described in the contract, and is bound to make out his title within a reasonable time to the reasonable satisfaction of the purchaser. This the vendor has failed to do, and he has failed to establish decontrol by making a statutory declaration or otherwise. [Counsel referred to *Charles Hunt, Ltd. v. Palmer* (5) and the Rent and Mortgage Interest Restrictions Act, 1923, s. 10.]

Weitzman: The contract was one by correspondence, and, therefore, the statutory conditions made under the Law of Property Act, 1925, s. 46, applied, and the requisitions as to decontrol were deemed waived. Alternatively, if it was an open contract, it was the duty of the vendor to satisfy requisitions as to title. The question of decontrol was not a question of title. Alternatively, the vendor was entitled to assume that the premises were decontrolled unless the contrary were proved. [Counsel referred to *White v. Bembridge* (6) and *Heginbottom v. Watts* (7).] Alternatively, the action was badly framed, as it did not ask for rescission, and, in an action for the return of the deposit, the plaintiff could recover his deposit only where there were substantial deficiencies in the substance and quality of the land sold. No evidence has been offered on this point, or as to the damage suffered by the plaintiff. [Counsel referred to *Bain v. Fothergill* (8) and *Barnes v. Cadogan Developments, Ltd.* (9).] There is no authority for the proposition that the purchaser of land is entitled to a statutory declaration.

OLIVER, J.: In this case, George Ridley, the plaintiff, sues Fanny Oster, the defendant, for the return of a deposit of £135 paid by the plaintiff upon a purchase of freehold houses from the defendant for the sum of £1,350, on the ground that the contract had come to an end owing to the inability of the defendant to deliver what she contracted to sell, or, in other words, that the consideration for the contract had wholly failed. The language of the indorsement on the writ is somewhat inartistic, but it must, I think, be interpreted in this way. In the

proceedings under R.S.C., Ord. 14, the defendant filed an affidavit, which was treated as the defence to the action. The contract was in writing, and consisted of two documents, each signed by one of the parties, and, *mutatis mutandis*, in identical terms. I will read one of them :

I, Mrs. Fanny Oster of 181, Kyverdale Road, London, N.16 agree to sell 12, 14, 16, 18, Gilpin Crescent, Edmonton, N.18 freehold decontrolled properties for the sum of £1,350 and Mr. George Ridley of 20, Edward Road, Walthamstow, E.17, agrees to purchase at this price completion on or before Oct. 31, 1937. A

One of those was signed by George Ridley and the other by Fanny Oster. The property the subject of the contract of sale consisted of four houses, Nos. 12, 14, 16 and 18, Gilpin Crescent, Edmonton. The houses were contiguous, and were let in apartments to various tenants, a list of whom is set out in evidence. There was a list of 15 tenants, four of whom inhabited various apartments in No. 12, two in No. 14, three in No. 16 and six in No. 18. B

Various matters were raised in the defence and touched upon in argument, but, in the end, the questions in controversy resolved themselves into three. (i) Were the premises "decontrolled"—that is to say, free from the operation of the group of statutes conveniently referred to as the Rent Restrictions Acts, so as substantially to fulfil the description of "decontrolled premises" ? (ii) Was the plaintiff entitled to requisitions as to the circumstances and dates of the decontrolling of the premises, they being all of a rateable value which would come within the pecuniary limits qualifying them to be controlled under the Rent Restrictions Acts ? (iii) In any event, was the form of the plaintiff's action correct ? C

The premises had for many years, certainly some twenty, been the property of a Mrs. Denning, deceased, but had recently—no date was proved—become the property of the defendant. They had at all material times been let out in apartments. Before considering (i), it is necessary I think, to refer to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), by the proviso of which it is enacted as follows : D

... (i) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of ... use of furniture. E

It is also necessary to refer to the Rent and Mortgage Interest (Restrictions) Act, 1923, s. 10 (1), which provides as follows : F

For the purposes of sect. 12 (2) (i) of the principal Act (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. G

It would follow that all apartments in these four houses which, during the relevant period, were let furnished (giving to the word "furnished" H

the significance demanded by sect. 10 of the 1923 Act) would be de-controlled, but that any of the apartments which proved to have been let "unfurnished" within that definition would be controlled.

- On behalf of the plaintiff, a Mr. Patmore was called. He at present occupies 3 out of the 5 rooms in No. 16 at a rent of 16s. per week. His evidence was to the effect that he and his wife first took a back room at a rent of 13s. 6d. per week, that this room was then furnished, but that within a year most of the furniture had to be destroyed, owing to vermin. He admitted that the bed had been replaced by the landlord and that the only two chairs had not been destroyed. Subject to this, he said that the landlord had supplied nothing. About 1931, he took the middle room, for which no furniture at all was provided by the landlord, and, about 1934, the long room, also unfurnished. Against this, his wife was called for the defendant, and she said that all the rooms were furnished by the landlord. She admitted, however, that the landlord had given them leave to take away the furniture in the event of their succeeding in obtaining a Council house. This admission, coupled with other facts, satisfied me that the husband's evidence was to be preferred, and, at any rate, that the amount of rent fairly attributable to such furniture as was there, regard being had to its value to the tenant, did not form any substantial part of the whole rent. This view is, moreover, strongly supported by the fact that the original room, which was undoubtedly let furnished at the beginning, cost 13s. 6d. per week, whereas, by the time all three were let, the rent was only 16s. 6d. per week, subsequently reduced to 16s. Mr. Denning, the widower of the former landlord, who was dead, gave general evidence that all the rooms, with the exception presently to be noted, were let furnished. I did not consider this statement sufficient to displace the view I have arrived at, set out above. He was not a very impressive witness, and had evidently been a kind of servant to his wife, as to whom he observed that "what he said did not count." The property and money were all hers. Accordingly, I find that Patmore's 3 rooms in No. 16 were controlled at the date of the contract with the plaintiff.

- When Denning gave evidence, he said that all the apartments were let furnished except those occupied by one Dellar at No. 14. He said that there was a little of the landlord's furniture in Dellar's room, but that most of the furniture was Dellar's, and, later on, that "the Dellar's took it as empty rooms." I should not have been inclined to act on Denning's word alone, having regard to the view I formed of him as a witness, but I find important corroboration of Denning's evidence with regard to Dellar's apartments in the correspondence. The defendant's solicitor, wrote to the plaintiff's solicitor on Sept. 8, 1937, as follows :

My client informs me that your client is fully aware of the terms of the tenancies and in fact is making arrangements with the tenants for vacant possession, and is permitting such tenants as vacate to retain the furniture included in their tenancies. I understand that two only of the tenancies are unfurnished.

I should take it that the two tenancies referred to were Patmore's and Dellar's. Again, the same solicitor wrote on Sept. 23, as follows :

With regard to the tenancy of the front room downstairs and the long room upstairs at No. 14, I am informed that the furniture belongs entirely to Mr. Dellar.

I do not think that it is necessary to read any more of that letter. It is true that in later letters an attempt was made to withdraw these admissions, but that does not impress me. I find, therefore, that the Dellars' two rooms in No. 14 were controlled. A

In view of these findings, it is unnecessary to discuss the interesting question as to who is to bear the onus of proof in this case. I have assumed it against the plaintiff, and hold that he has discharged it. With the above two exceptions, I find that all the premises are decontrolled. B

I have next to consider whether, in any circumstances, the defendant was in a position to convey property substantially complying with her contract to convey decontrolled premises. I have come to the conclusion that she was not. Bearing in mind the many well-known disadvantages from the landlord's point of view in the possession of controlled, as against decontrolled, houses, and particularly the fact that in the present case no rebuilding of the property as a whole could be undertaken without getting rid of the tenants of parts of the middle two of the 4 houses, I think that what was offered differed in substance and in kind from what was contracted to be conveyed. C D

The law is thus laid down in *Flight v. Booth* (1) by TINDAL, C.J., at p. 377 :

In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. E

It is true that the real purchaser, one Shapiro—the plaintiff was his nominee—did not give evidence. Nevertheless, I think that it is obvious from the language of the contract itself, and from the fact that the correspondence from the outset discloses the importance attached by the plaintiff to the question of decontrol, that this was a matter of vital importance to him. However, even if it were not, the test laid down by TINDAL, C.J., is an abstract one, and the standard to be applied is general, and not individual. It was strongly urged by Mr. Weitzman, for the defendant, that Shapiro had not been called, and that no express evidence was before me as to the value of premises decontrolled as compared with the value if parts were controlled. F G

In *Lee v. Rayson* (2), the vendor had agreed to sell 13 controlled houses let on 6 leases for a term of 99 years at ground rents aggregating £72 per annum. The title shown was for 12 houses at a rent of £5 10s. each, and one at a rent of £6, aggregating £72. The agreement, moreover, contained a provision that, if there should be any mis-statement or error H

in the description of the premises, no compensation should be allowed nor should the sale be annulled. It was proved in evidence that the property would have the same market value under either description. EVE, J., says, at p. 618 :

A Therefore, says the defendant, this ground rent of £72 whether payable in one sum and by one person, or in 6 sums and by 6 persons, or in 13 sums by 13 persons, has the same market value, and accordingly it is impossible for the court to hold that the mis-statement is a substantial or material one. I agree that if the element of value were the only factor to be taken into account this argument would be conclusive, but that it is not the only factor will be demonstrated by a moment's consideration. A vendor could not fulfil a contract to sell Whiteacre by conveying Blackacre, although he might prove to demonstration that the value of the latter was largely in excess of the value of the former. Value, no doubt, is an element to be taken into account in determining whether an error in description is substantial or material, but it is certainly not the only element, nor, in my opinion, the dominant one. A statement of LORD ELDON'S, quoted by BUCKLEY, J., in the case to which I have already referred—*Jacobs v. Revell* (3)—indicates, in my opinion, the pertinent inquiry which has to be answered. It is in *Knatchbull v. Grueber* (4), where LORD ELDON says : " This court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."

C The conclusion at which I have arrived, subject to the third question as to the propriety of the form of action, is sufficient to entitle the plaintiff to succeed. It is not, therefore, strictly necessary for me to decide the second question. The attempts to obtain answers to the questions as to the circumstances relating to decontrol are fully set out in the correspondence. It is enough to indicate that I should accept Mr. Weitzman's argument for the defendant that requisitions must be as to title, and the question of decontrol does not go to title at all.

E With regard to the third question, Mr. Weitzman argued that the plaintiff should have sued for rescission, and not *simpliciter* for the return of the deposit. Holding, as I do, that the defendant was quite unable to carry out her contract and had, therefore, broken it in a fundamental manner, I can see no reason why the plaintiff should not frame his action as he has done. Accordingly, there must be judgment for the plaintiff, with costs.

F *Judgment for the plaintiff, with costs.*

Solicitors : *Lloyd & Davey* (for the plaintiff) ; *Gale & Phelps* (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

G
COOPER v. LUXOR (EASTBOURNE), LTD.

[KING'S BENCH DIVISION (Branson, J.), February 7, 1939.]

H Agency—Remuneration—Commission—Contract to pay commission on completion of sale of property—Willing purchaser found—Justification of refusal to complete—Sale of company's property ultra vires the company—Directors with conflicting interests.

The defendant companies wished to dispose of certain property, and agreed to pay the plaintiff a commission on the completion of the sale to any purchaser whom he could introduce. He did in fact introduce a purchaser who was prepared to pay the price required by the

defendants. Internal dissensions over the proposed sale arose among the directors of the defendant companies, and, as a result of these dissensions, if the sale had been proceeded with, the directors might have been charged with *ultra vires* acts, or, at least, with breaches of their fiduciary duty. In these circumstances, the defendants refused to proceed with the sale, and thereupon the plaintiff claimed damages against the defendants for having, as he contended, broken an implied term in the agreement between them that they would do nothing to prevent him from earning the agreed commission :—

HELD : in view of the state of internal dissension and of the charges which might have been made against the directors, the defendants were justified in refusing to complete the sale.

Trollope (George) & Sons v. Martyn Bros. (1) and *Trollope (George) & Sons v. Caplan* (2) applied.

[EDITORIAL NOTE.] Since the decisions in *Trollope v. Martyn* (1) and *Trollope v. Caplan* (2) there has remained the question as to what facts will justify a principal in not proceeding with negotiations for sale and purchase or other business in which an agent's commission is concerned. In the present case the directors could not be expected to proceed with a sale when there was a suggestion that they were acting *ultra vires*. This difficulty, however, neither arose from any act of the agent, nor was it a circumstance in any way under his control, but, since it justified the defendants in not continuing with the negotiations, it is a sufficient defence within the decisions above referred to.

AS TO JUSTIFICATION OF VENDOR IN REFUSING TO CONTINUE NEGOTIATIONS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 261, 262, para. 435 ; and FOR CASES, D see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to :

- (1) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436 ; Digest Supp. ; 103 L.J.K.B. 634 ; 152 L.T. 88.
- (2) *Trollope (George) & Sons v. Caplan*, [1936] 2 K.B. 382 ; [1936] 2 All E.R. 842 ; Digest Supp. ; 105 L.J.K.B. 819 ; 155 L.T. 365.

ACTION by agent claiming commission alleged to be earned by securing intending purchasers ready and willing to buy certain properties belonging to the defendants. The defence (*inter alia*) was that the defendant Luxor, Ltd., was unable to complete the contract of sale on the ground that it would be unlawful and *ultra vires* the company to sell its property. The facts and arguments are fully set out in the judgment.

Cyril Miller for the plaintiff.

H. St. John Field, K.C., and *F. W. Beney* for the defendants.

BRANSON, J. : The plaintiff, Mr. Cooper, is suing two companies Luxor (Eastbourne), Ltd., and Regal (Hastings), Ltd., for commission which he alleges was agreed to be paid to him in respect of an introduction by him of intending purchasers for the properties of those two companies. It is alleged that he produced ready and willing purchasers, who were prepared to buy upon the same terms as those companies were prepared to sell : that he is consequently entitled, not to commission, since the sale never took place, but to damages of the same amount, because he would have earned that amount had not the defendants broken the implied term of the contract between them and him ; and that they undertook,

according to the decisions of *Trollope (George) & Sons v. Martyn Bros.* (1) and *Trollope (George) & Sons v. Caplan* (2), to do nothing to prevent his earning the commission according to the terms of the contract between him and them.

Numerous defences are raised. It is alleged, first of all, that no such contract was made between either of the companies and the plaintiff. It is said, in the first instance, that the solicitor, Mr. Garton, who purported to make such a contract was not authorised to do so. It is said that a director, Mr. Griffiths, who is also alleged to have had something to do with the making of the contract, was equally not authorised to make such a contract. It is said that the contract included the payment of a large sum of commission to Mr. Ewbank, the auditor of the company, and it is contended that he was in a position of fiduciary relationship of such a nature with the company that the mere fact that a part of this money was to be paid to him, is sufficient to render the whole contract unlawful and *ultra vires* the company.

The first duty which falls upon me is to state what, in my view, is the result of the evidence with regard to the facts. The facts appear to me to be as follow. In the two defendant companies, Luxor (Eastbourne), Ltd., and Regal (Hastings), Ltd., Mr. Walter Bentley had in one a very large, but not controlling, interest, and in the other had a controlling interest. It appears that in the summer of 1935 Mr. Walter Bentley, as he was becoming an old and sick man, desired to dispose of his interests in these two companies, and in a number of other companies which owned cinema theatres, in order to rid himself of the burden of having to look after those interests. Being so desirous, he spoke to Mr. Ewbank, and asked him if he could find somebody who would take over these interests for him. Nothing definite was arrived at between these parties. The matter rested simply in discussion and suggestion when, on Sept. 11, 1935, Mr. Walter Bentley died. He died intestate, and the persons interested in his estate were his son, Mr. Harry Bentley, his widow, and two daughters, one of whom was married to a Mr. Allwood. Mr. Bentley having died, and the son Harry being much of an invalid, it was the desire of the Bentley family to pursue the idea of Mr. Walter Bentley and realise their interests in these cinematograph businesses. It is plain that the remaining directors also wished to dispose of their interests in these cinematograph theatres. Their view of the best way of disposing of their interests was that they should sell the properties, but the Bentley family seem to have favoured the method of disposing of their shares in the companies.

It is proved that the directors of both companies authorised their solicitor, Mr. Garton, to negotiate for the sale of the companies' properties. Mr. Garton approached Mr. Ewbank, or Mr. Ewbank approached Mr. Garton—I really do not think it matters which way round it was. Mr. Ewbank, having been spoken to previously by Mr. Walter Bentley on the matter, knew that Mr. Bentley had had it in mind to dispose

of his shares. Mr. Ewbank says that he had had certain relations with the plaintiff, Mr. Norman Cooper ; thus, when it was suggested to him that he should, if possible, find someone to purchase the properties of these two companies, he spoke to Mr. Cooper about the matter. Mr. Cooper was in touch with Colonel Burton, the head of a group which dealt with a number of cinemas under the heading of London and Southern Super Cinemas, Ltd., and he interested Colonel Burton. Colonel Burton said that it was Mr. Ewbank who first introduced the matter to him, but he also said that Mr. Cooper was going to help to finance the taking over of the properties of these two companies, and consequently Mr. Cooper was as much instrumental in bringing about the introduction as Mr. Ewbank. Mr. Ewbank and Mr. Cooper, as he put it, jointly introduced the matter. A B

A great contest has arisen as to whether Mr. Garton was ever authorised by the board of either company to employ Mr. Ewbank, or, through Mr. Ewbank, Mr. Cooper. The direct evidence about it is very slight indeed, because neither side has thought it right to help the court by producing those persons who were then directors of either company, nor was Mr. Garton, who appears to be the man who would know most about it, called by either party. I think that it appears sufficiently from the correspondence that Mr. Garton was authorised to negotiate the sale if a purchaser could be found, and I think it also appears that he was authorised to contract with Mr. Cooper and Mr. Ewbank to pay them a commission for introducing a purchaser. The evidence which leads me to this conclusion is that I find that Mr. Garton wrote to Mr. Ewbank on Oct. 1, putting forward the terms of a contract which the company might be willing to accept. Both Mr. Cooper and Mr. Ewbank told me (and there is no contradiction of the fact) that, before getting to grips with the possibility of a sale, and before introducing Colonel Burton and Mr. Cohen, they had had an interview with Mr. Garton at which they explained that they were only prepared to introduce their clients, as they called them, if a procuration fee of £10,000 was to be reserved for them. It is said that Mr. Garton said : " Well, if your clients are prepared to pay what the companies want, plus the procuration fee that you want, it does not make any difference to me." The fact that Mr. Garton had undertaken to pay the procuration fee was disclosed by him at the board meeting of Regal (Hastings), Ltd., upon Oct. 2, as appears from the minute of that date. It also appears that those persons who were directors of that company and directors of the Luxor company were all present when that disclosure was made. I find no suggestion that any of the directors made any protest or raised any question concerning the authority of Mr. Garton to make such an agreement. I have come to the conclusion that the directors knew that Mr. Garton had entered into a contract to pay to Mr. Cooper, or to Mr. Cooper and to Mr. Ewbank, this procuration fee of £10,000. Mr. Allwood was called, and he impressed me as a witness of truth in the matter. I gather from his evidence that C D E F G H

he knew well enough that Mr. Ewbank was sharing, in some indefinite manner, in this £10,000, and, if he knew that, it is safe to conclude that the directors of the companies knew. From that, it appears that Mr. Garton had authority to contract to pay a procuration fee to Mr. Ewbank and Mr. Cooper.

- A Now the exact nature of the contract appears clearly enough from the letter of Oct. 11, in which Mr. Garton (at the request of Mr. Ewbank) confirmed the contract as follows :

... on completion of the sale of the two leasehold cinemas at Hastings, and the freehold cinemas at Hastings and Eastbourne, respectively, to the London and Southern Super Cinemas, Ltd., a procuration fee of £10,000 is to be paid to Mr. Norman Cooper, being £5,000 in respect of each of the freehold cinemas at Hastings and Eastbourne.

- It is plain, on the facts of the case, that no such sale ever took place, and the next point with which I have to deal is the reason why no such sale ever took place. At this time there was a clash of interests between the surviving directors of the companies and Mr. Harry Bentley, who represented the estate of his deceased father. What is said is that the directors of these companies other than Mr. Harry Bentley had evolved a plan whereby, instead of the two leaseholds, for the purchase of which Mr. Walter Bentley was in negotiation at the time when he died, being transferred to Hastings Amalgamated Cinemas, Ltd., in which case the purchase price which was to be received would be divided, so that Mr. Bentley's shares would receive half, those two leaseholds were to be transferred to a new company which was formed, and in which the Regal Company was allowed to take only £2,000 shares out of £5,000 capital, whereas the directors of the Regal Company were taking £3,000 out of £5,000 capital, with the result that those directors would have been able the next day, or the next day but one, to resell their shares at enormous profits, had this deal been allowed to go through. When that appeared to those who were representing the Bentley interests, objection was taken, and Messrs. Bulcraig & Davis, solicitors, wrote a letter on Oct. 3, 1935, to each of the directors, complaining of this course of action, and saying that, by reason of it, the Bentley interest would do its best to stop the suggested sale being made to London and Southern Super Cinemas, Ltd. In that letter, it was contended that the effect of what was being done was such that the directors, who were personally interested in the sale of the properties from the newly formed Hastings Amalgamated Cinemas, Ltd., had placed themselves in a position in which their interests conflicted with their duty, and consequently they were not qualified to go on with this suggested contract. When that situation arose, Mr. Allwood, who was connected with Union Cinemas, Ltd., and who was anxious to get his father-in-law's estate realised in cash, succeeded in getting Union Cinemas, Ltd., to increase their offer for the shares of the two companies to a sum which was equivalent to the net sum which the companies would have received for their properties had the deal with London and Southern

Super Cinemas, Ltd., gone through. In view of the fact that the Bentley interests were threatening to take legal action to prevent the directors from carrying out the contract which they had made, or which they were prepared to enter into, with London and Southern Super Cinemas, Ltd., the directors thought it well to give up that notion and to agree to the sale of their shares, with those of the Bentley estate, to Union Cinemas, Ltd. Thus, the matter was carried out in that way, and the sale upon which the plaintiff was to get a commission never took place at all. A

The question is what, in these circumstances are the legal rights of the parties. First of all, it is plain that, the sale never having taken place, the commission cannot be recovered as such. That is agreed B on all hands. It is said on behalf of the plaintiff that, according to the law as laid down by the Court of Appeal in *George Trollope & Sons v. Martyn Bros.* (1) and *George Trollope & Sons v. Caplan* (2), every contract such as this must be deemed to contain an implied covenant, and by the implied covenant which this contract must be deemed to C contain the plaintiff is entitled to recover damages, though he cannot recover the commission as such.

One wants to see the nature of the implied covenant which, following the decisions in *Martyn's* case (1) and *Caplan's* case (2), the court ought to import into such a contract as the present. I confess that I find D myself in some difficulty in expressing exactly what that implied covenant should be. I think that it is plain from the judgments in *Martyn's* case (1) that the two Lords Justices who composed the majority based their judgments upon a very narrow ground. The facts before them in that case were that the plaintiffs, having been employed to find a pur- E chaser, found a purchaser who actually executed a contract the draft of which had been approved by the vendors, and, so far as appears from the report of the case, there was no reason whatever, except a change of mind, which induced the vendors to refrain from signing the contract thereby bringing about that result which would have entitled the plaintiffs F to their commission. Dealing with the facts of the matter, GREER, L.J., says, at p. 451 :

The service for which the defendants engaged Messrs. Trollope & Sons was, that they would introduce as a purchaser of the property in question their customer Major Howard who would be prepared to buy on the terms of contract prepared by the defendants' solicitors and approved by Major Howard's solicitors. When the latter assented to the terms of contract sent by the vendors' solicitors, and on behalf of the buyer indicated the latter's acceptance of those terms, the plaintiffs had completed the work they had undertaken to do, though the vendor might still have been free to refuse to sign the contract, without any liability on his part to the proposed purchaser. But as between the plaintiffs and the defendants, the latter could not after the plaintiffs' work was complete deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion G of the sale. H

In the same case, MAUGHAM, L.J., also put his judgment quite definitely, at p. 458 :

For the purposes of the present case, it is, I think, sufficient to say that no excuse whatever has been put forward on behalf of the defendants, and their conduct in refusing to exchange the engrossed contracts seems to have been purely arbitrary.

It is therefore unnecessary to consider what the conclusion would have been, if the refusal to go on with the matter had been due to the receipt of an unconditional higher offer from some third party, and I will not now express any opinion whether that would have made a difference in the present case. I am content to rest my decision on the view that the sole cause of the commission not being earned by the plaintiffs was the arbitrary act, that is, the default, of the defendants, and this I understand to be the view which commended itself to HORRIDGE, J.

A Thus, it appears that, had the Lords Justices been able to find that there was anything which they could have looked upon as an excuse for the conduct of the defendants in not going forward with the contract, that, at all events, might have made a difference to the judgment which they were pronouncing.

B *Caplan's* case (2) differed in no way from that of *Martyn's* case (1), except that the negotiations had not gone to anything like the same extent as in *Martyn's* case (1). It was said in *Caplan's* case (2) that, if there was no reasonable cause for the vendor's withdrawal from the negotiations, the court must look at the state of the negotiations and form an opinion as to the likelihood of their having come to a satisfactory conclusion had not the vendors retired from the negotiations.

C I do not think that any of the other cases cited throw any further light upon the law which I have to apply. Dealing with this point, what I have to ask myself is, "Was there, upon the facts of the present case, any excuse for the defendant companies' refusal to go on with the negotiations which had been initiated by Mr. Ewbank and Mr. Cooper with London and Southern Super Cinemas, Ltd?" It is said on behalf of the plaintiff that mere dissensions among the shareholders of a company cannot possibly form any excuse for the legal entity (*i.e.*, the company) failing to go on with the negotiations. However, when one looks at the reasons which in *Martyn's* case (1) were adumbrated as possible reasons justifying the vendor in not continuing to carry on the negotiations, particularly the suggestion which is made by MAUGHAM, L.J. (as he then was), at p. 458, one finds that the receipt of an unconditional higher offer from some third party might possibly afford justification.

F I have come to the conclusion that the facts in this case do afford a justification for these two companies not continuing the negotiations upon the lines which had been started with London and Southern Super Cinemas, Ltd. There were here, as I have already said, two sets of directors with conflicting interests, one director, representing in at least one of these companies a majority of the shareholders and representing in the other company a very substantial bulk of the shareholders, strongly objecting to the continuance of those negotiations. When one asks oneself whether, in those circumstances, it can be said that the company had no reasonable excuse for not going on and completing a contract which they were negotiating, I do not think that that can properly be said against them. If they had gone on, the directors might have been charged with all sorts of *ultra vires* acts, or, at all events, with acts which were in breach of the fiduciary duties which they owed to their shareholders, rightly or wrongly. I do not think that it is necessary for me to decide

whether such acts would have been *ultra vires* or whether there would have been such a breach of duty. The considerations which were involved in the points taken by the letter of Oct. 3, 1935, from Messrs. Bulcraig & Davis were certainly sufficient, it seems to me, to make it right for the directors to reconsider the position in which they found themselves.

There were other points also taken by Mr. St. John Field. The point, for example, that, it being known that this money, if it were paid, would be shared by the auditor who was an officer of the company in a fiduciary relationship with the company, was obviously a matter which would have required consideration. Again, I do not think it is necessary for me to decide it one way or the other here, because, so long as there was a just cause or excuse for not going on with the negotiations, then the companies were entitled, as I read the judgments in *Martyn's* case (1) and *Caplan's* case (2), to say: "We will not go on," and by so doing would not make themselves liable in damages to the plaintiff or to Mr. Ewbank.

Having come to that conclusion upon the question as to whether or not there was just cause or excuse, and having decided that in favour of the defendants in this case, I think that it is unnecessary to deal in any detail with any of the other points raised, because that point is sufficient to make it necessary to enter judgment for the defendants.

Solicitors: *Mayo, Elder & Co.* (for the plaintiff); *H. S. Wright & Webb* (for the defendants).

[Reported by CHARLES NEWTON, Esq., Barrister-at-Law.]

UNIVERSITY MOTORS, LTD. v. BARRINGTON.

[COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), February 14, 1939.]

County Courts—Costs—Special allowances—Only to be allowed at hearing—What is a "hearing"—C.C.R., Ord. 18, rr. 1, 2—C.C.R., Ord. 47, r. 21.

The respondents made a claim under the provisions of the Landlord and Tenant Act, 1927. The tribunal for the purposes of the Act is the county court, and such matters are referred by the court to a referee for inquiry and report. At a preliminary hearing before the referee, the referee gave directions, but, before the date fixed for the further hearing, the respondents gave final notice of discontinuance, and, under the rules, the appellant then became entitled to tax his costs up to the date of discontinuance. A large sum had been claimed, and the appellant had incurred various items of costs beyond those included in Scale C. The appellant applied to the county court judge for an order for directions as to taxation of the costs of the proceedings before the referee. The judge ordered the costs to be taxed on scale C, but refused to allow certain extra fees under C.C.R. Ord. 47, r. 21, since that rule provides that such fees can only be allowed at a "hearing." The appellant later made another application to the judge to consider the referee's report, but as that report only mentioned the discontinuance, the judge ruled that such proceedings would not be a "hearing":—

Held: the county court judge was right in both his decisions, and

neither of the applications before him was a "hearing" within the meaning of that word in C.C.R., Ord. 47, r. 21.

- [EDITORIAL NOTE.]** The point here is a short one, but of great importance to litigants in the county court in matters where that court has a special statutory jurisdiction. Such matters often involve large sums of money and require the determination of intricate points of law. The rule under which the extra costs to meet the extra burden upon counsel and solicitors are allowed speaks of an application for such costs at the "hearing." The present case considers what is a "hearing" and, although it only decides that a mere application relating to costs is not a hearing within the meaning of the rule, it implies that there must be some exercise of the judicial function of the judge.
- B** AS TO COSTS OF PARTICULAR ITEMS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 367, 368, para. 785; and FOR CASES, see DIGEST, Vol. 13, p. 520, No. 707. See NEW COUNTY COURT PRACTICE, 1939, p. 701.]

Cases referred to :

- C** (1) *Green v. Penzance (Lord)* (1881), 6 App. Cas. 657; Digest, Practice, 269, 64; 45 L.T. 353; *sub nom. Re Green*, 51 L.J.Q.B. 25; *affg. S.C. sub nom. Ex p. Green*, 7 Q.B.D. 273.
- (2) *Morley v. Bevington* (1905), 93 L.T. 768; 13 Digest 520, 707.
- (3) *Reed v. Nutt* (1890), 24 Q.B.D. 669; 13 Digest 502, 524; 59 L.J.Q.B. 311; 62 L.T. 635.

- D** APPEAL from two orders of His Honour Judge Dumas at the Westminster County Court, dated Oct. 28, 1938, and Nov. 17, 1938, respectively. In the proceedings in the county court the parties were called the applicants and the respondent and are so referred to in the judgment of CLAUSON, L.J. It was the respondent in those proceedings who brought the present appeal.

R. F. Levy, K.C., and *S. P. J. Merlin* for the appellant.

B. B. Stenham for the respondents.

- Levy, K.C.* : There is no scale of costs provided for by the Landlord and Tenant Act, 1927. This claim was for a large sum. The judge has to direct the proper scale to be applied in any particular case under the Act. The proceedings have not come to an end because there is a discontinuance. The respondent can apply to the judge for directions. The applicants cannot deprive the respondent of any right he has got by discontinuing. The respondent had a right to ask the judge for these special allowances when the matter came before him on the referee's report that there had been a discontinuance.

- Stenham* : It is irrelevant to the decision of this appeal what sum, however large, was involved in the litigation. The applicants were entitled to discontinue. The words as they stand permit discontinuance at any time. It is impossible to have a "hearing" after there has been a discontinuance. [Counsel referred to *Morley v. Bevington* (2).]

Levy, K.C., in reply : The judge's construction of "the hearing" is too narrow. Hearing must include all matters in dispute between the parties which have to be determined by the judges. *Reed v. Nutt* (3) shows that a "hearing" does not cease to be one because the merits

are not investigated by the court. If this had been intended, "on the merits" would have been added to the words of the rule in question.

CLAUSON, L.J. [delivering the judgment of the court]: The question which arises in this case turns upon the construction of two rules in the County Court Rules. The first one is C.C.R., Ord. 47, r. 21 (1), which A provides as follows:

If in any particular case the judge is satisfied that the fee for counsel ought not to be limited to the amount appearing in the scale and certifies to that effect at the hearing, the fee to be allowed on taxation shall be such larger sum as the registrar thinks reasonable.

The other rule—or, rather, portion of a rule—is r. 21 (3), which was adopted in July, 1938. The amendment added a para. (3) to r. 21 in these terms:

If in any particular case the judge is satisfied that the solicitor's charge for taking instructions for brief to counsel on trial or arbitration or reference, or the solicitor's charge for attendance at court in conducting the cause without counsel ought not to be limited to the amount appearing in the scale, and certifies to that effect at the hearing, the fee to be allowed on taxation shall be such larger sum as the registrar thinks reasonable.

Those two subrules form part of a series of rules which appear in C.C.R., Ord. 47, under the heading "Part III. Items of Costs." It is convenient to say that generally those rules give power to the judge, or in some cases the registrar, to make particular provision as regards costs, certifying a case fit for counsel, and so on, and, in the rules other than those two which I have just read, the power of that kind is not limited to a power to be exercised, as this one is, by a particular certificate at the hearing. The particular character of these two subrules is that, in order to see whether or not, in any case and in any particular circumstances, the judge can act under those rules, it is essential to ascertain whether the occasion on which he professes to act under the rule is or is not the hearing.

The phrase "a hearing" is somewhat vague, and is susceptible of different meanings in various contexts. Perhaps the best example that can be given to show that that is so is the case which was cited in the House of Lords, which it is unnecessary to go into at length, *Green v. Penzance (Lord)* (1), where, in a particular context, the verb "to hear" was decided to cover, not only the occasion on which the judicial officer in that case dealt with the case (if I may use that expression), but also all occasions on which he was performing the judicial functions vested in him under the particular statute in question. It is material to this case only as showing that it is impossible to come to a sound conclusion as to the meaning of the word "hearing" in its application unless the particular circumstances of each case are given careful consideration.

The particular circumstances of this case are a little unusual. The proceedings in the county court arose in this way. Under the Landlord

and Tenant Act, 1927, the applicants, University Motors, Ltd., were entitled, if they thought proper, to make application for certain relief in regard to compensation, granting a lease, and so forth, into the details of which it is unnecessary to enter. They launched their application under C.C.R., Ord. 40, which deals with proceedings under the Landlord and Tenant Act, 1927, and provides that they shall be commenced by originating application. The originating application was put in, and the proper steps were taken to give notice to the respondent, and so forth, and, ultimately, in accordance with that provision of the Act and the rules, a reference was made to a referee for inquiry and report under the Act. That order is dated June 17. The referee in question held a preliminary sitting, at which certain directions were given as to discovery, particulars, and so forth. That was on June 28. On July 29, the applicants, acting under C.C.R., Ord. 18, gave notice that they would not proceed further in this matter, and that they wholly withdrew from and discontinued the same.

Numerous interesting questions were considered in argument as to the exact operation of C.C.R., Ord. 18 and as to whether or not it was applicable and, if so, how it was applicable, to proceedings of this character. The only thing with which we are concerned is that on that day, July 29, the applicants intimated that they did not propose to go on. This fact was communicated to the referee, and the referee, under date Aug. 5, made this report to the court :

Having held a preliminary meeting on Tuesday, June 28, 1938, when I made an order for directions and appointed a date for the hearing, the applicants' solicitors, by notice dated July 29, 1938, informed me that they will not proceed further in this matter, and that they wholly withdraw from and discontinue the same.

The obvious question which then arose was as to what the effect of that was in regard to the respondent's desire to have his costs met by the applicants. On Sept. 24, the respondent gave notice that he would apply to the judge of the court on Oct. 14 for an order for directions as to taxation of the respondent's costs as regards these proceedings pursuant to the notice of discontinuance. It is not necessary to consider how. It seems to be common ground that, unless some application were made to the judge, the taxation of the respondent's costs under C.C.R., Ord. 18, which, in case of discontinuance, gave the party against whom the proceedings were discontinued the right to have costs taxed, could not be effectively determined unless someone—and apparently the judge—determined which scale was to apply. We were taken through the various rules dealing with that matter, but it is not necessary to take up time by going through them again. The application was made to the judge, and came before him on Oct. 28. There was an adjournment, at which nothing happened. On Oct. 28., the judge was asked to consider, and did consider, under what scale the costs should be taxed, as to whether or not he should give, under C.C.R., Ord. 47, r. 21 (1), a certificate for two counsel, and as to whether he should give a certificate for plans, and so

forth, and he deals with those various matters. The formal order as drawn up was as follows :

Upon reading the report dated Aug. 5, 1938, of Mr. Wilfred Price the referee . . . and upon hearing counsel for the applicants and for respondent, it is ordered that the applicants do pay to the registrar [his costs under Scale C].

Then certificates were given in regard to the other matters I have mentioned. The judge on that occasion was asked to give a certificate under r. 21 (1) and a certificate under r. 21 (3) in regard to the particular matters which I have mentioned—the amount of the fee, and the instructions for brief, and so on. The judge took the view that he was not in a position to give such a certificate. We gathered from the statement of counsel that, had he thought he had jurisdiction, he was prepared to exercise it by giving the certificates, and accordingly it is a perfectly proper case for appeal, because, if he was wrong in thinking that he had no jurisdiction, that was a matter of law on which he could be corrected if he was wrong. He took the view that that meeting before him and the proceedings which there took place were not “the hearing” within the meaning of those two subrules. Leave to appeal was given. A
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The next step was this. On Nov. 15, for reasons which I think may well be appreciated, the respondent gave notice of another application to the judge to ask him to consider the referee's report, and hear the parties and make such order as might be just. That came before the judge on Nov. 17, and he thereupon, upon that application, ordered that the application to consider the referee's report and hear the parties be dismissed with costs. He again gave leave to appeal. It is pretty clear that on that occasion the suggestion was : “Here is a report. We ask you to deal with the report. Dealing with the report will be the hearing, and that will give the judge jurisdiction to give the certificate which on the previous occasion he felt unable to give.” The judge again took the view that the proceedings before him on that day could not properly be called the hearing, and accordingly he did not see his way to give the certificate, although I presume he again indicated that, had he had jurisdiction, he would have been prepared to give the certificate. Again leave to appeal was given, and the present appeal is against both those orders. Having regard to the extracts which I have read from the rules, the point, and the sole point, before this court is whether or not the proceedings before the judge on Oct. 28 and the proceedings before the judge on Nov. 17 were “the hearing” within the meaning of the two subrules. It is not necessary, for the purposes of this case, to consider what the true construction of the phrase “the hearing” might be, and its application to other circumstances. The question is as to the true meaning of the phrase “the hearing” in its application to these particular circumstances. We do not see our way to differ from the decision to which the judge came—namely, that neither of these two occasions could properly be described as “the hearing.” The first occasion was an occasion the purpose of which was merely to ascertain how the rights of the respondent under D
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the discontinuance order, Ord. 18, should be worked out, having regard to the difficulty that the rule itself lays down a particular scale. The application on the later date, on Nov. 17, was an application to ask the judge to consider a report which, in the circumstances, required no consideration. The report contained nothing except a statement that

A the applicants were not going on, and we do not see our way to differ from the view which the judge took that, within the meaning of these two subrules, it was not possible to say that on either of those occasions there was "the hearing" before the judge. For these reasons, we cannot differ from him, and the appeal must be dismissed, with the usual consequences.

Appeal dismissed with costs.

Solicitors: *Finnis, Downey, Linnell & Chessher* (for the applicants); *Cardew Smith & Ross* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

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Re EDGAR, COHEN v. EDGAR.

[CHANCERY DIVISION (Bennett, J.), **February 16, 1939.**]

D *Wills—Conditions—Validity—Public policy—Forfeiture upon acceptance of public office—Commission in Territorial Forces.*

The will of the testator provided, *inter alia*, that the testator's sons should forfeit all interest under the will if they were to undertake any "public office" prior to 1943. The questions in this case were (i) whether or not a commission in the Territorial Forces was a "public office," and (ii) whether or not the provision in the testator's will was void as being

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contrary to public policy:—

HELD: (i) a commission in the Territorial Forces is a "public office."

(ii) a condition designed to prevent a person from entering the armed forces of the Crown is void, as being contrary to public policy.

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[EDITORIAL NOTE. The modern tendency has been to restrict the number of conditions which are against public policy as restraining the party from doing some act the undertaking and performance of which are in the interest of the state. The maintenance of the Territorial Forces at sufficient strength is at the moment a matter of considerable concern to the state, and a condition that operated to prevent persons wishing to join those forces from doing so would clearly be against public policy. The condition here considered, however, was probably also void for uncertainty, but the decision is rested upon the principle relating to public policy.

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AS TO CONDITIONS VOID AS BEING AGAINST PUBLIC POLICY, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 585, 586, para. 1159; and FOR CASES, see DIGEST, Vol. 44, pp. 452, 453, Nos. 2745-2753.]

Cases referred to:

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(1) *Cooke v. Turner* (1846), 15 M. & W. 727; 44 Digest 461, 2820; 17 L.J. Ex. 106.

(2) *Re Beard, Reversionary & General Securities Co., Ltd. v. Hall, Re Beard, Beard v. Hall*, [1908] 1 Ch. 383; 44 Digest 453, 2749; 77 L.J. Ch. 265; 98 L.T. 315.

ORIGINATING SUMMONS by trustees for the determination of the question, *inter alia*, whether the sons of the testator would forfeit their

interest under the will if they were to accept a commission in the Territorial Forces prior to a certain date.

E. Ackroyd for the plaintiffs.

E. M. Winterbotham for the first two defendants.

J. Griffiths for the third, fourth and fifth defendants.

J. H. Little for the sixth defendant.

Harold Brown for the seventh, eighth and ninth defendants.

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BENNETT, J. In cl. 14 of this will, after having indicated that he attaches great importance to his sons applying themselves assiduously to his business, the testator makes this provision with respect to his two sons :

I expressly stipulate that they shall not prior to the year 1943 become candidates for or enter Parliament or undertake any other public office and upon failure by either or both of them to observe this stipulation he or they as the case may be shall forfeit as if they had predeceased me without issue all benefits under this my will or any codicil hereto not then already actually received by them respectively.

It appears from the affidavit in support of the summons that the testator's two sons are desirous of joining His Majesty's Territorial Forces and taking commissions therein, and in connection with such desire the questions raised in paras. 2 and 3 of the summons have arisen for decision. Para. 2 is in the following terms :

Whether the stipulation in cl. 14 of the will of the testator in relation to the defendants Gilbert Harold Samuel Edgar and Robert Rex Samuel Edgar in the following words . . . is valid or void as against public policy or for uncertainty or otherwise.

Para. 3 is in the following terms :

If such stipulation is valid then whether the taking of a commission in or enlisting in His Majesty's Territorial Forces (a) is the undertaking of any public office within the meaning of such stipulation, or (b) is a failure to observe such stipulation, or (c) causes a forfeiture of all benefits under the will of the testator not then already actually received.

There is a considerable degree of uncertainty as to the meaning of the phrase "undertake any other public office," the public office expressly mentioned being membership of Parliament. Numerous occupations have been referred to in the course of the argument, such as an air raid warden, a special constable, a district councillor, and occupations of that kind, which show, I think, the difficulty in which anybody subjected to this provision may find himself in determining whether or not any particular step which he takes will lead, if the condition be a good one, to forfeiture of his interests under his father's will.

Quite apart from questions of that kind, there are conditions in which the law is interested because they may interfere with acts which are regarded as being in the interest of the state. ROLFE, B., in delivering the judgment of the Court of Queen's Bench in *Cooke v. Turner* (1), used this language, at pp. 735, 736 :

The conditions said to be void, as trenching on the liberty of the law, are those which restrain a party from doing some act which it is supposed the state has or

may have an interest to have done. The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation.

I feel very little doubt that there would be a breach of the condition in this particular case if either or both of the testator's sons were to become commissioned officers in the Territorial Army. If they should do that, the clause, if it be valid, would destroy the interests they have in their father's estate.

In *Re Beard, Reversionary & General Securities Co., Ltd. v. Hall* (2), SWINFEN EADY, J., decided that a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy. It seems to me that, following that decision, if, as a matter of construction, a public office includes the holding of a commission in the Territorial Army, or in any other of the armed forces of the Crown, I am bound to hold that the condition is void as being contrary to public policy. Indeed, one cannot help feeling that the whole purpose of this condition is to compel the beneficiaries for a certain number of years to put their own private interests in front of their public service. I hold in answer to both questions that the condition in question is void as being contrary to public policy. I express no view as to whether or not it is void for uncertainty, but I think that there are good grounds for suggesting that it may be.

Declaration that the provision in the will was void, and that no forfeiture would result therefrom.

Solicitors: *North, Kirk & Co.*, Liverpool (for all parties except the first two defendants); *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool, (for the first two defendants).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

RADCLIFFE v. RIBBLE MOTOR SERVICES, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Macmillan and Lord Wright),
January 16, 17, 19, February 23, 1939.]

Master and Servant—Liability in case of accident—Defences—Common employment—Coach driver driving one of 6 coaches returning to garage—Death caused by another coach belonging to same company.

The appellant's husband was a coach driver, who was killed while 6 coaches, the property of the respondent company, were returning to the respondent's garage. In an action for damages for negligence, the respondents pleaded common employment. It was proved in evidence that these coaches had conveyed 3 parties of excursionists from Liverpool to New

Brighton, and were returning empty at the time of the accident. The drivers were supposed to return to the garage by the most direct route, but were under no obligation to keep together. The coach driven by the deceased had stopped, for some unexplained reason, and the deceased had dismounted. The driver of the following coach pulled up behind the first coach, and then pulled out to get in front of it when the deceased was crushed in between the two vehicles :—

HELD : as the two drivers were proceeding independently through the streets of Liverpool, although to the same destination, the risk of injury in the streets by a vehicle driven by a fellow-servant was not one of "the natural risks and perils incident to the performance of his service." The defence of common employment, therefore, failed.

Per LORD WRIGHT : the risk was the general risk of the highway, not the specific risk of the fellow-servant's negligence.

Order of Court of Appeal ([1938] 1 All E.R. 71), reversed, and decision of HAWKE, J., restored.

[EDITORIAL NOTE.] The House of Lords have here considered the whole basis and development of the doctrine of common employment. It is clear that their Lordships think that it was not based upon any proper principle of law at the time it was introduced into the Common Law of England in 1837, but that it cannot now be overruled otherwise than by the legislative action of Parliament. The House of Lords have in their own decisions confirmed and approved the doctrine and the House is bound by its own decisions. The doctrine is quite inappropriate to modern conditions, though singularly enough the case of *Metcalfe v. London Passenger Transport Board* [1938] 2 All E.R. 352; Digest Supp., where that inappropriateness was most completely shown, is not referred to. No doubt, after the expression of their Lordships' opinion herein, it will not be long before the doctrine is made the subject of legislation.

AS TO COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 211-217, Nos. 1744-1789.]

Cases referred to :

- (1) *Priestley v. Fowler* (1837), 3 M. & W. 1; 34 Digest 71, 479; 7 L.J.Ex. 42.
- (2) *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (1850), 5 Exch. 343; 34 Digest 207, 1697; 19 L.J.Ex. 296; 15 L.T.O.S. 230.
- (3) *Smith v. Baker & Sons*, [1891] A.C. 325; 34 Digest 202, 1657; 60 L.J.Q.B. 683; 65 L.T. 467.
- (4) *Vose v. Lancashire & Yorkshire Ry. Co.* (1858), 2 H. & N. 728; 34 Digest 208, 1706; 27 L.J.Ex. 249; 30 L.T.O.S. 289.
- (5) *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. 266; 34 Digest 126, 971; 31 L.T.O.S. 255.
- (6) *Bartonshill Coal Co. v. McGuire* (1858), 3 Macq. 300; 34 Digest 126, 972; 31 L.T.O.S. 258.
- (7) *Bowman (or M'Naughton) v. Caledonian Ry. Co.* (1858), 21 Dunl. (Ct. of Sess.) 160; 36 Digest 111, case 732 *liii*.
- (8) *Farwell v. Boston & Worcester Railroad Corpn.* (1842), 3 Macq. 316; 4 Metcalf 49.
- (9) *Charles v. Taylor, Walker & Co.* (1878), 3 C.P.D. 492; 34 Digest 212, 1749; 38 L.T. 773.
- (10) *Morgan v. Vale of Neath Ry. Co.* (1864), 5 B. & S. 570; *on appeal* (1865), L.R. 1 Q.B. 149; 34 Digest 212, 1750; 35 L.J.Q.B. 23; 13 L.T. 564.
- (11) *The Petrel*, [1893] P. 320; 34 Digest 213, 1757; 62 L.J.P. 92; 70 L.T. 417.
- (12) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A.C. 77; 34 Digest 211, 1741; 79 L.J.K.B. 173; 101 L.T. 835.
- (13) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

- (14) *Johnson v. Lindsay & Co.*, [1891] A.C. 371 ; 34 Digest 215, 1773 ; 61 L.J.Q.B. 90 ; 65 L.T. 97.
- (15) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463.
- (16) *Tozeland v. West Ham Union*, [1907] 1 K.B. 920 ; 34 Digest 220, 1823 ; 76 L.J.K.B. 514 ; 96 L.T. 519.
- A (17) *Smith v. Steele* (1875), L.R. 10 Q.B. 125 ; 34 Digest 213, 1756 ; 44 L.J.Q.B. 60 ; 32 L.T. 195.
- (18) *Indermaur v. Dames* (1867), L.R. 2 C.P. 311 ; 34 Digest 191, 1565 ; 36 L.J.C.P. 181 ; 16 L.T. 293.
- (19) *Burr v. Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. 544 ; 34 Digest 210, 1728 ; 76 L.J.K.B. 459 ; 96 L.T. 447.
- B (20) *Wilson v. Merry* (1868), L.R. 1 Sc. & Div. 326 ; 34 Digest 211, 1747 ; 19 L.T. 30.
- (21) *Hedley v. Pinkney & Sons S.S. Co.*, [1894] A.C. 222 ; 34 Digest 210, 1726 ; 63 L.J.Q.B. 419 ; 70 L.T. 630.

APPEAL from an order of the Court of Appeal (GREER and SCOTT, L.JJ., and LUXMOORE, J.), dated Dec. 20, 1937, and reported [1938] 1 All E.R. 71, reversing an order of HAWKE, J., dated Feb. 20, 1937, in favour of the plaintiff. The plaintiff having died intestate on Dec. 21, 1938, the administrators of her estate were on Jan. 6, 1939, added as parties to conduct the present appeal *in forma pauperis* in her stead. The facts and the arguments are set out in the opinions of their Lordships.

Hon. Sir Stafford Cripps, K.C., William Gorman, K.C., B. R. Rice-Jones and M. Turner-Samuels for the appellant.

Sir Walter Monckton, K.C., and R. H. Norris for the respondents.

E LORD ATKIN : My Lords, this is an appeal from a decision of the Court of Appeal, which reversed the decision of HAWKE, J., sitting at Liverpool, in the Winter Assizes, 1937. The action was brought under the Fatal Accidents Acts against the respondents in respect of the death of the deceased man Radcliffe, whose death was caused by the now admitted negligence of one Jones. Both Radcliffe and Jones were in the employment of the respondents. The respondents relied on the defence of "common employment." The judge thought that, on the facts found, the doctrine did not preclude the plaintiffs from recovering, and awarded damages. The Court of Appeal, taking a different view of the facts, held that the doctrine applied, and entered judgment for the defendants.

It is only necessary to deal shortly with the facts before discussing the application of the doctrine which is known to all concerned under the title "common employment." The respondents are the owners of a number of motor coaches and motor omnibuses which they use for private hire and public transport. The two men mentioned above, Radcliffe and Jones, were drivers employed by them at their garage in Bootle. On Apr. 24, 1936, a firm of transport agents agreed to hire from the respondents 4 coaches to seat 124 on June 25, 1936, to start from a café in Liverpool at 1.40 p.m., thence to the Cathedral, and thence *via* Mersey

Tunnel and Egremont to New Brighton. They were not to convey the party back. This order was eventually reduced to 3 coaches, one of which was driven by Jones. On May 27, 1936, the same firm of transport agents agreed to hire one coach to seat 32. The order was expressed to be for the Copmanthorpe Women's Association. The time, starting point and journey were substantially the same as in the first order, except A that there was an express provision for "½-hour stay" at the Cathedral. This coach was, on the day in question, driven by Radcliffe. On the same day, another order was given by the same firm for one coach to seat 31. It was expressed to be for the Copmanthorpe Church School. In all material respects it conformed to the other order of the same date. B

On the day in question, June 25, the coaches left the garage. The drivers of the 3 coaches first mentioned received instructions to start at 1.10 p.m., the drivers of the two single coaches at 1.15 p.m. They all arrived at the café before 1.40 p.m., parked there, and, at 1.40 p.m., loaded their passengers and proceeded to the Cathedral. They seem to C have stayed there about the same time, and then proceeded by the same route to New Brighton. Radcliffe was leading, and they seem to have kept as near one another as traffic permitted. On the discharging of the passengers at New Brighton, the hire was finished. It was then the duty of the drivers to return to their garage at Bootle. They could D choose their own route, but, up to the Liverpool exit from the Mersey Tunnel, there was only one available route. In Liverpool, there were several routes, and the drivers did not all adopt the same. Radcliffe took one of the recognised routes up William Brown Street. He stopped his coach in that street for some reason unknown, alighted, and was E standing on the offside of the coach when he was crushed by the coach driven by Jones. Jones had been delayed in the tunnel, was deliberating which way to go, saw Radcliffe's coach standing, went up to it, stopped behind it to see what Radcliffe had stopped for, then pulled out to get in front of it, and, in passing close to it, inflicted the injuries on Radcliffe. F It was suggested that there was some duty on Jones, arising out of the contract of service, to stop and attend to Radcliffe if Radcliffe's coach had stopped. The judge negatived any such obligation. His finding in this respect is amply supported by the evidence, and should be accepted. In dealing with the question of liability, the trial judge negatived what G he called "community of risk" in the respective employments of Jones and Radcliffe from the beginning of the return journey, and at any rate from the exit from the Mersey Tunnel. From that moment, he held, these coaches were all engaged on independent operations. He thought, therefore, that neither of them had undertaken the risk, at this stage, H of negligent or incompetent driving by the other.

The legal issue is whether, on these facts, the employers are protected from the plaintiff's claim by the doctrine of "common employment." At the present time, this doctrine is looked at askance by judges and textbook writers. "There are none to praise, and very few to love." How-

ever, it is too well-established to be overthrown by judicial decision. Affirmed by several decisions of this House, it has been accepted by the legislature once expressly in the Employers' Liability Act, 1880, and subsequently as the foundation underlying the various Workmen's Compensation Acts. I will only refer to the Employers' Liability Act, 1880, s. 1, which provides that, where personal injury is caused to a workman by reason of, amongst other things, negligence of a person in the service of the employer who has duties of superintendence, or of a person in the service of the employer to whose orders the workman was bound to conform, the workman or his representatives :

A . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

We must, therefore, deal with this case upon the footing that there are conditions in which the law will not hold a master liable for injuries caused to a workman by the negligence of his fellow-workman employed by the same master and engaged in a common employment with him. However, the difficulty is, and always has been, to define the conditions in which the doctrine holds good, and this is largely due to the unsatisfactory statement of the supposed principles upon which the doctrine was based in the decisions which inserted it into the common law. It originated in the Court of Exchequer in *Priestley v. Fowler* (1), a case in which the plaintiff had recovered damages at the Summer Assizes, 1836. The defendants had obtained a rule in a motion to arrest judgment in Michaelmas term, 1836. Cause had been shown in Hilary term, 1837, and judgment was given in Michaelmas term, 1837. The plaintiff's cause of action was that he was the servant of a butcher and had been injured by the negligence of his master, in that he was directed to travel in a van which was overloaded and broke down. The action was in case, and it would appear that the plaintiff founded the duty to take care as arising out of an implied contract so to load the van that the plaintiff should be carried safely. The plaintiff had given evidence at that trial that the master knew of the overloading, though there was no express averment of this in the declaration. The motion for arrest of judgment proceeded on the terms of the record. In judgment, LORD ABINGER called attention to the absence of this averment, and declined to decide what would be the law if it existed. It may be that, in the interval between the argument and the judgment, he had forgotten that counsel for the defendant had admitted that the declaration did disclose this very fact (see p. 4). LORD ABINGER felt that he had to decide the case upon general principles, and was at liberty to look at the consequences one way or the other. Surveying them, he was alarmed, for he found that, if the master was liable, he would be liable for the negligence of all his "inferior agents," e.g., to a footman for the negligence of his coachmaker, his harnessmaker or his coachman, to a domestic servant for the negligence of the chambermaid, the up-

holsterer, the cook, the butcher and the builder. A more remarkable medley of so-called "agents" it is difficult to conceive. Faced with the "absurdity" of these consequences, the court concluded that the master is not bound to take more care of the servant than he may reasonably be expected to do of himself. The servant is not bound to risk his safety in the service of his master, and, in most cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as is his master. In fact, to give a remedy to the servant would encourage him to omit the diligence to protect the master from the negligence of his fellow-servants, which the court considered a much better security against injury than any recourse against his master for damages could possibly afford. It is perhaps difficult to extract from this judgment any principle other than the negation of any implied contract by the master to be liable for the safety of his servant in respect of the matters complained of in the action. In *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (2), the Court of Exchequer developed the doctrine, and, in a judgment delivered by ALDERSON, B., founded the immunity of the master upon an implied contract by the servant. Where two servants are engaged in a common service the duties of which impose a certain risk on each of them, the party injured knew, when he engaged in the service, that he was exposed to the risk of injury by the want of skill on the part of his fellow-servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk. In that case, the deceased workman was a railway servant in the employ of the defendants, and, whilst travelling on the railway in pursuance of his service, his train was run into by another train belonging to the same defendants, owing to the negligence of the driver of the second train. ALDERSON, B., illustrates his principle by assuming the case of two servants employed to drive the master's cattle to market and one injured by the negligence of the other—that is, "while they are jointly engaged in a common service."

It is obvious that the illustration would support only a limited application of the principle enunciated, though whether the principle of an implied contract could have been maintained at all, after the decision in *Smith v. Baker & Sons* (3), and its support of the recent discovery that *volens* and *sciens* do not mean the same thing, may be doubted. By 1858, POLLOCK, C.B., had been so imbued with enthusiasm for the doctrine that in *Vose v. Lancashire & Yorkshire Ry. Co.* (4) he said, at p. 252, of the rule "laid down in this court originally":

I believe there was never a more useful decision, or one of greater practical and social importance in the whole history of the law.

That quotation is from the Law Journal Exchequer report of the case. The language is less exuberant in the report in 2 Hurlstone and Norman. In 1858, there was argued in the House of Lords *Bartonshill Coal Co. v. Reid* (5), an appeal from the Court of Session. It was heard before LORD CRANWORTH, L.C., sitting as the only law Lord, who, as ROLFE, B.,

- had been party to the decision in *Hutchinson's* case (2) already mentioned. He deferred delivering his opinion until *Bartonshill Coal Co. v. McGuire* (6), a case arising out of the same accident, was heard in the House of Lords, which took place in 1858 before LORD CHELMSFORD, L.C., LORD BROUGHAM and LORD CRANWORTH. It is this case which has
- A bound the English and Scots courts since it was delivered, and is binding on this House. The facts were that two miners, Reid and McGuire, were being drawn up the shaft in the cage, when, owing to the negligence of the man in charge, the cage was not stopped in time, overturned, and the men were killed. The actions were by the widows and children of
- B the deceased workmen, who, by the decisions in Scotland, had recovered reparation. The appeals were allowed. The grounds of the decision of LORD CRANWORTH, L.C., are not easily discerned. The first part of his decision seems to point to an opinion that the doctrine of *respondet superior* cannot in principle apply to the demand of a workman in
- C respect of injuries resulting from the negligence of a fellow-workman when engaged in common work. Later, he places the exemption on what is, I think, now accepted as its true basis—implied contract by the workman. He says, at p. 295 :

- D When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.

- He agrees that the real question is what is common work, and says that it is not necessary that both workmen should be engaged in performing
- E the same or similar acts. He cites as illustrations the driver and guard of a coach, the steersman and rowers of a boat, the driver of an engine or a train and the signalman. In *McGuire's* case (6), LORD CHELMSFORD, L.C., adopts the implied contract. He says, at p. 307 :

- F It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception. . . .

- G An illustration of the conception of LORD CHELMSFORD, L.C., of what is not common work is afforded by his approval of the decision in the Court of Session of *Bowman (or M'Naughton) v. Caledonian Ry. Co.* (7), where a man employed by the railway company as a carpenter was engaged in repairing a railway carriage on a siding and was killed by the negligence
- H of a driver, also in the employ of the company, in driving his engine so as to collide with the stationary carriage. The courts had allowed the widow reparation. LORD BROUGHAM agreed that the decision in that case might well stand with their decision. It is not surprising that in 1860 in *MANLEY SMITH ON MASTER AND SERVANT*, 2nd Edn., p. 135, which was published after the decision, the author should state that the

application of the general principle to the circumstances of particular cases would probably yet give rise to considerable litigation and dispute, and that the question as to who were fellow-workmen was still unsettled. It seems desirable here to refer to the American case of *Farwell v. Boston & Worcester Railroad Corpn.* (8), a decision of SHAW, C.J., in the Supreme Court of Massachusetts. His judgment was referred to by LORD A CRANWORTH, L.C., in terms of admiration as recognising, and in the fullest manner adopting the English doctrine. The judgment has been received with terms of approval in other cases. My Lords, while appreciating the vigour and literary style of this judgment, I venture with respect to think that, as an expression of legal B principles, it is far from praiseworthy. It proceeds on a fallacious proposition from first to last—namely, that the doctrine of *respondent superior* only applies to strangers, that it has no application to the servants of the employer, and that a cause of action against the employer can only be based on contract. Moreover, as will be seen if the report C in 4 Metcalf is looked at, this was the only ground put forward by the plaintiff's counsel, who, at p. 51, expressly disclaimed putting his case upon the general principle which renders principals liable for the acts of their agents. SHAW, C.J., repeats what I consider to be the very unconvincing argument of LORD ABINGER—that the fact that a servant is D an observer of the conduct of his fellow-servants, can give notice of misconduct to his employer and leave the service is much more effectual to secure the safety of all than a resort to the employer for damages. At p. 57, he has brought himself to consider that the rule of marine insurance that the underwriter is liable for loss occasioned by the negligence E of the master or crew of the assured is a useful analogy to the supposed immunity of the master for negligence occasioned by one servant to a fellow-servant. I do not derive assistance from this judgment.

Since the decision of the House of Lords, various opinions have been expressed by the courts as to the definition of the “common work.” I F strongly suspect that one cause of the difficulty has been the unsatisfactory statement of any principle on which the rule is founded. Some judges have approved the test suggested by POLLOCK, C.B., of working “with a common object.” I myself find no help in this. I do not know whether it assumes a conscious object aimed at by both workmen alike, G or both workmen and their employer, and it is difficult to see how it falls short of the common object of assisting the employer to make a profit out of his business. This, indeed, seems to have been the view accepted by two members of the Court of Appeal in *Charles v. Taylor, Walker & Co.* (9). In that case, the plaintiff workman was engaged by the defend- H ants (brewers) to unload coals from a barge at their wharf. He was injured by the negligence of another servant of the defendants in moving barrels, whereby a flap fell on the plaintiff and injured him. THESIGER, L.J., thought that, where there was one common general object, in attaining which a servant was exposed to risk, the servant was not

entitled to sue the master if he was injured by the negligence of another servant whilst engaged in furthering the same object. This perhaps records the highwatermark of the doctrine, from the employer's point of view. BRETT, L.J., had enunciated a formula, at p. 496, which he agreed might not be exclusively true :

- A . . . when the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other.
- B 'This is obviously a much more limited statement than that of THESIGER, L.J. It will be evident, in perusing the cases, that the courts have in many cases tried to determine the limits of the principle as an objective rule of law, without having regard to its foundation in the implied contract of the workman. The principle had been expressed by
- C BLACKBURN, J., in 1864, in terms which were subsequently adopted in the Exchequer Chamber, and appear to me to state with as much precision as possible the true limits of the doctrine. In *Morgan v. Vale of Neath Ry. Co.* (10), a carpenter employed by a railway company as their servant to repair the roof of an engine shed was injured by the negligence of
- D porters, also servants of the railway company, in moving an engine on a turntable so as to cause the plaintiff's scaffolding to fall. The court held that it was a case where the doctrine of common employment applied. BLACKBURN, J., said, at p. 578 :
- E That principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services . . . and that, where the nature of the service is such that, as a natural incident to that service the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master. . .
- F This statement was accepted in terms by the Court of Exchequer Chamber by ERLE, C.J., WILLES, BYLES and KEATING, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB. POLLOCK, C.B., interposed his opinion that what one had to look at was a common object—the furtherance of the business of the master—and not (as had been suggested by
- G BRAMWELL, B., *arguendo*) a common immediate object. With this exception, the statement by BLACKBURN, J., had the approval of all the judges of the common law courts at that date, and, short of this House, is authoritative. I only propose to deal with one further case, *The Petrel* (11). In that case, a collision had occurred in the Thames between
- H two steamers, the *Petrel* and the *Cormorant*, both belonging to the same owners, owing to the admitted negligence of those navigating the *Petrel*. The *Cormorant* sank. In a suit for limitation of liability, the claim of the master, officers and crew of the *Cormorant* for loss of their effects was disputed on the ground of common employment. SIR FRANCIS JEUNE, P., held that the doctrine did not apply. He relied on the

statement of the principle by BLACKBURN, J., above set out, and proceeded thus, at p. 326 :

The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment.

I adopt this reasoning, which appears to me clear and sensible. I seek to apply it to the case where the judge has found—and, as I think, rightly—that the two drivers were proceeding independently through the streets of Liverpool, though to the same destination. They might—indeed, would—in the course of their employment meet in the same garage, and, while there, be dependent on the skill with which each drove his vehicle, but, in regard to driving in the streets of Liverpool, the one was no more interested in the skill of the other than in that of the drivers of the myriads of other vehicles in whose vicinity he might happen to drive. In other words, for the purposes of this doctrine, the risk of injury in the streets by a vehicle driven by a fellow-servant is not one of “the natural risks and perils incident to the performance of his service.” If the doctrine applied here, I do not see why it should not apply to the case of drivers of cars let out on hire from different garages in different towns, if employed by the same employer, or why the driver of a lorry stationed at Portsmouth should not be deemed to have contracted to bear the risk of injury from another lorry driven by a driver stationed at Newcastle which he may happen to meet on the same road in the Midlands. This is implied contract run riot. I find no support for it in *Reid's* case (5) and *McGuire's* case (6). Indeed, I think it is negatived by the instances given in the opinions of cases where the doctrine did not apply. I have no doubt myself that the members of the Court of Appeal, if they had taken the same view of the facts as HAWKE, J., did, would have accepted the view of the law stated in *The Petrel* (11), and would not have interfered with the judgment. Agreeing as I do with the trial judge on the facts as well as the law, I think that the appeal should be allowed, with costs here and below, and that his judgment in favour of the plaintiffs should be restored.

LORD MACMILLAN : My Lords, the question in this appeal is whether the respondents are liable in damages for the death of Eric Charles Radcliffe, one of their employees, who lost his life on June 25, 1936,

through the admitted negligence of Hugh Jones, another of their employees. The respondents do not dispute their general liability, on the principle of *respondeat superior*, for the negligence of their servants in the performance of their duties, but they claim to be exempted from liability in the present instance because, as they allege, the deceased and

- A Jones whose negligence caused his death were "engaged in one common employment or service" by and under the respondents. The plea so advanced has raised important questions as to the scope and effect of what is known as the doctrine of common employment, and as to its applicability to the peculiar circumstances of the casualty which befell
- B the deceased. These circumstances have already been described in detail by my noble and learned friend LORD ATKIN, who has preceded me in addressing the House, and I need not repeat them. Historically, the principle of the exception invoked by the respondents to the general rule of *respondeat superior* is derived from a legal theory of the contract
- C of employment. Thus in *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (2), ALDERSON, B., said, at p. 351 :

. . . [the servant] must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk [of injury through the negligence of his fellow-servant].

- D The principle is more fully stated by LORD CRANWORTH, L.C., in *Bartonshill Coal Co. v. Reid* (5), at p. 284 :

When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself ; he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility

E protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness

F of a fellow-workman when engaged in a common work.

In the judgment of SHAW, C.J., of the Supreme Court of Massachusetts, in *Farwell v. Boston & Worcester Railroad Corpn.* (8), which was extolled by LORD CRANWORTH, L.C., as recognising and in the fullest manner adopting the English doctrine, SHAW, C.J., puts the matter thus, at p. 319 :

- G Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require.

- H I shall cite only one other statement of the principle, this time from the judgment of BLACKBURN, J., in *Morgan v. Vale of Neath Ry. Co.* (10), at p. 578 :

That principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services ; the presumption of law being that the compensation

was adjusted accordingly, or, in other words, that these risks are considered in his wages.

It will thus be seen that the immunity of an employer from responsibility for injury sustained by one of his workmen through the negligence of a fellow-workman is regarded as an implied term of the contract of employment, by which is meant that the law imports this term into the contract although the contract says nothing about the matter. The law is chary of implying in contracts terms which the parties themselves have not thought fit to express, and will not do so unless the implication is necessary in order to give effect to the intention of the parties, as gathered from the nature and terms of their expressed contract. The passages I have quoted disclose the grounds on which the judges of England and the United States justified the importation into the contract of employment of the implication that the servant must be presumed to have accepted the risk of his fellow-servants' negligence. Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large-scale industry they have no foundation whatever in fact. The assumed facts are nowadays a sheer fiction. Yet the rule of law persists, though substantially mitigated by legislation, notwithstanding that its original ratio has long ceased to be regarded as tenable. It is one of the ironies of the law that the decisions in *Reid's* case (5) and *McGuire's* case (6), which affirmed the doctrine of common employment as part of the common law of England, should have been pronounced in appeals from Scotland, thereby fastening upon the law of Scotland a principle as distasteful as it was alien to Scottish jurisprudence.

The danger attendant on all doctrines which are founded on presumptions, implications or fictions originally thought to be equitable is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may originally have possessed. This has been the case with the doctrine of common employment, as numerous decisions cited to your Lordships have plainly shown. It is, therefore, essential, in a case such as the present, where the doctrine is invoked in circumstances of a quite exceptional character, to examine carefully whether the case falls within the principle upon which the doctrine is professedly based. One thing is clear. It is not enough, for the doctrine to apply, that the negligent employee and the injured employee should be in the service of a common master. They must be serving him in a common employment, or, as it was put by LORD CRANWORTH, L.C., "engaged in a common work." The chauffeur who drives his master to the works is not in a common employment with his master's employees in the works, though they have a common employer. In the ordinary case of common employment, the nature of the employment is such as to bring the employees into association with each other in carrying on some activity in common, and it is from this association that there arises the risk that

one of those so engaged may be injured by the negligence of another also so engaged.

In the present case, an important part of the business of the respondents is to hire out coaches for the conveyance of parties on excursions. The destinations of these excursions may be as diverse as the points of the compass. Each hire is a separate enterprise, and it is of the essence of the work of the respondents' coach drivers that each shall go upon the errand assigned to him, which, in the ordinary case, will take him away from the only place where he is associated with his fellow-employees—namely, the garage where the respondents house their coaches. The drivers are in common employment to the extent that they all drive coaches belonging to the same employers, and are thus all engaged in the conduct of their business, but the nature of their employment is not to bring them into association in carrying on their work, but to dissociate them. Their work involves their dispersal, not their collaboration. It is true that, by a coincidence, the deceased driver in the present case happened, on the day when the accident befell him, to have been employed in conveying a party to the same place as that to which the respondents' other driver, Jones, was also conveying a party, but that was a mere chance. They were separate hires, and separate excursion parties, and that the one empty coach on its way back to the garage should fall in with the other empty coach, also on its way back to the garage, was quite fortuitous.

I accept the guidance given by LORD CHELMSFORD, L.C., in *Bartonshill Coal Co. v. McGuire* (6), at p. 308 :

... in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at.

The respondents' drivers, in undertaking service with them, must be taken to have known that, in driving their coaches to various destinations in town and country, they would be exposed to the ordinary risks of road transport, but to my mind it is absurd to suggest that they must be taken to have "expected" that, if they were involved in a road accident, it might turn out that the party at fault was a driver also in the respondents' service. The chance was incalculable. It was too remote to be within any reasonable estimation by the respondents' servants of the risks undertaken by them on entering their employment. I decline to read into the deceased's contract of employment with the respondents the implication that he undertook any such risk, and I am consequently of opinion that the doctrine of common employment is inapplicable to the present case.

I find support for this view in *The Petrel* (11), where SIR FRANCIS JEUNE, P., dealt with the analogous case of a collision in the Thames between two vessels belonging to the same owners. The collision was found to be due to the negligent navigation of one of the two ships, but the fact that the captain and crew of the innocent vessel had a common

employer with the captain and crew of the negligent vessel was held to be no bar to a claim by the former, on the ground that the two captains and crews could not be said to have been engaged in a common employment within the meaning of the doctrine. Adopting as tests phrases used by SHAW, C.J., in *Farwell's* case (8), and by BLACKBURN, J., in *Morgan's* case (10), SIR FRANCIS JEUNE, P., expressed the opinion that the chance that two vessels involved in a collision on the high seas or in the estuary of the Thames should happen to belong to the same owner was not a risk naturally incident to the performance of the duties of the respective captains and crews, and that the risk of injury from such a collision was not a risk which, in the ordinary and natural course of things, would ever be contemplated as a risk of the service. I agree entirely with the reasoning of SIR FRANCIS JEUNE, P., and regard it as most apposite to the present case. I am accordingly of opinion that the appeal should be allowed, and the judgment of HAWKE, J., restored.

LORD WRIGHT: My Lords, the deceased man, who was in the respondents' employment, having been killed by the negligence of another servant of the respondents in the course of his service, the only defence that was raised was that of common employment. HAWKE, J., held that the defence failed, but his judgment was reversed by the Court of Appeal. Before I examine the facts, it will be necessary to attempt to define as precisely as possible the nature and limits of the doctrine of common employment. I take as the leading case or cases which bind this House *Bartonshill Coal Co. v. Reid* (5) and *Bartonshill Coal Co. v. McGuire* (6), which not merely stated the general principle that an employer is not liable to an employee for acts and defaults of a fellow-employee in the course of the service, and the considerations on which it is based, but also stated the main limitations of that principle. The essential question in this appeal is to ascertain the limitation relevant to this case, and to see if the facts fall within the principle as so limited. The relevant limitation, in my opinion, is that the rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work, or are not fellow-labourers in the same work, or are engaged in different departments of duty. This question, it has been pointed out by decisions of this House, may raise difficult problems in particular cases.

In order to understand *Reid's* case (5) and *McGuire's* case (6), it is necessary to refer to the earlier decisions on the question. In 1837, *Priestley v. Fowler* (1) came before the Court of Exchequer. The plaintiff, who was employed by a butcher, had been injured and his thigh fractured by the breakdown of the cart in which he was engaged in delivering the meat. The declaration alleged that the accident was due to the neglect of the defendant. The plaintiff gave evidence that the van was overloaded with the knowledge of the defendant, his employer. The jury found for the plaintiff, and there was a motion in arrest of judgment on the ground

that the defendant was not liable in law in the circumstances stated in the declaration. LORD ABINGER indignantly rejected the claim. He said that the action was unprecedented, and, if the master were held liable to his servant in that action, the principle of liability would carry them to an alarming extent. He gave as instances the case of the foot-

A man being injured by the negligence of the coachbuilder or the harness-maker or the coachman. In these and other instances he was confusing the position of an independent contractor with that of a servant. What the declaration alleged was neglect by the defendant of proper care. LORD ABINGER also instanced the cases of the servant being

B injured by the negligence of the chambermaid in putting him in a damp bed, or by the upholsterer sending a crazy bed, or by the cook not cleaning the copper pots, or by the butcher supplying bad meat. These instances seem to show personal apprehensions, rather than any principle, but he seems to justify the rule on the ground that the master is not

C bound to take more care of the man than he may reasonably be expected to take of himself. If, as was alleged in the declaration and found by the jury, the master was personally negligent in overloading the van, he would clearly, in modern law, be liable to the injured servant, as, indeed, he should have been, on LORD ABINGER'S own statement that the master

D is bound to provide to the best of his ability for the safety of the servant in the course of his employment. LORD ABINGER'S reason, that the man was just as likely to be acquainted with the danger as his master, and could decline any service if he apprehended danger, if it is meant to invoke the principle *volenti non fit injuria*, is not consistent with *Smith*

E v. *Baker & Sons* (3), where it was held that the fact that a man goes on working is, for obvious reasons, not conclusive that he voluntarily takes the risk, because he may do so rather than lose his job. However, the fact that the butcher's boy, or, indeed, any particular employee, could know as well as the master is, at the lowest, questionable, and, if

F applied to wider industrial operations, such as those of modern times, is absurd. Finally, LORD ABINGER'S explanation, that to allow such actions would be an encouragement to a servant to omit the due diligence and caution which he is bound to exercise for his master to guard against the negligence of his fellow-employees, and that these are a better security

G for the man's safety than is a claim for damages against the master, seems to go beyond the limit of judicial cognisance, and to be difficult to reconcile with ordinary experience or common sense.

However, *Priestley v. Fowler* (1) was accepted in a case 5 years later by the plaintiff's counsel, as well as the judge, who decided the case,

H as being good law. That was in *Farwell v. Boston & Worcester Railroad Corpn.* (8), a case tried in the Supreme Court of Massachusetts before SHAW, C.J., who delivered an elaborate judgment. The plaintiff, employed by the defendant company as the conductor of a train, had been injured in a collision due to the negligence of a switchman also employed on the line by the defendant company. The action was laid in trespass on the

case. The judgment, which was commended by LORD CRANWORTH, L.C., in *Reid's* case (5), is carefully composed and lucidly expressed, but I think it is here necessary to analyse the reasoning on which it proceeds. SHAW, C.J., did not deny that the master owed some duty to his servant, but limited that duty (in addition to the master's own personal duty in the conduct of the work) to a duty to answer for failure to use due diligence in the selection of competent and trusty servants, and to furnish them with proper means. He accepted that the principle *respondeat superior* required an employer to answer in tort to a stranger for his employee's negligence, but held that a different principle applied where it was an employee who was so injured, because the rights as between employer and employee were regulated by contract, express or implied, so that there was no room for an indemnity in tort against the negligence of a fellow-servant. I am not clear if he based that conclusion on the now-exploded doctrine that, where there is a contract between parties, there is no room for liability in tort. In modern law, it is realised that a duty may arise out of a relationship based on contract, with a consequent liability for a breach of that duty, which I take to be the legal basis for many cases of liability in negligence, and for such liability as now exists between employer and employee. If, on the other hand, he held that there was, in the cases of this nature, an exception to the rule *respondeat superior*, he must have found the exception in the implied terms of the contract of employment. I think his conclusion was the latter, because he says that the relations between employer and servant must, in contemplation of law, be presumed to be regulated by contract, express or implied. He based this general conclusion, as he said, on considerations of public policy and general convenience, and because the rule was best calculated to promote the benefit of all parties concerned. We have always been told that public policy is a dangerous ground of judgment, and it is clear that the reason and grounds on which a judge in effect usurps the function of the legislature should be explicitly set forth. If the public policy which SHAW, C.J., had in mind was that the welfare of the community was best promoted by reducing the charges on industry, or saving the master's pocket in particular in respect of compensation to workmen injured or killed, he might at least have considered the other side of the picture—the crippled workman deprived by the injury of the means of earning his living, the widow and orphans bereaved of their breadwinner. However, SHAW, C.J., did not explain very clearly to what public policy he meant to give effect. He instanced the case of marine insurance as a case where underwriters could not excuse themselves on the ground that the loss was caused by the negligence of the assured's servants. However, that is a very different contract. The condition of liability is the loss itself, and negligence is immaterial, by reason of the rule of *causa proxima*. It is no true analogy. At one place, he seems to emphasise that each workman has better means of providing for his own safety by observing the conduct of those with

- whom he is employed, and can give notice of any incapacity to the master, and, if necessary, leave the employment, and that this is a better security than a claim for damages (which seems to me a very fallacious idea), but later he rejects that explanation in so far as it depends on the servant being in the same department of duty, and says that such a
- A distinction was not the ground of the exemption from the scope of the rule *respondeat superior*, which he holds was that, though there was an implied contract to indemnify the servant, it was limited to the matters already stated. There was, he also held, no liability in tort, because the employee and employer were not strangers. He said that the risks
- B incident to the service included the risk of another servant's negligence, which was distinctly foreseen and provided for in the rate of compensation. This latter seems to me to be as hard to comprehend as the idea of public policy, when it is considered how little bargaining-power a workman possesses, but it seems to assume that the men were working
- C in one department of duty. What, however, seems to me to be most important to note for purposes of this case is that it was the view of SHAW, C.J., that it was extremely difficult to distinguish what would constitute one department, and what a distinct department of duty, and hence any such distinction must be disregarded. This was a point
- D which was dealt with differently by the House of Lords in the *Reid's* case (5) and *McGuire's* case (6). It may not, perhaps, be unfair to say that the judgment depends at least in part on a very questionable view of public policy, and on a view of the relation of contract to tort which modern law has rejected.
- E A few years later, in 1851, the principle of *Priestley v. Fowler* (1) was applied, or, rather, extended, in *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (2). *Farwell's* case (8) does not appear to have been cited. In *Hutchinson's* case (2), a railway guard, while acting as such on the company's train, was injured by a collision, due to the negligence of an
- F engine driver of another train employed by the same company, or of the drivers of both engines. The decision was, it seems, based on the idea that the workman must be taken to have contracted on the terms that, as between himself and his master, he would run the risk of his fellow-servant's negligence as one of the ordinary risks of the service,
- G even though the two servants were not engaged in any common act of service. Hence the courts treated as immaterial the question whether or not the accident was due to the negligence of the driver of the plaintiff's train, or of the other driver, or of both. Apart from the assertion that there is such an implied term, I am not clear on what principle the
- H decision is based, except perhaps that negligence on the part of a fellow-servant is treated as on the same footing, *quoad* the master's liability, as negligence of the man himself causing injury to him.

The Scottish courts, however, refused to accept the doctrine of common employment. I note in particular *Bowman (or M'Naughton) v. Caledonian Ry. Co.* (7), another railway case, where the company was held

liable notwithstanding the plea. The Lord Justice-Clerk, repudiating that there was any such rule in Scotland, said that, if a master was responsible to strangers for his servants' negligence, *a fortiori* should he be responsible to his own servants in the like case, and shrewdly added that to say that each workman undertakes all risks of accidents which might be caused to him by perhaps 1,000 fellow-workmen employed on a railway was opposite to reason and justice. The House of Lords in *Reid's* case (5) and *McGuire's* case (6) rejected and overruled the view so expressed, but they reserved their opinion in regard to the case itself, which they said might stand with their decision. I think their Lordships were referring to what was said by the Lord Ordinary in his judgment on the subject of distinct departments of work, which it seems had been regarded as immaterial both in *Farwell's* case (8) and in *Hutchinson's* case (2). As instances of distinct departments of work, the Lord Ordinary mentioned the cases of a dairymaid, when taking the milk to the house, being run over by the coachman, of a painter working on a high ladder knocked down by the gardener, and of a ploughman employed by a railway being injured, while working in a field near the line, by the negligence of the railway servants on a passing train. Where persons were working side by side in a common operation, the Lord Ordinary said, it might be possible to imply the consent to undergo the risk, but it was a different matter where there was a universal undertaking extending to hundreds of persons in widely different places. In *M'Naughton's* case (7), a carpenter employed by the railway company was working on a railway carriage in a siding. The carriage was run into in consequence of the negligence of the driver of a train belonging to the same company, and the carpenter was injured. The Lord Ordinary held that the carpenter belonged to a different department from the locomotive department, and was entitled to recover.

This decision which I have said was specially reserved for further consideration in the *Reid's* case (5) and *McGuire's* case (6) by this House is peculiarly important in the present appeal, which depends on whether the man who was killed and the man who was negligent, being both employed by the respondents, were both employed in the same departments, or in the same work or common task. As will appear, this House carefully limited the rule to cases where the answer to that can be that the men were so employed. This was in *Reid's* case (5) and *McGuire's* case (6), which may be considered as if they were one. In the former, *Reid's* case (5), LORD CRANWORTH, L.C., (who, as ROLFE, B., had been a Baron of the Exchequer when the Court of Exchequer gave judgment in *Hutchinson's* case (2)) was the single Lord of Appeal. In the other, *McGuire's* case (6), he, with LORD CHELMSFORD, L.C., and LORD BROUGHAM, delivered opinions. The facts were that the two miners who were killed met their death through the negligence of the man working the cage which brought them from the bottom of the pit to the surface. It was held by this House, reversing the Scottish courts, that the defence of

common employment was good. Their Lordships accepted the view that the rule depended on an implied contract on the part of the workman, which they treated as involving a special exemption from the principle of *respondet superior*, but LORD BROUGHAM said, at p. 313, that, to bring a case within the exemption, there must be the

A . . . most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment.

In the same case, LORD CRANWORTH said that the real question in general was what was common work. He said it was not necessarily the same

B or similar acts. The instances he gave all involve some juxtaposition or inter-connection in working, such as steersman and rower, driver and guard of stage coach, and so on. He included in the category of such work the case before him (that of the work of the miners and the lift-man), and also that of the conductor of a train and a switchman. LORD CHELMSFORD, L.C., in an important passage in *McGuire's* case (6), at
C p. 307, cited as an authoritative statement of the rule by LORD LORE-BURN, L.C., in *Coldrick v. Partridge, Jones & Co., Ltd.* (12), at p. 80 said:

It is necessary, however, in each particular case to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.

He added that there might be difficulty in deciding whether a common
E employment existed, but, by keeping in view what a servant must have known, or expected, to be involved in the service which he undertakes, a satisfactory conclusion may be arrived at. He held that in the case before him there was one common operation, that of getting coals from the pit, and that all necessary incidents were included in it, including
F the very act in question. LORD CHELMSFORD, L.C., said that *M'Naughton's* case (7) might be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of duty.

I have been attempting to elucidate the principle of law, and its limits.
G I ventured in *Wilsons & Clyde Coal Co., Ltd. v. English* (13) to express some criticism of the doctrine, which I cannot help regarding as an arbitrary departure from the rules of the common law, based on a prejudiced and one-sided notion of what was called public policy, and sanctioned by no previous authority. Your Lordships have been invited
H by counsel for the appellant to say that the rule is based on industrial and social conditions which have changed. Therefore, it is said, as it is the duty of the common law to mould and adapt itself from time to time so as to do justice under new and changing conditions, this is a case in which that duty should be fulfilled. It is, indeed, true that the common law is flexible and progressive, but it is so only subject to

definite limitations. One is that this House is bound by its own decisions. It may overrule in a proper case the decision of a lower court, even a decision which has stood and has been acted upon for a long series of years. It may also refuse to act upon expressions of opinion or matters of observation stated in opinions of members of the House. Nevertheless, in a matter of clear and precise decision, such as the doctrine of common employment, it is well settled by established authority that the decision of the House is final, and that the rule can only be changed by the legislature. In this particular matter, the rule has been reaffirmed by this House in several cases to which I have referred, or shall shortly refer. It has also been clearly recognised in certain remedial legislation—namely, the Employers' Liability Act, 1880, which, subject to serious qualifications, made some specific exceptions to the rule, which it expressly recognised. The rule may also be said to be implicitly recognised in the Workmen's Compensation Acts. These Acts, however, do not give the workman or his dependants the same benefits as he or they would have in proper cases if the rule did not exist, though they also give the employee the option of proceeding at common law as an alternative remedy, when he has a right at common law. This House cannot usurp the function of the legislature in a matter of this nature.

However, these considerations make it more important to state the rule precisely, and to determine its exact limits, which have sometimes been in danger of being overlooked. I have already stated the limit material to this appeal, as expressed in the decision of this House. There are also other limitations which this House, while affirming the rule, has had at times to reaffirm. Thus, in *Johnson v. Lindsay & Co.* (14), this House was constrained to reverse a decision of the Court of Appeal, and to hold that it was not enough that the men were engaged in a common general operation or work, but that they must also be employed by the same employer. In *Wilsons & Clyde Coal Co., Ltd. v. English* (13), this House reaffirmed the principles laid down in this House in *Reid's* case (5) and *McGuire's* case (6) and other decisions—that the doctrine of common employment did not extend to excuse lack of due diligence on the part of the employer in the threefold duties of selection of competent employees, provision of proper appliances and provision of a proper system of working. In that case, this House affirmed the view of the Court of Session, and overruled decisions of the Court of Appeal to the contrary effect. On the same principle, it has been held that the doctrine of common employment does not apply to failure of an employer to fulfil an obligation which is personal to him, such as that under the Factory Acts, though the employer does not, and, indeed, cannot, perform the obligation personally, or otherwise than by employees: see, for instance, *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (15). These are clear limitations of the scope of the doctrine. However, the limitations which I have explained, and which, for purposes of this opinion, I wish to emphasise, are based on the fundamental principle that there

must be an actual contract between the employer and employee, so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow-employees. On this footing, it has been held that, where there was no contract at all, as in the case of a workhouse inmate doing work which he was ordered to do (*Tozeland v. West Ham Union* (16)), or a pilot employed under compulsion of law (*Smith v. Steele* (17)), there is no basis of actual contract on which to found the implied term. BLACKBURN, J., in delivering judgment in the latter case, referred to *Indermaur v. Dames* (18) as a case in which the law could not imply the term. The decisions which have held that a volunteer may be met by the defence of common employment have not come before this House. If they are right, they can only be considered as special exceptions to the settled general rule that the basis of common employment is a contract, as BLACKBURN, J., specifically said in *Smith v. Steele* (17). If what was said by SIR RICHARD HENN COLLINS, M.R., in *Burr v. Theatre Royal, Drury Lane, Ltd.* (19), at p. 555, was meant to contradict this idea, and to place the doctrine of common employment on an abstract rule or fundamental principle of law, applicable without regard to circumstances, and incidental to the bare relationship of master and servant, I cannot agree with him, for reasons already sufficiently made clear. SIR RICHARD HENN COLLINS, M.R., however, stated the basis of the rule to be, at p. 554 :

... under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself into juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself.

This clearly recognised that the extent of the fictitious or imaginary term depends on the circumstances of the particular employment. It agreed in substance with the language of BLACKBURN, J., in *Morgan v. Vale of Neath Ry. Co.* (10), at p. 580 :

There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages.

I think the words "natural and necessary" are more accurate than those of SIR RICHARD HENN COLLINS, M.R., "necessary or reasonable." I construe the words of BLACKBURN, J., as meaning "necessary in the normal course of things," having regard to the service undertaken. I may note in passing, however, that even BLACKBURN, J., repeats the old and erroneous idea that the workman considers this risk in his wages, which, oftener than not, as most people would agree, may be on the limit of bare subsistence. BRETT, L.J., expresses not quite so accurately the same general idea as BLACKBURN, J., in his formula :

... where the service of each will bring them so far to work in the same place and same time that the negligence of one ... may injure the other. ...

It is noteworthy that BRETT, L.J., says "will bring," not "may bring." He is thinking of what is natural and necessary, not merely accidental (*Charles v. Taylor, Walker & Co.* (9) at p. 496). We are thus brought back to the language of the leading case, *McGuire's* case (6), by which, as LORD WATSON said in *Johnson v. Lindsay & Co.* (14), at p. 382, the doctrine was for the first time "fully explained and reduced to its proper limits." A

I am here merely concerned with "the proper limits," or, rather, one particular limit. It is clear that the phrases found here and there in judgments, to the effect that the doctrine applies wherever two or more workmen are working for one master for no other common end than to make money for him, cannot be regarded as correct since *Reid's* case (5) B and *McGuire's* case (6). Perhaps such inaccuracy is natural enough where the courts have to give effect to a vague and unreal figment of an implied term. It is easy to generalise, and ignore limits which arise on the facts of the case. It is difficult sometimes to fit a factual qualification on a fictitious contract. However, it is clear on the authorities in this House C that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work—that is, work which necessarily and naturally, or in the usual course, involves juxtaposition, local or causal, of the fellow-employees, and exposure to the risk of the negligence of one affecting the D other. According to the cases, the *nexus* may be some general undertaking, which, however large it may be, can be regarded by the court as a unit, as a colliery was regarded in *Wilson v. Merry* (20), where it was held that there was common employment between the miner and the works managers, notwithstanding the difference in grade and responsibility E between them. Similarly in the navigation of a ship, as in *Hedley v. Pinkney & Sons S.S. Co.* (21), where the common employment was between the master and the seaman. The interdependence of the employees who are all engaged in the same work is obvious in such cases. F

Again it has been held that there is employment in common in regard to the working of a railway system, at least so far as working on the lines and adjoining premises is concerned, though the exception recognised or reserved in *M'Naughton's* case (7) must not be overlooked. I need not detail the instances which appear in the cases, of which many have been cited in argument. It is, indeed, true that, with one exception, G there does not appear to be any reported case in which the defence of common employment has failed. There may be many explanations of that, but the most likely explanation may be that normally the negligence which caused the trouble occurred in the normal conditions of the trade, which necessarily brought the men into local, or at least causal, proximity. H

It is true, as LORD CHELMSFORD, L.C., said in *McGuire's* case (6), that there may be difficulty in deciding the question whether it was the same work on which the men were engaged. All the same, the question is vital, especially in the more complex organisations of industry in modern times. It is easy to give clear instances where men

employed by the same employers are not engaged in common work. A great industrial concern may operate collieries, blast furnaces, steelworks, and engineering shops. It is not possible to say that the miner is in common employment with the artificer in the engineering shop. The question may not arise in such cases, because the different men are not likely to
 A come into relation, but they illustrate the principle. In the same way, different works of a large concern may employ different lorry drivers, two of whom in the course of their employment may collide in the home counties through the negligence of one driver, and thus the other driver may be injured, the one, it may be supposed, carrying material from one
 B of the company's factories in Cheshire, the other from one of their factories in Wales. That, in my opinion, would not be a case of common employment. Let me take a simpler case. A chain-store firm may have two branches in the same town, or in adjoining towns. An errand boy employed in one branch may be run over, while doing his errands in the
 C street, by the negligence of the driver of a van working in the employment of the other branch. That again would not, in my opinion, be a case of common employment. Instances might easily be multiplied, but these may suffice to illustrate the principle.

The one case to which I referred in which the defence failed is *The*
 D *Petrel* (11). The soundness of the decision of SIR FRANCIS JEUNE, P., in that case has, so far as I know, never been questioned, and, in my opinion, the case was well decided. Two vessels, the *Cormorant* and the *Petrel*, both owned by the General Steam Navigation Co., collided in the Thames. The *Petrel* was found alone to blame. To claims by
 E the crew of the *Cormorant* for damage they had suffered, the plea of common employment was set up, because, it was said, they and the crew of the *Cormorant* were both employed by the same master. SIR FRANCIS JEUNE, P., held that the plea failed. His conclusion is to be found at p. 326 :

F The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.

G Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps; for example it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I
 H think, therefore, that these two captains were not in common employment.

I think that that passage admirably expresses and applies the limit on the rule laid down in *Reid's* case (5) and *McGuire's* case (6). If the risk from the fellow-servant's negligence is accidental, as in the facts stated by SIR FRANCIS JEUNE, P., not incidental to the employment, if the men

are engaged to act on independent jobs, which do not necessarily or in the ordinary course bring them into relation, if the risk from the fellow-servant is only the same risk as that from men employed by other masters in the same type of occupation, if there is no object, immediate or remote, common to the employments of the fellow-employees, even though concerned in the same class of work, except that they are all engaged in seeking to make money for the same employer, I think there is *prima facie* no case of common employment. A

The question is whether this principle, which is true equally of drivers of lorries on the highways as of captains of vessels, applies in the facts of the present case. The judge has held that it does, on the facts as he has found them. The Court of Appeal, departing materially from the findings of fact of the judge, have come to a different conclusion. I prefer the findings of the judge, and his conclusion. I may recapitulate the material facts, which are simple. The respondents, who, as appears from the documents, had their head office in Preston, a garage in Bootle, and a depot in Islington in Liverpool, had motor coaches which they let out on hire. The deceased man was one of the drivers. On the occasion in question, the deceased man had his independent instructions, and, though he proceeded in company with 4 other coaches which started from the same garage, went to the same place to pick up the passengers, took them to the same destination and was directed to return to the Bootle garage, his instructions were addressed to him individually. He was not in any true sense engaged on a joint operation with the others. In particular, it was left entirely to his own discretion by what route he should return. Actually, he was returning independently, and separately from the other 4 coaches, when he happened to stop on the Liverpool side of the Mersey Tunnel for some reason. What it was does not appear. There is no evidence that he had a breakdown. The other driver, whose negligence caused the death, was delayed in the tunnel, and was coming up independently when he saw the deceased man's coach standing in the street. He said that he proceeded to pass alongside him to see why the deceased man had stopped. There is no evidence of any compulsion or order of the employers which brought these two men together at that time and place. The concurrence of their course was fortuitous. The decision of the Court of Appeal is based on a finding that the two men were engaged in common work, because, in the view of the court : B C D E F G

... they were engaged in carrying out together the order of their employer to get back direct to the garage and because Jones [the other driver] was in fact doing what he was expected to do by his employer, that is to say, trying to get in front of the deceased's coach and then pull up and go to his assistance. H

I cannot agree, with all respect, that these findings, which are not in accordance with the findings of the judge, are justified. As to the former, the men were not, in my opinion, engaged in carrying out any order "together." Each was independently carrying out the separate order given to him. Nor is there any evidence that his employers

expected that he would act as the Court of Appeal have held that he did, even if that court's view of the circumstances were justified. The judge found that there was not any breakdown of the coach, or any occasion for Jones to go to the deceased man. As to duty to go, the judge found that the high-water-mark of the evidence, given by a witness who, in the

A judge's view, knew nothing about it, was :

Oh, it might happen if one Ribble bus sees another stopped, he might go and ask what is the matter.

I accept these findings.

In my opinion, the circumstances here, as found by the judge, are
 B such that, having regard to the nature of the employment, there was no common work justifying the conclusion that the deceased man's contract of employment was subject to the fictitious implied term that he assumed the risk of his fellow-servant's negligence while driving his employers' coach on the highway on a separate job. I think there was no such term,
 C any more than there was in *The Petrel* (11). The two drivers concerned, when they were on the road severally driving their motor coaches, were engaged on independent pieces of work. There was no common work. The deceased man was not exposed to the risk of the negligence of another employee of the respondents driving another of the company's coaches
 D in any degree or in any sense other than he was exposed to the risk of any other driver's negligence on the road. The risk was the general risk of the highway, not the specific risk of the fellow-servant's negligence. This can be tested by supposing that the accident had occurred on the open road, when one driver was returning to the Bootle garage and the
 E other proceeding to the company's head office in Preston, and the two coaches had collided owing to the negligence of the driver of one. This, I think, for reasons sufficiently explained, would not be a case of common employment. I see no difference in principle between the present case and such a case, or the others I have suggested as instances. The
 F deceased man may be imagined, if the implied term were stated to him when he entered the employment, as observing, "Well, I shall generally be driving the coach I am assigned to on my own job, and not be concerned with any risk from my fellow-employees driving their coaches on their jobs." It may be that the men, while working in the respondents'
 G garage, are in common employment for the time in which they are occupied in working together there, in the same way as, in the opinion of SIR FRANCIS JEUNE, P., the crews of ships owned by the same owners might be in common employment while the ships were in the same dock, and perhaps the same might be true also in other circumstances which
 H might occur in their employment. I am limiting my conclusion to the special facts of this case, as found by the judge. Other cases may raise different problems and lead to different conclusions.

It is enough here to say that I think it would, on the facts so found, be contrary to the principles explicitly laid down by this House to say that the respondents' employees, while thus severally driving the coaches

on independent journeys on the roads, which was a substantive part of their regular employment, were engaged in a common work, or were within the rule of common employment. I accordingly agree with the decision of the judge, and think that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Silverman, Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool (for the appellant); *Berrymans*, agents for *Weightman, Pedder & Co.*, Liverpool (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

CRANE v. HEGEMAN-HARRIS CO. INC.

[CHANCERY DIVISION (Simonds, J.), **January 31, February 1, 2, 3, 7, 8, 9, 1939.**]

Mistake—Rectification—Agreement containing arbitration clause—Parties proceeding to arbitration and award made—Claim for rectification of agreement in action to enforce award—Estoppel.

By a building agreement dated July 16, 1935, the defendants agreed to construct for the E.C. Co., Ltd., the E.C. exhibition buildings. The contract price was to be divided into two clear parts—namely, (a) the actual cost of labour and materials, and (b) a fixed sum of £140,000, which was to cover and include the defendants' profit, the cost and expenses of plans, specifications and architectural drawings, the salaries of architect and engineer, and general overhead expenses. It was also provided that the total liability of the E.C. Co., Ltd., should not exceed £1,209,250, and that, should the total cost exceed that amount, the defendants should assume responsibility for, and pay for, any such excess, called the over-run. It was agreed that the sum of £140,000 should be divided into two equal parts, and that the first £70,000 should represent the defendants' expenses and the second £70,000 the job profit, subject, however, to the over-run. By an agreement, dated Oct. 23, 1935, made between the plaintiff and the defendants, and expressed to be supplemental to the building agreement of July 16, 1935, the plaintiff was to be the architect for the job, and was to be paid a minimum fee of £13,000, and "such a further amount (not exceeding £20,000 in all) as shall be equal to two equal seventh parts of the amount which the company shall under the terms of the building agreement" receive and retain "in respect of the fixed fee of £140,000 payable thereunder to the company." No sum under this provision was to be payable to the architect until the company, the defendants, had "received and retained £70,000 on account of the fixed fee payable to them but as and when any sum in excess of £70,000 shall be received and retained by the company in respect of the fixed fee the company shall pay over to the architect an amount equal to two equal seventh parts thereof." A dispute arose over the meaning of the words "and retain," the defendants contending that it had been part of the bargain between the parties that from the £70,000 in respect of which the plaintiff was to get his two-sevenths there must first be deducted any sum which the defendants had to pay by way of over-run. On a submission to arbitration being made, the arbitrator decided against the construction contended for by the defendants. The plaintiff brought an action to enforce the arbitrator's award, and the defendants then contended that the submission was no real submission, because it was based upon a fundamental mistake of fact and did not express the real agreement between the parties. They also counterclaimed for rectification of the agreement. The plaintiff contended that the defendants were

not entitled to put forward the plea after a submission to an arbitration in which an award had been made :—

HELD : (i) as the evidence showed that, prior to and until the execution of the agreement, the plaintiff had concurred in his remuneration being subject to over-run, the agreement did not represent the true consensus of the parties, and the defendants were, therefore, entitled, apart from other considerations, to have it rectified.

A . (ii) the defendants were not barred, by reason of the arbitration proceedings and the award therein, from putting forward the claim for rectification in an action to enforce that award.

[EDITORIAL NOTE.] The point here is quite a short one, such complication as there is being purely one of the facts. The point is whether, in an action to enforce the award of an arbitrator, the defendants can ask for the rectification of the contract containing the arbitration clause. The matter not being covered by authority, the plaintiff, in answer to such a claim, pleaded estoppel, but it is held that the award is not, in this respect, in the same position as that of a judgment of the court, and that the defendants were, therefore, not too late in their claim for rectification. Assuming a proper case for rectification, it follows that the agreement submitted to the arbitrator was not the agreement of the parties, and, as the court here holds, that an action to enforce an award is essentially an action to enforce the agreement, it is only right that, in that action, a claim for rectification of the agreement should be allowed.

AS TO TIME FOR RECTIFICATION, see HALSBURY, Hailsham Edn., Vol. 23, p. 160, para. 232 ; and FOR CASES, see DIGEST, Vol. 35, pp. 142-144, Nos. 408-419.]

D Cases referred to :

(1) *Shipley Urban District Council v. Bradford Corpn.*, [1936] Ch. 375, 399 ; Digest Supp. ; 105 L.J.Ch. 225, 232 ; 154 L.T. 444.

(2) *Caird v. Moss* (1886), 33 Ch.D. 22 ; 21 Digest 172, 267 ; 55 L.J.Ch. 854 ; 55 L.T. 453.

(3) *Marriot v. Hampton* (1797), 7 Term Rep. 269 ; 12 Digest 560, 4650.

E ACTION to enforce an award made by an arbitrator upon a submission to arbitration.

C. E. Harman, K.C., and *Gerald Upjohn* for the plaintiff.

H. U. Willink, K.C., and *John Megaw* for the defendants.

F SIMONDS, J. : The plaintiff in this suit is one Charles Howard Crane, an American citizen and an architect. The defendants are the Hegeman-Harris Co. Inc., a corporation incorporated under the laws of the state of New York, and, as I understand, domiciled in the city, county and state of New York. The action is brought to enforce an award upon a submission to arbitration made by the parties on Apr. 19, 1937. An action upon an award is in substance an action to enforce an agreement, the agreement being implied in the submission to arbitration that the parties will pay or do that sum or thing which is awarded by the arbitrator. To that claim the defendants put in this defence. They say
G that the submission to arbitration was no real submission, because it was based upon a fundamental mistake of fact, the mistake of fact being that the agreement which gave rise to the differences referred to arbitration was not the real agreement between the parties. The submission was made upon the footing that that was the agreement, whereas in fact it was not the agreement. Upon the same considerations, they
H

claim to have the agreement in question rectified so as to give effect to what was, as they allege, the true consensus of the two parties when they made that agreement. To that the plaintiff by his reply makes a number of pleas. With them I will deal in due course, but in substance what he says is that, whether or not the defendants to this action might, at some time, have had the right to raise that plea and claim rectification, they have lost that right by the course which they have taken in assenting to the arbitration proceedings and pursuing them through all their course. Logically, I think it is necessary for me first to consider whether the defendants are right in the contention which they put forward—namely, that the agreement, the differences upon which were submitted to arbitration, does not represent the true consensus of the parties, so that, apart from any other considerations, they would be entitled to have it rectified so as to bring it into conformity with that consensus. A B

Before I consider the facts and come to a conclusion whether the defendants are right in their contention, it is necessary to say a few words upon the principles which must guide me in this matter. I am clear that I must follow the decision of CLAUSON, J., as he then was, in *Shipley Urban District Council v. Bradford Corpn.* (1), the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I shall continue to exercise the jurisdiction which CLAUSON, J., as I think rightly, held might be entertained by this court. D E F G

Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective H

skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which LORD ELDON, I think, in a somewhat picturesque phrase described as "irrefragable" that the court can act. I would rather, I think, say that the court can only act if it is satisfied beyond
 A all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is in the light
 B of those principles that I must examine the facts of this somewhat complicated case.

The agreement in respect of which the differences that were submitted to arbitration arose was an agreement made on Oct. 23, 1935, between the defendant corporation purporting to act by John W. Harris, a
 C director and duly authorised agent, of the one part, and the plaintiff, of the other part. The agreement is said to be supplemental to an agreement called the building agreement, which was made on July 16, 1935, between the defendants, of the one part, and the company, called Earls Court, Ltd., of the other part. Earls Court, Ltd., is hereafter
 D called the owner. That was :

. . . an agreement for the erection of certain exhibition premises and the carrying out of certain alterations in existing premises situate at Earls Court in the parishes of Fulham and Kensington in the county of London substantially in accordance with and of the sizes and character detailed in the preliminary plans and specifications already prepared and also in accordance with architectural working drawings and specifications structural engineering plans and specifications and mechanical engineering plans and specifications to be prepared by the company [the defendant corporation] in accordance with the true intent and meaning of the preliminary plans and specifications [there referred to].
 E

The agreement recites that, under the principal agreement, to which I have just referred, the company had undertaken to complete the work
 F which was to be carried out by them within certain specified dates, so that the time factor is there made clear. It was provided by the building agreement that time was to be of the essence of the contract. It states that the architect—that is, the plaintiff in this suit—had already prepared, on the instructions of the company, preliminary plans and specifications, and that the company had now requested him to prepare the
 G working plans and specifications, and to do certain other work which the architect had agreed to do upon the terms thereafter contained. It recites that the company had already paid to, or for, the architect since Aug. 1, 1935, the sum of £3,500, which was to be regarded as a
 H payment by the company on account of the architect's remuneration. It refers to a certain claim made by one Sir Owen Williams against the owner and the company by reason of an alleged use of certain plans. Then the operative part of the agreement provides as follows. It provides for the architect to prepare and complete the architectural drawings and to do the other work which is therein referred to. By para. 2 it

provides that, in consideration of the services to be rendered by the architect, the defendants are, subject to due and punctual performance by him of his obligations, to pay to him his remuneration, which is thus stated : (i) the minimum fee of £13,000, of which the defendants were to be deemed to have paid already the sum of £3,500, and were to pay the balance in instalments on dates given ; (ii) (and now I come to the vital clause in this agreement, upon which the whole matter turns, and which I will read verbatim) :

Such a further amount (not exceeding £20,000 in all) as shall be equal to two equal seventh parts of the amount which the company shall under the terms of the building agreement receive and retain in respect of the fixed fee of £140,000 payable thereunder to the company provided always that no sum shall be payable to the architect under this subclause until the company shall have received and retained £70,000 on account of the said fixed fee payable to them but as and when any sum in excess of £70,000 shall be received and retained by the company in respect of the said fixed fee the company shall pay over to the architect an amount equal to two equal seventh parts thereof.

I think that nobody can read that provision without feeling at once that it is an obscure provision, which requires further definition, and it is not strange that a difference arose between the parties upon the meaning of the words "and retain" in the provision. That was the difference which, as a matter of construction of this agreement, went to the arbitrator, and upon which the arbitrator, with the assistance of the Court of Appeal, before whom a special consultative case ultimately came, decided in favour of the contentions put forward by the plaintiff in this suit, and against the contention put forward by the defendants. He decided, in effect, I think, that no real meaning could be given to the words "and retain," and that, in particular, there could not be given to the words that meaning for which the defendants contended—namely, that they referred to the fact that throughout it had been part of the bargain between the parties that, from that £70,000 in respect of which the plaintiff was to get his two-sevenths, there must first be deducted any sum which the defendants had to pay in respect of the difference between the actual cost of the buildings and the sum which, under the agreement, the building owners, Earls Court, Ltd., were to pay to the defendant corporation. The arbitrator and the Court of Appeal were unable to give that meaning to the words "and retain," and, if I may say so, it appears to me that no other conclusion could have been reached. That matter having been thus decided as a matter of construction against the defendant corporation, their claim in the present suit is that this provision, which I have read, should be so rectified as to give effect to what they allege to have been the common intention of the parties—namely, that the remuneration of the plaintiff out of that second £70,000 should be subject to the deduction which I have mentioned. For the purposes of seeing whether that contention is right or wrong, I must go back clearly to the principal agreement, to which this agreement is made supplemental, and examine the circumstances from that date to the date of the agreement which it is sought to reform.

The principal agreement, as appears from the agreement which I have just read, was an agreement made on July 16, 1935, between the defendant corporation, of the one part, and Earls Court, Ltd., of the other part, and in effect it was a building agreement under which the defendants agreed for Earls Court, Ltd., to construct at a very large cost the new

A Earls Court exhibition buildings. Art. 1 provides for the defendant corporation (whom I will call in this document the contractor) forthwith commencing the preparation of architectural working drawings and specifications as provided by the article. I need read no more of it. Arts. 2, 3, 4, 5, 6, 7, all contain provisions in regard to the construction

B of the buildings, and I think I need not refer to them. Art. 8 provides as follows :

The contractor shall be paid by the owner in the manner and to the extent hereinafter described for its actual cost of materials labour and other expenses paid and incurred in the performance of the work hereunder and also a fixed fee of £140,000 which fixed fee is to cover and include the contractor's profit the cost and expenses

C of the preparation of the said preliminary plans and specifications and of the said architectural drawings and specifications structural engineering plans and specifications and mechanical engineering plans and specifications the salaries and expenses of the contractor's executive officers' salaries and expenses of any persons employed during the execution of the work in the main or branch office of the contractor whose time is devoted to the general carrying on of the contractor's business such as typists plan clerks file clerks estimating purchasing and accounting departments

D cost of capital employed by the contractor or money borrowed overhead or general expenses of every kind (except as specifically provided elsewhere in this agreement) and general supervision of the work.

Therefore, one has it divided into two clear heads, (i) the actual cost, which is subsequently defined, and (ii) the expenses which are to be borne out of the fixed fee of £140,000. The actual cost is defined subsequently

E in the agreement, and I need not read through it. In effect, it is the cost of the job, and of the job overhead expenses, as distinguished from certain specific expenses and general overhead expenses. Art. 11 is one of paramount importance, and provides as follows :

The contractor hereby guarantees that the total amount which shall be payable

F by the owner to the contractor for the work to be performed by the contractor under this agreement including the contractor's fixed fee payable under art. 8 will not exceed the sum of £1,209,250 and the contractor agrees that if for any reason the total cost of such work together with the contractor's fee shall exceed the said sum of £1,209,250 the owner shall not be required to pay such excess or any part thereof but the contractor will assume and pay all such excess and shall have no claim against the owner on account thereof.

G That excess of cost over the £1,209,250 has been in this case, in evidence and elsewhere, frequently referred to as the over-run, and that is a convenient short expression which I will use to mean that excess. The article continues :

Should the contractor perform the work for less than the above guaranteed cost

H properly adjusted by estimated costs of changes if any be made the contractor shall only be entitled to receive a sum equal to the amount of the final cost of the said work (plus the contractor's said fixed fee of £140,000 with any additions thereto under art. 14 hereof) and shall forthwith repay to the owner any amount paid by it hereunder in excess of such final cost and fee.

Art. 12 provides for payment of various sums by the owner upon certificates of the consulting architect. These are, I think, the usual provisions

in a building agreement, to which I need not specifically refer. Art. 14 provides for additions or deductions. Art. 19 provides for a number of matters, including the possibility of the contractor becoming liable to pay to the owner—that is, to Earls Court, Ltd.—such additional sum as shall be necessary to compensate the owner for certain damages. Art. 20 provides for a lien in certain cases. I think that there is nothing else A in that agreement to which I need refer.

That agreement was dated July 16, 1935. The position by that time was this. The plaintiff by no means occupied the position usually occupied by an architect where a big building is in the course of construction. He was in fact employed, as the agreement which I first read B shows, not by the owner, but by the contractor. That was a position which at first he was extremely unwilling to hold, thinking that it was not consistent with the dignity of his profession. That was, I think, the reason—a not unnatural reason—but, whatever the reason may have been, it was a position which he was unwilling for some time to assume, C though eventually it was a position into which he was forced. Already, by July 16, 1935, when this agreement was made, as appears from its terms, the plaintiff had gone far in the preparation of the preliminary plans and drawings, and in fact he himself had borne a large part in the project from its inception, and it may be that it was in large part due D to him that the project was put upon its feet at all. However that may be, by July 16 there had already been negotiations between the plaintiff and the defendants as to the terms of his remuneration. Then, or shortly after that date, the negotiations proceeded and continued until Oct. 23, when the agreement was executed. The fixed fee of E £140,000 was, of course, the fee out of which the plaintiff was, one way or another, to obtain his remuneration, and, in order to make clear what follows, I must make this observation. It is not quite clear to me how or where it happened, but it is common ground between the parties that at some stage or other that £140,000 was divided into two equal parts F of £70,000, and it was assumed that the first £70,000 was to represent the expenses to which the contractor would be put, including the payment to the plaintiff himself of £13,000 in respect of his minimum fee. The balance of the first £70,000 was to be devoted to the payment of the engineer and to the payment, in some respects, of certain sums, and in G other respects of uncertain and arbitrary sums, to cover their general overhead expenses. It was the common assumption of the parties that the second £70,000 would be available as the job profit. That might or might not turn out to be a correct estimate, but the second £70,000 was treated as the sum out of which both the plaintiff and the defendants H were to make their profit, but that £70,000 was subject to what I have called the over-run. It might be eaten into by the fact that the cost incurred by the defendant corporation in the erection of the building would exceed the sum which they were to receive from the building owner.

I find, then, upon all the evidence, that it is impossible to come to the conclusion that the plaintiff did not concur, on Sept. 19, and thenceforward until the execution of this contract on Oct. 23, in his remuneration being subject to over-run. How exactly he was minded to phrase that provision is a thing which I think is not really material.

- A It is, of course, true that, for the purposes of rectification, one must find that which was specifically intended, but the exact form of words in which the common intention is to be framed appears to me to be immaterial as long as in substance and in detail their intention is to be ascertained. In fact, however, here the very words which represent
- B their common intention are, in my view, to be found in the letter dated Sept. 2, to which I have referred.

Then the position is that, if, at some date before the proceedings went to arbitration, the defendant corporation had sought to rectify this agreement, they must have succeeded, in my view, in their action. Is

C there, then, anything that has happened since that time which precludes the defendants from putting forward that case now? The circumstances can be very shortly stated. The question having arisen as to what was the true construction of the agreement as framed, the matter was submitted to arbitration, and the parties put forward their respective views.

- D I think that it is fair to say that, as a matter of construction of the agreement, the defendants did not put forward exactly, though very nearly exactly, the case which they are now putting forward as the intention of the parties. I pay little attention to that. Substantially, they put forward the case which they are now putting forward, and the
- E plaintiff put forward the case which he, of course, now puts forward. That is not quite accurate. Upon the arbitration, the plaintiff put forward his view of the construction of the agreement and the defendants put forward the view that, upon its true construction, it would bear substantially the meaning for which they contend if it were rectified. Upon
- F that, the arbitrator put forward a special case, a consultative case, for the opinion of the court. That went eventually to the Court of Appeal, who held that the provision in question could not bear the meaning for which the defendants contend, although I think they were not able to give any very precise meaning to the words "and retain." Accord-
- G ingly, in due course the arbitrator made his award. It is said that in this action upon the award the defendants are not entitled to put forward the plea that the agreement does not represent the true consensus of the parties. I am quite unable to accept that view. It is put forward, in the first place, not upon any very clear principle of law, but upon the
- H basis of an authority, *Caird v. Moss* (2), the suggestion being that, because the parties have been to arbitration, and because a matter of construction has been decided in that arbitration, and because the defendants might have taken some course of suggesting that the question of rectification also should be submitted to arbitration, or an independent action brought, therefore in some way they are precluded now from

putting forward this plea. That is put forward, I say, first of all, upon the authority of *Caird v. Moss* (2), and then, apparently, as an independent head of argument, upon the ground of estoppel. The headnote in *Caird v. Moss* (2), or part of it, states sufficiently all I need say about the case :

After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred. A

It came first before KAY, J., who held :

. . . that the action must be allowed to proceed [the action for rectification] for that there was no estoppel on the ground of *res judicata*. B

It went to the Court of Appeal, and it was there held :

. . . that the action must be dismissed, for that although, the question of rectification not having been before the Palatine Court, there was no *res judicata*, the plaintiff could not come to have the agreement rectified after it had been worked out, and the fund distributed under the order of the court in the Palatine action. C

It appears that the whole of that case rests on the fact that there had been a judgment by a court of competent jurisdiction which had been satisfied, and the money had been paid. Accordingly, the Court of Appeal decided—I respectfully submit that they could come to no other possible conclusion—that what they were being asked to do was to reform a spent agreement, and an agreement which had been spent in the sense that a court of competent jurisdiction had adjudicated upon it and upon the judgment of that court the money had been paid. Accordingly, the agreement was spent, and nothing could be done under the agreement. What, then, was the use of rectifying it? I think that LOPES, L.J., put his finger on the spot when he said, at p. 36 : D

The object of this action is in form to rectify an agreement, but in substance to get back money which was paid under that agreement by the judgment of another court. Now *Marriot v. Hampton* (3) shews that money paid under legal process cannot be recovered back while that process stands. E

That, of course, is founded upon the fact that the action for money had and received, at any rate according to the view held at that time—I think, if I may say so, it is the better view—rests upon an implied obligation to pay, and there can be no implied obligation to pay under the order of a court of competent jurisdiction. That was the case in *Caird v. Moss* (2), which seems to have no relation to a case where the action is brought upon an award, and where *ex hypothesi*, since the action has been brought, the money has not been paid under the award. The agreement has not been spent even in the sense of the money being paid under it, much less has it been spent under the order of a competent court. Accordingly, as far as *Caird v. Moss* (2) is concerned, I think that it is not authority. F

Then it is said that, apart altogether from that, there is estoppel. Had it not been so emphatically and strenuously argued, I should have thought that the point was unarguable. Estoppel arises where one party by his word or his deeds makes a representation of fact to another upon G

his word or his deeds makes a representation of fact to another upon H

which that other is intended to act, or upon which he may be reasonably assumed to be intended to act, and he does act, thereby altering his position to his prejudice. If he does that, then the party making the representation is debarred or estopped from denying that that is the fact which he has represented. So I ask myself what is the representation in this case, and, as I am entitled to do in such a case, I look to the pleadings to see what is the representation alleged which debars the defendants in this suit from setting up the case that the agreement as written does not represent the true consensus of the parties. This is the plea in para. 16 of the reply :

The plaintiff says that at all material times the defendants were well aware of all the facts which are alleged to give the defendants the right to claim rectification of the said agreement and (1) upon the true construction of the agreement of reference the defendants could have raised for the determination by the said arbitrator the question of rectification of the said agreement, or (2) alternatively, the defendants could have successfully applied at an early stage of the said arbitration to stay all proceedings under the agreement of reference pending the determination by this court of the question of rectification but the defendants wrongfully failed or neglected to follow either of these courses nor did the defendants ever suggest until after the final award of the said arbitrator that the said agreement did not express the true bargain between the parties but on the contrary the defendants wrongfully allowed the plaintiff to incur expense in contesting the said arbitration and the application to the court during the course thereof and in taking up the respective awards of the said arbitrator. In the foregoing circumstances the defendants are now estopped and debarred from claiming rectification.

In my view of the law, that does not begin to support the case which the plaintiff is here making out—that the defendants are estopped from asserting what was the true meaning of the agreement. At most, it comes to this, not that there is no right to claim rectification at all, but that the defendants did not do what they might have done at an early stage—namely, intimate that, if their view of the construction of the agreement was wrong, they had another string to their bow, and they proposed in that case to take such proceedings as they might be advised to get the instrument rectified by the court. Why that amounts to a representation upon which the plaintiff acted to his detriment I fail to see. Nor was any evidence of any kind led to support the plea that, by virtue of the representation, the plaintiff altered his position to his detriment. The plea of estoppel, in my view, fails.

The position, then, is this. As I pointed out at the beginning of this judgment, this is an action upon an award. It is, therefore, an action to enforce an agreement, for an action upon an award is an action to enforce an agreement implied in the submission, for the submission involves the implied promise of the parties that they will do that which the arbitrator awards. However, it follows from what I have said that the agreement which was submitted to the arbitrator for his arbitration was not the agreement of the parties. It did not represent the true consensus of their minds. Accordingly, the submission was made under a fundamental mistake of fact, common to them both. I must assume that they both submitted this agreement to the arbitration of the arbitrator upon the footing that it represented their intentions, when it did not.

Therefore, the defence which the defendants put forward is a defence which both reduces the claim under the award to a nullity and at the same time entitles the defendants to have the agreement rectified so as to bring it into conformity with the consensus of the parties. It follows that, so far as the action is concerned, it must be dismissed, and, so far as the counterclaim is concerned, it must be allowed. I think that the instrument can be rectified in the manner which was stated in the defendants' counterclaim. A

Action dismissed. Counterclaim allowed.

Solicitors: *William Charles Crocker* (for the plaintiff); *Slaughter & May* (for the defendants). B

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

TENNANT AND OTHERS *v.* LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS). C

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **February 7, 23, 1939.**]

Estate and other Death Duties—Property deemed to pass on death—Aggregation of property—Policy of assurance assigned to trustees during deceased's lifetime in trust for payment of death duties—Deceased's interest in proceeds of policy—Whether "an estate by itself"—Finance Act, 1894 (c. 30), ss. 2 (1) (d), 4. D

In 1911, a person effected a policy of assurance on his own life, and in 1931 he assigned the policy to trustees, whom he directed, *inter alia*, (i) to pay to his testamentary trustees the proceeds of the policy in satisfaction of all death duties payable by reason of his death, and (ii) to pay any residue to his children. When he died in 1935, the net proceeds of the policy amounted to £75,328 13s. 7d., but, as the death duties exceeded this sum, the whole proceeds of the policy were paid to the testamentary trustees. The premiums after the date of the assignment had been paid by the trustees out of money raised on the security of the policy. The Inland Revenue Commissioners assessed the sum of £75,328 13s. 7d. for estate duty on the basis that it was property which, for the purposes of determining the rate of estate duty to be paid on property passing on the deceased's death, fell to be aggregated with the other estate of the deceased. The appellants objected to this aggregation, on the ground that the sum, being property in which the deceased "never had an interest" within the meaning of the proviso to the Finance Act, 1894, s. 4, constituted an "estate by itself" within the meaning of that section, and fell to be assessed at the proper graduated rate of estate duty on the principal value thereof:— E F G

Held: the deceased had, from the commencement of the policy's existence, an interest in the proceeds thereof, and the property fell to be aggregated with the other estate of the deceased for the purpose of determining the rate of estate duty to be paid on property passing on the deceased's death. H

[EDITORIAL NOTE.] The question in this case is similar to that before the Court of Appeal in the recent case of *Re Hodson's Settlement, Brookes v. Attorney-General*, [1939] 1 All E.R. 196; Digest Supp., except that in the present case it would seem that it was easier to suggest that the deceased had an interest in the property during his lifetime. It must be noticed, however, that, after the assignment

to the trustees, the premiums of the policy were not paid by the deceased, but were paid by the trustees themselves out of moneys raised by them upon the security of the policy.

AS TO PROPERTY IN WHICH DECEASED NEVER HAD AN INTEREST, see HALSBURY, Hailsham Edn., Vol. 13, p. 261, para. 262; and FOR CASES, see DIGEST, Vol. 21, p. 23, Nos. 130, 131.]

A Cases referred to :

(1) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 21 Digest 17, 97; 69 L.J.Q.B. 223; 81 L.T. 607.

(2) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15, case q.

(3) *Lord Advocate v. Scott*, [1918] S.C. 720.

B (4) *A.-G. v. Pearson*, [1924] 2 K.B. 375; 21 Digest 15, 75; 94 L.J.K.B. 139; 132 L.T. 717.

C APPEAL from an interlocutor dated Jan. 4, 1938, pronounced by the First Division of the Court of Session at the Court of Exchequer in Scotland (LORD NORMAND, Lord President, LORD FLEMING, LORD MONCRIEFF and LORD CARMONT), affirming the decision of the Inland Revenue Commissioners, dated Dec. 30, 1936. The facts and the arguments are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

Cyril Radcliffe, K.C., and *J. L. Duncan* for the appellants.

D *The Lord Advocate for Scotland (T. M. Cooper, K.C., J. H. Stamp and T. B. Simpson* for the respondent.

E LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be expressed by my noble and learned friend LORD RUSSELL OF KILLOWEN. I entirely agree with it, and I have nothing to add.

F LORD THANKERTON : My Lords, I have also had a similar privilege and desire to express my entire concurrence in the opinion about to be delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN.

G LORD RUSSELL OF KILLOWEN : My Lords, this is an appeal against an interlocutor pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland. The question for our decision is whether a sum of about £75,328, paid under a policy of assurance on the life of the late Harold John Tennant, falls within the proviso to the Finance Act, 1894, s. 4, with the result that it constitutes a separate estate, and must not be aggregated with his general estate. It is not in dispute that estate duty is payable in respect of the £75,328. **H** It is merely a question of what is the appropriate rate, which will vary according as the proviso does or does not apply.

The Finance Act, 1894, s. 4, as amended by the Finance Act, 1900, provides as follows :

For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate and the duty shall be levied

at the proper graduated rate on the principal value thereof: Provided that any property so passing in which the deceased never had an interest, shall not be aggregated with any other property, but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof.

The relevant facts of this case may be stated shortly. Mr. Tennant, whose trustees are the present appellants, died on Nov. 8, 1935. He had on his own behalf effected with the Star Life Assurance Society a policy on his own life, dated July 26, 1911, for the sum of £100,000. The policy provided that, in the event of the assured's death after July 21, 1936, the sum of £100,000 should be paid to his executors, administrators or assigns. In the event (which happened) of the assured's death before July 22, 1936, the whole of the premiums paid, with compound interest, fell to be returned to the assured's executors, administrators or assigns. By assignment and deed of trust dated June 1, 1931, the deceased assigned the policy to trustees for (i) payment of the expenses of the trust, (ii) payment to his executors or testamentary trustees of all the proceeds of the policy in satisfaction of all death duties payable on or by reason of his death upon and in respect of all and any property whatsoever passing on his death, and (iii) payment of any residue to his surviving children equally among them, with a destination over to the issue of predeceasing children. Mr. Tennant paid the premiums due up to the time of the assignment. No separate fund was provided by him for payment of the subsequent premiums. These were raised upon the security of the policy. At the date of the death, the gross amount receivable under the policy was about £88,553. The amount due in respect of premiums and interest (less tax) was about £13,224. The net amount payable was the sum of about £75,328. The Inland Revenue Commissioners assessed the estate duty at the rate applicable upon the basis that the £75,328 should be aggregated with the general estate.

The trustees appealed against this assessment to the Court of Session, and on Jan. 4, 1938, their Lordships of the First Division, by interlocutor of that date, affirmed the decision of the commissioners, but gave leave to appeal to your Lordships' House.

The case was argued, both in the First Division and before your Lordships, upon the footing that, in regard to the policy, estate duty was leviable upon property passing on the death of the deceased by virtue of the Finance Act, 1894, s. 2, which provides as follows:

(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (d) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

The Lord President thought that the real question for decision was whether the deceased had at any time an interest in whatever was (in regard to the policy) the property which, under the Finance Act, 1894, s. 2 (1), was to be deemed included in property passing on his death. He thought that the word "interest," as used in the proviso to sect. 4,

was of wide and comprehensive meaning, that, before the assignation, Mr. Tennant had the sole interest in the whole beneficial rights under the policy, and that, even after the assignation, he retained some interest therein. He was accordingly of opinion that the proviso did not apply, and that the appeal should be dismissed. LORD FLEMING
 A thought it impossible to say that, between the date of the policy and the date of the assignation, the deceased had no interest in the policy. He rejected the contention that the deceased could not have any interest in policy moneys which only arose on his death, and held that the property which passed on the death was the right to recover those moneys from
 B the insurance company. LORD MONCRIEFF proceeded upon the footing that, since the policy moneys were, under the policy, payable to Mr. Tennant's executors, and were also payable to those executors under the assignation, the deed of assignation might be ignored, and the matter dealt with on the footing that all beneficial interests remained undiverted
 C from the granter, and still formed part of his estate. LORD CARMONT agreed with the Lord President.

Before your Lordships' House, the argument of counsel for the appellants involved two steps. The first step, which was essential to the taking of the second, was that the property which was subject to
 D the duty consisted of the policy moneys—that is, of the cash payable and paid by the insurance company—and of nothing else. If that were true, as he contended it was, then, he argued (and this was the second step), it must inevitably follow that the deceased never had, and never could have, an interest in the property which passed on his death,
 E because that property never was in existence in his lifetime. For myself, I am not prepared to accept without some further consideration the correctness of the first step. Three authorities were cited as establishing it—namely, *A.-G. v. Dobree* (1), *A.-G. v. Robinson* (2) and *Lord Advocate v. Scott* (3). No doubt language is used in some of the judgments in
 F those cases which might give colour to the view that what passed on the death was the cash, and not the policy, or the value of the policy, but in none of those cases was it material that any such question should be decided. Indeed, it is not easy to see how the question can ever become material. The policy must, if valued, be valued as a matured
 G policy, and with reference to the solvency of the insurance company, with the result that the value of the policy will be the same as the value of the moneys payable thereunder. However, I would wish to keep the question open, in case it should ever hereafter be necessary to decide between the two alternatives.

H Proceeding, then, upon the assumption, in favour of the appellants, that the duty is leviable upon the proceeds of the policy, do those proceeds fall within the proviso to sect. 4? In my opinion, they do not. I feel no doubt that the deceased had, from the commencement of the policy's existence, an interest, and for many years the sole interest, in the proceeds thereof. He could, before the assignation, have assigned

or charged the entirety of those proceeds, and even after the assignation he had a contingent interest therein by way of resulting trust, of which (for what it was worth) he could have disposed *inter vivos* or by will. The word "interest" is a word capable of wide meaning, and I see no valid reasoning for limiting its scope in sect. 4 as was suggested in the course of the argument. The case is really covered by the decision of ROWLATT, J., in *A.-G. v. Pearson* (4), and, agreeing, as I do, with that decision, I am of opinion that this appeal fails, and should be dismissed.

LORD MACMILLAN : My Lords, I agree.

LORD WRIGHT : My Lords, I also agree.

Appeal dismissed, with costs.

Solicitors : *Allen, Edwards & Oldfield*, agents for *Mackenzie & Black, W.S.*, Edinburgh, and *James & George Collie*, Aberdeen (for the appellants); *Solicitor of Inland Revenue*, agent for *Solicitor of Inland Revenue*, Edinburgh (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), January 31, February 1, 23, 1939.]

Tort—Waiver—Action on same facts based on contract—Action not proceeding to judgment.

Bankers—Cheque—Conversion—Previous action against indorsee—Waiver of tort.

E. was the secretary and a director of the plaintiff company. Without authority, he indorsed a cheque, made payable to his company, to M.F.G. Trust, Ltd. The defendant bank accepted it for collection, and credited the proceeds to the account of M.F.G. Trust, Ltd. Subsequently, the plaintiff company commenced an action against M.F.G. Trust, Ltd., to recover the value of the cheque as a loan, or, in the alternative, as money had and received. Before final judgment, M.F.G. Trust, Ltd., went into liquidation. The plaintiffs put in a proof for the sum alleged to be due in the liquidation, but the proof was not admitted, as the funds to meet the demands of creditors were merely trivial. They then brought the present action against the bank for wrongful conversion of the cheque. The defence pleaded was, *inter alia*, that the plaintiffs had ratified E.'s indorsement of the cheque by suing the M.F.G. Trust, Ltd., and had therefore waived the tort, to which it was answered that there could be no waiver, as no judgment had been obtained against M.F.G. Trust, Ltd. :—

HELD : it was not necessary that the previous action should have proceeded to judgment in order to establish a waiver of the tort. The plaintiffs had elected to treat E.'s act as an authorised one, and could not afterwards not merely abandon that election but contradict it.

[EDITORIAL NOTE. It has been decided that, where an action based upon contract or implied contract has proceeded to judgment, the plaintiff is barred, by his election so to sue, from suing in tort. Such procedure has long been known as the

"waiver of the tort." The question in the present case is whether there is such an election where the action in contract does not proceed to judgment, but, for some reason, is stayed or discontinued before a final decision is reached. It is here decided, in accordance with *dicta* in a number of cases, that the bringing of the action in contract is a sufficient election to bar a subsequent proceeding in tort. It is to be noted that the subsequent proceedings in tort are not against the same defendant as the earlier proceedings in contract.

AS TO WAIVER OF TORT, see HALSBURY, 1st Edn., Vol. 27, Tort, pp. 500. 501, para. 982; and FOR CASES, see DIGEST, Vol. 42, pp. 994-996, Nos. 215-241.]

Cases referred to:

- (1) *Verschuere Creameries v. Hull & Netherlands S.S. Co.*, [1921] 2 K.B. 608; 42 Digest 995, 233; 91 L.J.K.B. 39; 125 L.T. 165.
- (2) *Lythgoe v. Vernon* (1860), 5 H. & N. 180; 42 Digest 996, 240; 29 L.J.Ex. 184.
- (3) *Smith v. Baker* (1873), L.R. 8 C.P. 350; 42 Digest 996, 237; 42 L.J.C.P. 155; 28 L.T. 637.
- (4) *Hitchin v. Campbell* (1772), 2 Wm. Bl. 779; 21 Digest 208, 489.
- (5) *Morris v. Robinson* (1824), 3 B. & C. 196; 21 Digest 226, 589.
- (6) *Valpy v. Sanders* (1848), 5 C.B. 886; 43 Digest 535, 706; 17 L.J.C.P. 249; 11 L.T.O.S. 201.
- (7) *Rice v. Reed*, [1900] 1 Q.B. 54; 42 Digest 977, 86; 69 L.J.Q.B. 33; 81 L.T. 410.
- (8) *Hussey v. Fiddall* (1699), 12 Mod. Rep. 324; Digest Supp.
- (9) *Davis v. Petrie*, [1906] 2 K.B. 786; 5 Digest 1108, 9034; 75 L.J.K.B. 992; 95 L.T. 239.
- (10) *Re Simms, Ex p. Trustee*, [1934] Ch. 1; Digest Supp.; 103 L.J.Ch. 67; sub nom. *Re Simms, Ex p. Trustee v. Williams, Simms, Ltd., and Gillett*, 149 L.T. 463.
- (11) *Buckland v. Johnson* (1854), 15 C.B. 145; 21 Digest 222, 566; 23 L.J.C.P. 204; 23 L.T.O.S. 190.
- (12) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 21 Digest 218, 540; 48 L.J.Q.B. 705; 41 L.T. 418.
- (13) *Holmes v. Watt*, [1935] 2 K.B. 300; Digest Supp.; 104 L.J.K.B. 654; 153 L.T. 58.
- (14) *Midland Bank, Ltd. v. Reckitt*, [1933] A.C. 1; Digest Supp.; 102 L.J.K.B. 297; 148 L.T. 374.
- (15) *Priestly v. Fernie* (1865), 3 H. & C. 977; 21 Digest 223, 573; 34 L.J.Ex. 172; 13 L.T. 208.
- (16) *Scarf v. Jardine* (1882), 7 App. Cas. 345; 21 Digest 224, 577; 51 L.J.Q.B. 612; 47 L.T. 258.
- (17) *Imperial Bank of Canada v. Begley*, [1936] 2 All E.R. 367; Digest Supp.
- (18) *Calland v. Loyd* (1840), 6 M. & W. 26; 3 Digest 190, 389; 9 L.J.Ex. 56.
- (19) *Heilbut v. Nevill* (1870), L.R. 5 C.P. 478; 43 Digest 503, 423; 39 L.J.C.P. 245; 22 L.T. 662.
- (20) *Brocklebank, Ltd. v. R.*, [1925] 1 K.B. 52; Digest Supp.; 94 L.J.K.B. 26; 132 L.T. 166; *revers.*, [1924] 1 K.B. 647.
- (21) *Re Collie, Ex p. Adamson* (1878), 8 Ch. D. 807; 4 Digest 444, 4019; 47 L.J.Bey. 103; 38 L.T. 917.

APPEAL by the plaintiffs from a judgment of GODDARD, J., dated May 25, 1938. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

A. T. Denning, K.C., and M. A. B. King-Hamilton for the appellants.
G. H. B. Streatfeild, K.C., and Clive S. S. Burt for the respondents.

Denning, K.C.: It is not now challenged that the bank converted the cheque. The mere commencement of an action is not a conclusive election. The plaintiff can amend, or withdraw at any time before judgment. For the doctrine of election to apply, the choice must be one of substance. The form of the action against the trust was really only a matter of procedure. The plaintiffs were saying no more than that the trust had their money and that they were asking for it back. The law on election is based on the law before the Common Law Procedure Acts. Anything further from an election as a fact could hardly be found. [Counsel referred to *Hussey v. Fiddall* (8), *Davis v. Petrie* (9), *Hitchin v. Campbell* (4), *Re Simms, Ex p. Trustee* (10), *Buckland v. Johnson* (11), *Smith v. Baker* (3), *Rice v. Reed* (7), *Kendall v. Hamilton* (12), *Holmes v. Watt* (13), *Midland Bank, Ltd. v. Reckitt* (14), *Priestly v. Fernie* (15) and SALMOND ON TORTS, Ch. 4, sect. 41.]

Streetfeild, K.C.: The bank is guilty of conversion only if there was conversion by Emons. If that fails, there can be no conversion by the bank. By commencing the action against the trust, they affirmed the act of Emons. The appellants had all the knowledge relative to the position when they decided to sue the trust. Automatically the bank were released. [Counsel referred to *Verschures Creameries v. Hull & Netherlands S.S. Co.* (1).] In the *Verschures Creameries* case (1), the plaintiffs did all they could to preserve their remedy, but they were not successful. It is not necessary to pursue the remedy to judgment: *Scarf v. Jardine* (16). Here the appellants took a judgment. It was not at their instance that it was set aside. The company pressed the proceedings so far as they could. The cases quoted in SALMOND ON TORTS do not support the proposition.

Denning, K.C., in reply, referred to *Imperial Bank of Canada v. Begley* (17), *Calland v. Loyd* (18), *Heilbut v. Nevill* (19), *Brocklebank, Ltd. v. R.* (20) and *Re Collie, Ex p. Adamson* (21).

CLAUSON, L.J. [delivering the judgment of the court]: In Nov., 1934, certain debtors of the plaintiff company sent to the plaintiff company an order cheque for £1,900. This cheque came to the hands of one Emons, secretary of the plaintiff company. Without authority (as must be assumed for the purposes of the present case), he indorsed it in the name of the plaintiff company in favour of a company which may conveniently be referred to as M.F.G., and that company paid the cheque to their bankers, the defendant bank, who proceeded to collect the money. In the present action, the question is whether or not the plaintiffs are entitled to recover the amount of the cheque from the defendant bank. The bank do not rely on the Bills of Exchange Act, 1882, s. 82. Accordingly, on the facts as we have stated them, if the matter stopped there, it is a clear and simple case of conversion of the cheque by Emons and M.F.G., with the result that, not only M.F.G., but also the defendant bank, which collected the proceeds of the con-

verted cheque, are liable to the plaintiffs in conversion for the amount of the cheque. It is, however, well-settled law that, on the facts stated, the plaintiffs might elect to treat the cheque as having reached M.F.G. properly, and, on this footing, to claim to make M.F.G. liable, not for damages for wrongful conversion, but for money had and received—
 A that is, liable as mere debtors to repay the money contractually or quasi-contractually, and not as persons bound to make reparation by way of damages for a wrongful act.

In earlier days, there were often considerable procedural advantages in taking the step of waiving the tort, to use the technical expression, and electing to sue on a contractual or quasi-contractual footing.
 B Under modern conditions, the advantages of waiving the tort may not always be important, but, if there were a possible question in such a case as the present (where a company's cheque has, it is said, been converted by or with the privity of a servant, in this case the secretary)
 C as to the extent of the authority of the servant—a question which might involve a difficult investigation of the internal affairs of a group of interlocked companies—the advantage gained by waiving the tort might be substantial.

What in fact occurred was that, on May 13, 1935, the plaintiffs issued
 D a writ against M.F.G. claiming (in addition to another claim, which is immaterial to the matter now in hand) the £1,900 either as money lent by the plaintiffs to M.F.G. or as money had and received to the plaintiffs' use. It is to be observed that the claim for money lent involved the position that there had never been any tort at all, but that the £1,900,
 E in the form of a cheque specially indorsed to M.F.G., had been properly passed by Emons (the secretary of the plaintiffs) to M.F.G. by way of loan. The claim for money had and received did, however, involve the position that there had been a tortious acquisition of the money by M.F.G., but also involved a waiver of the tort, and an election to claim
 F against the defendants in *assumpsit*—that is, on the footing of a quasi-contractual liability to refund. The action never came to final trial. An interlocutory judgment was obtained, but was set aside. The financial position of M.F.G. was found to be precarious. M.F.G. went into liquidation. On Dec. 10, 1935, the plaintiffs put in a proof in
 G the liquidation for money lent. The proof has never been admitted, as the funds available to meet the creditors of M.F.G. appear to be either non-existent or trivial in amount.

This being the position, on Nov. 8, 1937, the plaintiffs began the present action claiming the £1,900 against the defendant bank as damages for
 H conversion of the cheque, thus setting up as against the defendant bank that the dealings of Emons and M.F.G.—and consequently of the defendant bank—with the £1,900 cheque were tortious. To this claim the defendant bank answer—and the judge has held that they have answered correctly—that, by reason of the institution of the 1935 action against M.F.G., which was in fact followed by a renewal of the like

claim upon the proof in liquidation later in 1935, the plaintiff company elected to waive the tort, and thus precluded themselves from thereafter setting up that the dealings of Emons and M.F.G. with the £1,900 cheque were tortious. It is obvious that, unless the plaintiff company can in this action treat the dealings of Emons and M.F.G. with the cheque as tortious, they must necessarily fail in this claim against the defendant bank.

There can hardly be any question but that, if the 1935 action had proceeded to successful judgment, or if the proof had been finally admitted, the plaintiff company could no longer treat as tortious the dealings of Emons and M.F.G. with the cheque. The sole question in debate is whether the election to institute proceedings, which were necessarily based on the position that the claim in tort was abandoned, now prevents the plaintiff company from reviving the claim in tort so as to pursue the remedy in tort against the defendant bank. The judge below held—and, in our opinion, held rightly—that he was bound by the decision of this court in *Verschures Creameries v. Hull & Netherlands S.S. Co.* (1), to decide the point in favour of the defendant bank. It is true that, in that case, not only had the plaintiffs begun proceedings, but also they had recovered judgment. Nevertheless, we can find nothing in the judgments delivered in this court to intimate that an election manifested by the issue of a writ is ineffective unless the proceedings go on to judgment. That the issue of the writ is perfectly effective for the purpose appears to have been for very many years the view of the profession. In *Lythgoe v. Vernon* (2), this view was admitted as correct by counsel in argument, apparently as a matter of course, and in 1873 BOVILL, C.J., expressed the same view quite clearly from the Bench in *Smith v. Baker* (3), at p. 355. BULLEN AND LEAKE ON PLEADINGS, 3rd Edn., p. 48, expresses the same view. It is true that the correctness of this view has sometimes been doubted, and we were referred to certain cases which were said to be contrary to what we venture to regard as the correct view, but we have failed to find anything in those cases to support such a doubt. *Hitchin v. Campbell* (4), at p. 827, recognises that an unsuccessful claim for goods in tort will preclude a claim for the proceeds in *assumpsit*, but seems to us to have no bearing on the point now in issue. *Morris v. Robinson* (5) decided that a plaintiff does not approbate a tortious sale by seeking, unsuccessfully, to lay hands on the proceeds. It was held that the unsuccessful attempt did not constitute a final election. An unsuccessful attempt to seize the proceeds of goods is a very different thing from a suit to recover on a contractual or quasi-contractual basis the proceeds of goods tortiously converted. *Valpy v. Sanders* (6) merely decides that an offer to make an election does not amount to a final election. *Rice v. Reed* (7) as a matter of decision gives no colour for any doubt on the subject, while A. L. SMITH, L.J., quite specifically expressed agreement with the view which BOVILL, C.J., had expressed in *Smith v. Baker* (3). The judge in

- the present case, following in this a somewhat similar observation made by SCRUTTON, L.J., in *Verschures Creameries v. Hull & Netherlands S.S. Co.* (1), found it difficult to see why the act of suing the M.F.G. trust in the 1935 action in contract or quasi-contract should enure for the benefit of the bank, who were not parties to the action and in no way altered their position in consequence of what the plaintiff company did. We agree with the judge that, even if this be a real difficulty, the doctrine which has so long prevailed binds him, and indeed, we may add, binds this court. However, whether or not this be a real difficulty, we should feel a greater difficulty if it were the law that a plaintiff whose servant has acted without authority can, when it suits him, use the King's courts to attack a third party on the footing that the servant acted within his authority, and, when this attack seems likely to be unproductive, can turn round and come back to the King's courts to attack a fourth party (whose liability arises, be it observed, only if the servant acted without authority) on a ground—namely, the want of authority in the servant—which in his previous attack he had deliberately elected, not merely to abandon, but to contradict. It is true that the fact that in a particular case a doctrine of law leads to a just result is not necessarily a sound ground on which to support it, but, when a doctrine which has been long embedded in law and practice is called in question, it is satisfactory to find that its operation does seem, on the face of it, to be in accord, at all events in the particular case under consideration, with general principles of right. In our opinion, the judgment below was correct, and the appeal will be dismissed, with costs.

Appeal dismissed, with costs. Leave to appeal to the House of Lords.

Solicitors: *King-Hamilton & Green* (for the appellants); *Durrant Cooper & Hambling* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

Re THOMPSON, LLOYDS BANK, LTD. v. GEORGE.

[CHANCERY DIVISION (Bennett, J.), **February 6, 9, 10, 13, 14, 15, 1939.**

- Wills—Condition—Condition inducing future separation of spouses—Public policy—Construction of condition.*

The testator's will contained, *inter alia*, a clause to the effect that his daughter, if still married to her present husband, whom, on the evidence, the testator disliked intensely, should be entitled to no more than an annuity of £300. The will further provided that the daughter should be entitled to the income of the whole estate "if at any time after the testator's decease she should be the widow of her present husband or married to someone other than her present husband or divorced from but not subsequently remarried to her present husband." On behalf of the daughter, it was contended that such a provision was contrary to public policy, and, therefore, void:—

HELD: the provision was not contrary to public policy, as, on the facts of the present case, the object of the testator's disposition was not to induce a separation of the spouses.

[EDITORIAL NOTE.] The contention in this case was that the fact that the wife by obtaining a divorce from her husband would secure an increase in the income to which she was entitled under the will rendered the clause in the will conducive to the future separation of the spouses, and, therefore, void as being against public policy. The court has held, however, that, as the main purpose of the condition is to prevent income coming into the hands of a spendthrift husband, it is unobjectionable on these grounds.

AS TO CONDITIONS INDUCING FUTURE SEPARATION OF SPOUSES, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 585, 586, para. 1159; and FOR CASES, see DIGEST, Vol. 44, pp. 453, 454, Nos. 2754-2762.]

Case referred to :

- (1) *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116; 44 Digest 438, 2646 57 L.J.Ch. 936; 59 L.T. 681.

ADJOURNED SUMMONS to determine, *inter alia*, whether or not a provision to the effect that a beneficiary should benefit only if widowed or divorced from her present husband is contrary to public policy, and, therefore, void.

Maurice Berkeley for the plaintiffs.

Henry Johnston for the first defendant, the testator's daughter.

J. V. Nesbitt for the second defendant.

F. Baden-Fuller for the third defendant.

BENNETT, J. : The question I have to decide arises upon the will of Frederick John Thompson, who died on May 13, 1927, leaving behind him a will of Dec. 22, 1934, of which the plaintiffs, Lloyds Bank, Ltd., are trustees. He had a daughter, the defendant Mrs. George, who married her present husband, Mr. William George, on Mar. 17, 1921, and there is evidence which I have read (I think that, having regard to the decision and the statement in the judgment of COTTON, L.J., in *Re Moore, Trafford v. Maconochie* (1), it was admissible) which shows that the testator disliked his son-in-law intensely. There is also in evidence which I have admitted under the provisions of the Evidence Act, 1938, a letter written by the testator lodged with his will which also establishes evidence of the dislike of the testator for his son-in-law.

The will in question contained two provisions which indicate the feelings of the testator, I think, towards his son-in-law, before the provisions which are to be considered in the present case. First of all :

All the residue of my furniture and household effects the most of which belonged to my parents I bequeath to my said daughter provided she is the widow of her present husband William George or married to someone other than her present husband at my decease but if she is then married to her present husband or has predeceased me I bequeath the same to my sisters. . . .

The next one is in regard to the house :

I devise my house to my said daughter free of all death duties provided she is the widow of her present husband William George or married to someone other than her present husband at my decease but if she is then married to her present husband I direct the bank to sell the said house as soon as convenient after my decease and to hold the proceeds of sale as part of my residuary estate. . . .

Both those gifts afford evidence, in addition to the express evidence I

have admitted, that the testator disliked his son-in-law. Then there follows a gift of the testator's residuary estate :

- ... upon trust if my daughter is the widow of her present husband William George or married to someone other than her present husband at my decease to pay the income to her during her life but if she is married to her present husband upon trust out of the income of my estate to pay to my said daughter free of legacy duty during her life the sum of £300 per annum to be paid half-yearly without power for her to anticipate the same and upon further trust to accumulate and invest the income of my estate exceeding £300 per annum for a period not exceeding 21 years from my decease and at the end of such period to pay the income of my estate exceeding £300 to Dr. Barnardo's Homes free of legacy duty but if at any time after my decease my said daughter shall be the widow of her present husband William George or married to someone other than her present husband or divorced from but not subsequently remarried to her present husband William George the whole of the income of my estate shall be paid to her. In the event of my said daughter predeceasing my said sisters or one of them I direct that the income of my estate shall be paid in equal shares to my said sisters and on the death of one the whole to the survivor of them during her life and on the death of my said daughter and my said sisters I direct the bank to pay the residue of my estate to Dr. Barnardo's Homes National Incorporated Association.

C The summons asks this question :

- Whether upon the true construction of the said will and in the events which have happened (1) the disposition in the said will contained of the income of the testator's residuary estate during the lifetime of the testator's daughter Marion Eliza Alder George is wholly void as being contrary to public policy. (2) If so, whether such income should during such period be treated as undisposed of and be paid to the testator's said daughter as his sole statutory next of kin or how otherwise such income should be dealt with.

If such disposition of income be not wholly void :

- (3) Whether (without prejudice to any question which may arise in the event of the subsisting marriage of the testator's said daughter determining in her lifetime) (a) the testator's said daughter is entitled to an annuity of £300 per annum during her life and the balance of the income of the testator's residuary estate should be accumulated during the lifetime of the testator's said daughter or until the expiration of 21 years from the death of the testator whichever shall be the shorter by investing the same and the resulting income thereof and adding the accumulations so made to the capital of such residuary estate ; or (b) how otherwise the income of such residuary estate should be dealt with during the lifetime of the testator's said daughter.

- F It is argued on behalf of the testator's daughter that this disposition for accumulation in favour of Dr. Barnardo's Homes is void, because it tends to induce or to lead to a divorce between the testator's daughter and her husband. Such a gift is said to be void by the law of England as being contrary to public policy. The authority upon which that argument is rested is a passage in the judgment of COTTON, L.J., in *Re Moore, Trafford v. Maconochie* (1). The will that was being considered by the Court of Appeal in that case was one by which the testator gave all his property to a trustee :

- H ... upon trust to pay to my sister Mary Maconochie during such time as she may live apart from her husband before my son attains the age of 21 years the sum of £2 10s. per week for her maintenance whilst so living apart from her husband.

At the time when the testator made his will, Mrs. Maconochie was living with her husband, and continued to do so. There was evidence, as I have already indicated, which established that the testator did not like Mrs. Maconochie's husband. Upon that, COTTON, L.J., observed that the

testator's apparent object was to induce the wife to live separate from him. Having made that observation, COTTON, L.J., uses these words, at p. 128, which are relied upon:

If so [if the apparent object of the gift was to induce the wife to live separate from her husband], the gift was for a purpose which is contrary to the law of England, for that law does not allow provisions made in contemplation of a future separation between husband and wife. A

The question to be considered upon this will is, therefore, whether there is to be found in it a disposition the object of which is to induce Mrs. George to live separate from her husband. The provision is said to be found in these words after the testator directed the income of £300 to accumulate for a period not exceeding 21 years from his decease and that the trustees were B

. . . at the end of such period to pay the income of my estate exceeding £300 to Dr. Barnardo's Homes free from legacy duty but if at any time after my decease my said daughter shall be the widow of her present husband or married to someone other than her present husband or divorced from but not subsequently remarried to her present husband William George the whole of the income of my estate shall be paid to her. C

It is said that, because at any time while she is married to her husband she can get free from him by means of a divorce, that increases her income from £300 per annum to the whole income, and that that is a provision for the purpose of inducing a future separation between husband and wife, and is, therefore, void. I am not satisfied that that is the purpose of the provision. The purpose of the provision is mainly to be sure that the income derived from the estate in excess of £300 will not go to the hands of, or get under the control of, a man whom the testator regarded as a spendthrift. I do not think that it can fairly be said that the object of this provision was to induce the wife either to divorce her husband or to put herself into a position in which her husband could divorce her. For these reasons, for myself, I see nothing contrary to public policy in the disposition which the testator has made of the income he has given in his will. D
E
F

Declaration that the disposition was not void.

Solicitors: Crossman, Block & Co., agents for Robert Middlemas, Alnwick (for the plaintiffs); Gregory, Rowcliffe & Co. (for the first defendant); Woodcock, Ryland & Parker (for the second defendant); H. B. Nisbet & Co. (for the third defendant). G

[Reported by F. HONIG, Esq., Barrister-at-Law.]

GRIFFITHS v. PETER CONWAY, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.J.J.), **February 21, 1939.**]

Sale of Goods—Implied condition of fitness—Abnormal circumstance—Idiosyncrasy of buyer—Duty of buyer—Sale of Goods Act, 1893 (c. 71), s. 14 (1).

In June, 1937, the plaintiff purchased from the defendants, who are retail traders, a Harris tweed coat, which was specially made for her. Shortly after she began to wear the coat, she developed dermatitis. She sought to recover damages from the defendants on the ground that there had been a breach of the condition implied by the Sale of Goods Act, 1893, s. 14 (1), in that the article was not reasonably fit for the purpose for which it was supplied. At the hearing, it was found as a fact that the plaintiff's skin was abnormally sensitive, and that there was nothing in the cloth which would have affected the skin of a normal person. The abnormality of the plaintiff's skin was not made known to the seller:—

HELD: the Sale of Goods Act, 1893, s. 14 (1), did not apply in the present case, as what was being dealt with here was something abnormal, which no seller would assume to exist.

[EDITORIAL NOTE.] The present case and the following one should be read together. In the present case, although there is a point of pure law as to how far the implied condition under the Sale of Goods Act, 1893, s. 14 (1) is negated by the idiosyncrasy of the person to whom the goods are supplied, the main interest to the practitioner is what amounts to an idiosyncratic condition and how such a condition is to be proved in practice. For this reason, the judgment of BRANSON, J., is included, as it deals more fully with the facts of the case. The case which follows the present, *Mayne v. Silvermere Cleaners, Ltd.*, is in a way the opposite of the present one. There was no idiosyncrasy in that case, but there it was practically impossible by direct evidence to prove what was the particular deleterious substance that caused the dermatitis, and how in the course of the defendants' cleaning operations any harmful matter was introduced. The importance lies in the contrast between the two cases.

AS TO IMPLIED CONDITION OF FITNESS, see HALSBURY, *Hailsham Edn.*, Vol. 29, pp. 63-66, para. 73; and FOR CASES, see DIGEST, Vol. 39, pp. 440-448, Nos. 693-762.]

Cases referred to:

- (1) *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] 2 A.C. 74; 39 Digest 445, 744; 91 L.J.K.B. 504; 127 L.T. 405.
- (2) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18.
- (3) *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*, [1934] A.C. 402; Digest Supp.; 103 L.J.K.B. 289; 151 L.T. 142.
- (4) *Willis v. Bentalls, Ltd.* (1933), *Times Newsp.*, Nov. 15, 16.

APPEAL by the plaintiff from a judgment of BRANSON, J., without a jury, sitting at Bristol, dated July 7, 1938. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R., and in that of BRANSON, J. *J. W. Morris, K.C.*, and *Malcolm McGougan* for the appellant.

Sir Walter Monckton, K.C., *Montague Berryman* and *J. F. F. Platts Mills* for the respondents.

The following judgment was delivered by BRANSON, J., at the Bristol Assizes on July 7, 1938.

BRANSON, J. : This case arises out of the sale of a coat. The story is that in June, 1937, the plaintiff went and looked at some patterns and then selected and ordered a coat from the defendants. The coat was made to her measure, and was taken home by her daughter and worn by the plaintiff on several occasions. She alleges that upon the second occasion when she wore this coat she received, from something A contained in the coat in the nature of an irritant substance, damage to her neck, which caused her neck to break forth into a rash. She claims that, because this coat caused that rash upon her neck, it was not reasonably fit for the purpose of her wearing it, and that it was not of merchantable quality. She therefore claims for the breach of the implied B warranty that the coat should be fit for the purpose of her wearing it, and also that it should be of merchantable quality. In order to succeed in that case, it seems to me that the plaintiff must establish that there was something about the coat which prevented it from being reasonably fit to be worn by her. It is contended by Mr. McGougan that, when C one says "reasonably fit," one has to use the expression as meaning by her, however abnormal or however idiosyncratic her skin may be. According to him, that is the proper construction of sect. 14.

He referred me to two authorities. The first was *Grant v. Australian Knitting Mills, Ltd.* (2), but, so far from that case being an authority D for the proposition for which Mr. McGougan cites it, it seems to me to be the very reverse, because in the judgment of the Privy Council, which was delivered by LORD WRIGHT, there occurs this passage, at p. 92 :

... then it was said that the disease may have been contracted by the appellant from some external irritant the presence of which argued no imperfection in the garments, but which only did harm because of the appellant's peculiar susceptibility. E Thus the disease might have been initiated by the mechanical irritation of the wool itself, or if it was due to some chemical ingredient in the garments, that might have been something in itself harmless, either because of its character or because of the actual quantity in which it was present, so that the mischief was attributable to the appellant's own physical defect and not to any defect in the garments ; the respondents, it was said, could not be held responsible for anything in the garments which would not be harmful in normal use. Two issues were thus involved ; one, F was the appellant's skin normal ? and the other, was there in the garments, or any part of them, a detrimental quantity of any mischievous chemical ?

It seems to me that that indicates quite plainly that what one has to do in a case of this kind is to see whether the injury which the plaintiff has undoubtedly sustained was due to anything in the garment which G would have injured a normal person, or whether it was due to some abnormality in the plaintiff herself. Thus, I have before me for consideration the same two issues as those which were raised in the case to which I have just referred.

The other case was *Willis v. Bentalls, Ltd.* (4). That case Mr. H McGougan quite rightly cited, not because it helped him, which it does not, but because he thought it proper that I should have it brought to my mind. I need say no more about that.

What is the position here ? It is admitted that the plaintiff contracted dermatitis, which she would not have contracted if she had not worn

- this particular coat. However, that, of course, is not sufficient to enable her to recover against the defendants. She has got to satisfy me, not only that she would not have contracted dermatitis if she had not worn the coat, but also that she would have contracted dermatitis through wearing that coat if she had been a normal person. I have heard the
- A** evidence of two sets of experts in this matter—first, evidence as to the condition of the plaintiff's skin, and, secondly, evidence as to the manufacturing and dyeing of the cloth from which the coat was made. It is perfectly plain from the evidence of Dr. O'Donovan that the plaintiff's skin in February—that is to say, some months after the injury had been
- B** sustained by her—was in a very abnormal condition. Her sympathetic nervous system was in such a state that the whites of her eyes were insensitive, her soft palate was insensitive, and she hardly felt the pricking of a pin when it was put into her arm, while her skin reacted so to the touch of a finger that what they call dermatographia appeared upon
- C** her skin, and her knee jerks were excessively glib. That part of the nervous system is the one that governs the circulation and the reaction of the skin. Thus, one begins with the admitted fact that the plaintiff's skin was in a very abnormal condition in Feb., 1938. However, Mr. McGougan says that that does not show that it was also abnormal in
- D** Dec., 1937, or in Sept., 1937. Unless there be some late development of this abnormality, it seems to me that it is evident that there was some abnormality in Sept., 1937, when it is alleged that this coat produced dermatitis upon her neck. Dr. O'Donovan also told me that in his view the patch tests, as they were called, showed that the sensitivity
- E** of her skin—this abnormality, in fact—was obviously less in February than it had been in December, for in December two patch tests upon her arm from fibres from the cloth in question produced a positive reaction, whereas two patch tests in February failed to produce any positive reaction at all. Perhaps it is right to say in passing, with
- F** regard to those February tests, that with regard to what was called the dry test in February I accept the view of Dr. O'Donovan. I do not think that it is possible that there could be a distant reaction from some toxic substance getting into the little pinhole in the skin without there being at the same time, and produced by the same cause, a local
- G** reaction round the spot where the assumed toxic substance got into the skin. Why should it have made no effect where it was, and only appear, not in a general disturbance of the health of the patient, but in a local spot some distance away, on the side of her neck? Dr. O'Donovan says that that would not be so, and I accept his view upon it.
- H** We have the position, then, that the two tests taken in December proved positive and the two tests taken in February, one of them more severe than either of those in September, proved negative. Unless one believes that by some unfortunate chance the two test pieces used in December came from some local patch of poisonous cloth, whereas the two that were taken in February came from some other part of the

cloth, which was not affected by this local poison, the conclusion follows that Mrs. Griffiths was better in February, when Dr. O'Donovan found all the symptoms of a disturbed sympathetic nervous system, than she was at the end of the preceding year.

The other tests, which, of course, are open to the same comment—that the bits of material used in the making of them did not happen to contain this deleterious matter—were the tests made by Dr. O'Donovan upon himself and upon the members of his family and upon some of his assistants in the laboratory. It is not a question of only two pieces of cloth having accidentally been taken from an infected area of the coat. Various pieces were tested upon a variety of individuals, with one regular result, except in the case of the two pieces that were tried upon Mrs. Griffiths in Dec., 1937. From that evidence, I come to the conclusion that Mrs. Griffiths' skin was not in a normal condition in Sept., 1937, when the friction of this coat upon her neck gave rise to this unpleasant attack of dermatitis. A

That, of course, is only a part of the case, because the defendants have called before me people who can give a regular history of this cloth, almost from the sheep's back, right through the various processes which have been applied to it until it became the coat that Mrs. Griffiths wore. I am satisfied that there is nothing in the process which could have left in it any deleterious matter which came into the wool at any period before the last washing of the cloth. The amount of cleansing of every kind that that material had to go through down to that point satisfies me that no hypothetical deleterious matter which might have got into it while the wool was still on the sheep's back, or while it was being handled in a crofter's cottage, or while it was being manufactured, could possibly have remained. The only two specific substances which it was suggested might possibly have been responsible for the trouble were chrome and soda ash. With regard to the chrome, Dr. Cox told me—and his evidence is not really challenged in any way—that his tests would have disclosed any chrome that was present to an amount of one part in ten million, and that that tiny amount could not possibly have had any effect. With regard to the soda, everybody knows what washing soda is. Every housewife uses it, and one does not find that the normal skin reacts in any violent way to the use of washing soda. Moreover, the cloth continues to be washed until the water comes away entirely neutral and clear. If that is the position, how can there be any of this soda left in the finished cloth? B

Then it is suggested that by some means or another some kind of deleterious matter might possibly have got into the cloth either when it was being handled or cut up, or when it was being made. One cannot exclude theoretically the possibility of something of that sort having happened to the cloth, but the possibility of that being the cause of this trouble must be infinitely smaller than the probability that this highly sensitive state of Mrs. Griffiths' skin at the critical time was really the C

- root of the trouble in this case. I do not think that it is right to guess what may possibly have happened to this cloth when a competent analyst like Dr. Cox has submitted it to every possible test and found nothing deleterious by any of the methods which he has been able to apply to it. It is not suggested that there was any other method which
- A** might have disclosed something which was not disclosed by those which he did use. It was suggested that a spectroscopic test might have disclosed some unspecified metal, but I think that that was really directed to the possible presence of chrome, which was negatived by other tests which Dr. Cox did apply.
- B** The result is that it all comes down to this. The evidence shows, as far as any evidence can possibly show, that this cloth was made as cloth of this description has been made for years and years, and in quantities running into hundreds of thousands of pounds' weight of yarn, and hundreds of thousands of suits, and no complaint has ever before
- C** been made to anybody, as far as the evidence goes, that dermatitis was caused by the wearing of Harris tweed. I am asked to say that, because it did so affect Mrs. Griffiths, there must be something wrong in this cloth, and that there has been a breach of the warranty warranting the condition referred to in the Sale of Goods Act. I am satisfied that the
- D** real cause of this trouble was not in the cloth alone, because there was nothing in the cloth that would have affected a normal person's skin. The trouble was that, because Mrs. Griffiths' skin was not normal, it had what Dr. O'Donovan has called an idiosyncratic effect, so that what the plaintiff got was idiosyncratic contact with dermatitis, a thing
- E** which no purveyor of cloth or wearing apparel could really guard against to any further extent than purveyors of this cloth have guarded against there being anything harmful in its texture. In consequence, in my view, this action fails.
- The plaintiff appealed.
- F**

- Morris, K.C.* : In the present case, the question is one of law—namely, whether or not the Sale of Goods Act, 1893, s. 14 (1), is applicable. If a buyer, either expressly or by implication, makes known to the seller the purpose for which the goods are required, so as to show that the buyer
- G** relies upon the seller's skill and judgment, and the goods are of a kind which it is within the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for that purpose. The wording of the section is applicable in the present case. What was purchased was a coat to be worn by the appellant, and, in the circum-
- H** stances, there was an implied condition that it should be reasonably fit for that purpose. If the contract is made on these terms, and the coat, on being worn, causes illness, it is a most unfortunate thing. There may be exceptional cases of hardship, but there is no escape from the consequences that sect. 14 (1) implies. In the present case, the goods were not reasonably fit for the purpose for which they were supplied,

within the meaning of sect. 14 (1), because, as a result of wearing the coat, the appellant suffered from dermatitis. The particular purpose for which the coat was supplied was for that of being worn by the purchaser. There is no issue of negligence in the present case, but the coat was not reasonably fit for the purpose for which it was supplied, because, on the purchaser wearing it, she at once developed dermatitis. A The implication of such words as "sensitive," or "hypersensitive," or "normal," or "abnormal" is merely a question of degree. One of the matters to be considered by a seller of a coat is whether or not the coat can touch the skin of the wearer without causing injury. This is an exceptional case and an exceptional risk, but the burden which Parlia- B ment has imposed is not a heavy one. A supplier ought to know that there are possibilities of dermatitis in certain circumstances. Into whatever group a person falls at the time the contract was made, there is an implied condition that the goods shall be fit for that person, what- C ever his abnormalities may be. In the present case, what had to be supplied was a coat suitable for the contracting party. [Counsel referred to *Manchester Liners, Ltd. v. Rea, Ltd.* (1), *Grant v. Australian Knitting Mills, Ltd.* (2), *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.* (3) and *Willis v. Bentalls, Ltd.* (4).]

Counsel for the respondents were not called upon. D

SIR WILFRID GREENE, M.R. : This is an appeal by the plaintiff in the action, Mrs. Griffiths, against the judgment of the judge who dismissed her action. The defendants are retail tailors, and in June, 1937, the plaintiff bought from them a Harris tweed coat, which was specially E made for her. Shortly after she began to wear the coat, she developed dermatitis, and suffered from a very severe and prolonged attack of that disease. She brought the present action to recover damages against the defendants on the ground of breach of warranty, and the only breach F of warranty relied upon before us is that dealt with by the Sale of Goods Act, 1893, s. 14 (1). That section negatives any implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale, except in the cases stated, and the relevant paragraph, para. (1), provides as follows :

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. . . . G

The judge found, and his finding of fact is not challenged in this court, H as follows :

. . . the real cause of the trouble was not in the cloth alone, because there was nothing in the cloth that would have affected a normal person's skin. The trouble was that, because Mrs. Griffiths' skin was not normal, it had what Dr. O'Donovan has called an idiosyncratic effect, so that what the plaintiff got was idiosyncratic contact dermatitis, a thing which no purveyor of cloth or wearing apparel could

really guard against to any further extent than purveyors of this cloth have guarded against there being anything harmful in its texture.

That finding is, of course, that no normal skin would have been affected by this cloth. There was nothing in it which would affect a normal skin, but the plaintiff unfortunately had an idiosyncrasy, and that was

A the real reason why she contracted this disease.

On the basis of that finding, which is not challenged, Mr. Morris says :
 "Take the language of the section, and the present case falls within it."

He says that the buyer, Mrs. Griffiths, expressly made known to the defendants the particular purpose for which the coat was required—

B that is to say, for the purpose of being worn by her, Mrs. Griffiths, when it was made. Once that state of affairs is shown to exist, Mr. Morris says that the language of the section relentlessly and without any escape imposes upon the seller the obligation which the section imports.

It seems to me that there is one quite sufficient answer to that argu-

C ment. Before the condition as to reasonable fitness is implied, it is necessary that the buyer should make known, expressly or by implication, first of all the particular purpose for which the goods are required. The particular purpose for which the goods were required was the purpose of being worn by a woman suffering from an abnormality. It seems to

D me that, if a person suffering from such an abnormality requires an article of clothing for his or her use, and desires to obtain the benefit of the implied condition, he or she does not make known to the seller the particular purpose merely by saying: "The article of clothing is for my own wear." The essential matter for the seller to know in such cases

E with regard to the purposes for which the article is required consists in the particular abnormality or idiosyncrasy from which the buyer suffers. It is only when he has that knowledge that he is in a position to exercise his skill or judgment, because how can he decide and exercise skill or judgment in relation to the suitability of the goods that he is selling for

F the use of the particular individual who is buying from him unless he knows the essential characteristics of that individual? The fact that those essential characteristics are not known, as in the present case they were not known, to the buyer does not seem to me to affect the question.

When I speak of "essential characteristics," I am not, of course, referring

G to any variations which take place and exist within the class of normal people. No two normal people are precisely alike, and, in the matter of sensitiveness of skin, among people who would be described as normal their sensitiveness must vary in degree.

This does not mean that there is a line which it is the function of the

H court, or of a medical witness, to draw with precision, so as to define all cases where normality ceases and abnormality begins. The impossibility of drawing such a line by reference to some scientific formula or something of that kind does not mean that, for the present purpose, the difference between normality and abnormality is a thing that must be disregarded, or cannot be ascertained. It is a question that no judge and no jury would

have any real difficulty in deciding on the evidence in any particular case. In this particular case, the judge has found the existence of abnormality, and, that being so, it seems to me impossible to say that the seller here had the particular purpose pointed out to him so as to show that the buyer relied on his skill or judgment. After all, the object of that is to enable the seller to make up his mind whether or not he will accept the burden of the implied condition, and the effect of the argument addressed to us would be to impose that implied condition upon the seller without his having the opportunity of knowing the vital matter which would affect his mind. A

One or two cases were referred to. The only one which I find it necessary to mention, and that for the purpose of distinguishing it, is *Manchester Liners, Ltd. v. Rea, Ltd.* (1). That was a case where ship-owners ordered from the defendants, who were coal merchants, 500 tons of South Wales coal for the bunkers of their steamship, the Manchester Importer. It so happened that, owing to the control of the coal trade that was in existence at that time, the supply of bunkering coal was very much restricted, and the defendants, having secured the right to a cargo through the coal controller, proceeded to supply bunker coal out of that cargo to the plaintiffs in satisfaction of the contract. It so happened that the coal so supplied was not suitable for the bunkering of that steamer, which was a natural draught steamer, and, as a consequence, she was obliged to return to port. The owners sued the coal merchants for damages, and relied upon the Sale of Goods Act, 1893, s. 14 (1). It was held by the House of Lords that, on the facts of the case, the implication of the statutory warranty was not rebutted. The ground on which it was said that it was rebutted was connected with the coal control, which limited the source of supply available to the merchants for the purpose of fulfilling their contract. That was negatived. The important matter for the present purpose is that the House of Lords held that, by ordering bunker coal for that particular steamship, the buyer was making known to the seller the particular purpose for which the coal was required. LORD BUCKMASTER, said, at p. 79 : B C D E F

It then remains to be considered whether in the circumstances there was any warranty that the coal was suitable for the purpose for which it was required. It is plain that the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply. G

Mr. Morris relies on that passage, and says that this coal was for the use of a particular individual. However, there is all the difference in the world between a case such as that and a case like the present. Steamships differ in types, and some of them have one kind of furnace and some another, and so forth, and the coal which is suitable for one is not necessarily suitable for another. That was a matter which would be within the knowledge of coal merchants, and coal merchants, when they are asked to supply for a particular steamship, are being told "that is the steamship for which the coal is required," and, if they do not choose H

to ascertain what particular type of coal is suitable for the particular furnaces of that steamship, then so much the worse for them. The mere naming of the particular steamship, having regard to the notorious differences between steamships in matters of this kind, was quite obviously a sufficient making known to the seller of the particular purpose.

- A** The case here is entirely different, because we are dealing here with something abnormal, unknown, which no seller could assume to exist, and, therefore, in my judgment, that case affords no support whatsoever for Mr. Morris's proposition. The judge held that the section did not apply. In my opinion, his judgment was perfectly right, and this appeal must
- B** be dismissed with costs.

MACKINNON, L.J. : I agree. If Mr. Morris had not so abundantly proved to the contrary, I should have thought that this appeal was unarguable.

- C** GODDARD, L.J. : I agree with both judgments.

Appeal dismissed, with costs.

- Solicitors : *Darley, Cumberland & Co.*, agents for *Lloyd & Burch*, Bristol (for the appellant); *Joynson-Hicks & Co.* (for the
- D** respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

E MAYNE v. SILVERMERE CLEANERS, LTD.

[LIVERPOOL MICHAELMAS ASSIZES (Croom-Johnson, J.), **October 26, 27, 1938.**]

Work and Labour—Fitness—Cleaning suit of clothes—Dermatitis—Proof.

- F** The plaintiff sent a suit to the defendants to be cleaned. After receiving it back, he did not wear it for a period of six months, being during that time in mourning for his mother. The suit was wrapped in tissue paper and put in a wardrobe: Upon wearing the suit at the end of that time the plaintiff developed dermatitis. The defendants, who cleaned some 2,000 suits each week, were unable to give evidence of the handling of this particular suit in their works, but gave evidence that their methods and materials were the best possible, and supported
- G** this by expert scientific evidence:—

HELD : the plaintiff's illness was something which ought not to have happened without negligence on the part of the defendants, and, upon these facts, the plaintiff was entitled to recover.

- [**EDITORIAL NOTE.** The importance of this case lies in the degree of proof
- H** necessary in the circumstances of the case for the plaintiff to succeed. The defendants, dealing with some 2,000 suits each week, could not be in a position to prove the actual happenings to any particular suit, and it follows that only general evidence can be given on each side. The position appears to be that, the plaintiff having proved the history of the suit from the time he received it from the defendants, it is then for the defendants to rebut the inference that they have been negligent in their treatment of it.

AS TO CONDITION OF FITNESS, see HALSBURY, 1st Edn., Vol. 28, Work and Labour, p. 873, para. 1542; and FOR CASES, see DIGEST, Vol. 44, pp. 1300, 1301, Nos. 56-62.]

ACTION for damages for breach of contract, the plaintiff having contracted dermatitis after wearing a suit cleaned for him by the defendants. The facts are fully set out in the judgment.

Noel B. Goldie, K.C., and Glynn Blackledge for the plaintiff.

G. J. Lynskey, K.C., and Philip Kershaw for the defendants.

CROOM-JOHNSON, J.: In or about Jan., 1937, the plaintiff sent a blue suit to the defendants to be cleaned, and incurred liability to them in the sum of 2s. 6d. as a reward for the work and labour which they impliedly thereby undertook to perform. In those circumstances, as it seems to me, the parties, although they perhaps did not realise it, entered into a contract. It was a contract for work and labour, and it is not disputed at the Bar on behalf of the defendants that there was annexed to that contract either a term annexed by law or a warranty implied by law that the defendants would take and exercise due care and skill in the performance by them of the contract. The particular suit was one which the plaintiff had possessed and had worn for two and a half years without any untoward happening of any sort. He was a man who had had no skin trouble up to that time, and a man who was, up to that time, in a reasonable state of health. Somewhere about the time when the suit was sent by him to the defendants to be cleaned, his mother had died. I think the actual date of death was Dec. 18, 1936. He told me that he had been a little run down in Jan., 1937, but that he was quite all right when the time came for him to cast off his mourning garments, which he had been wearing for some six or seven months, and resume the wearing of the then cleaned blue suit.

The blue suit, having been cleaned by the defendants by their process, was by them packed up in tissue paper, surrounded by corrugated cardboard, and delivered at the plaintiff's residence. The plaintiff, being, as I have said, in mourning, put it away in the wardrobe, having first removed the outer wrapper, but having retained the tissue paper. He put it in a wardrobe where there were other garments, and he told me—and I accept his evidence on the point—that he had no trouble from any other garment which came out of the same wardrobe.

Somewhere about July, 1937, the plaintiff took the blue suit out of the tissue paper and put it on. He proceeded to wear it, as he says, for about four or five days. At the end of that time, or shortly after that time, the plaintiff noticed redness at the wrists, and some irritation. He appears first of all to have gone to the chemist and obtained an ointment, which he used. However, the result of this self-treatment was that the inflammation got worse, and at some time—which is again not very clear to me on the evidence—the irritation and the redness apparently developed on the back of the neck and behind the knees.

Matters did not get any better, and at the end of July the plaintiff went to see Dr. Edwards, a medical practitioner who at that time was acting as *locum tenens* for the plaintiff's panel doctor. Dr. Edwards is, I understand, not available, and therefore has not been called before me. Just what treatment Dr. Edwards gave him is not indicated, but he did not
A get better as the result of it, and Dr. Edwards recommended him to see Dr. Stopford Taylor, a medical man of experience, whose evidence I followed with the closest possible attention. I will come back to that evidence in a moment or two.

Somewhere between the time when the plaintiff went to see Dr.
B Edwards and the time when he was recommended to see Dr. Stopford Taylor, a somewhat significant thing happened. The plaintiff went to see the city analyst, because he was apparently in some doubt as to whether it was not something in the blue suit which was causing the trouble. I should have said that he told me that after four or five days
C he gave up wearing the blue suit. Although his evidence was not very clear, and I think that there was a little confusion in his evidence as to precisely how the disease developed at that time, I do not think there is any doubt at all that, although he had given up wearing the blue suit, he was still suffering from something which was diagnosed
D as dermatitis.

Dr. Stopford Taylor described to me a condition of acute dermatitis which, when he saw the plaintiff on Aug. 19, existed on the back of the wrist, a little on the neck, a little on the eyebrow—which I gather might have been caused by infection by rubbing, or something of that
E sort—and on the legs behind the knees. Dr. Stopford Taylor did not see the plaintiff again, as I understand it, professionally, but I do not think that, on that evidence, there can be any question at all that the plaintiff was suffering from an acute attack of dermatitis. One of the first questions which has arisen in the case for my determination is
F what caused it.

At a later stage in the matter altogether—no doubt as part of the investigations made for the purposes of this case—in June, 1938, Dr. Stopford Taylor made a test. The blue suit, which had survived, was used for the purpose. The witness told me that he made what he called
G a patch test. He took two pieces from the coat and two pieces from another part of the garment and two pieces of the lining, I think, and applied those to the plaintiff in order to see what happened. He found after two days a slight reaction in the places where the pieces from the coat had been affixed to the plaintiff's chest, but no reaction with regard
H to the lining. He then made another test. He obtained a piece of blue cloth, which he told me was similar to the cloth in the suit, and he took another piece from the coat, and he applied those, in the way that he described, to the plaintiff's back. In that case, he found a similar reaction in the case of the cloth from the suit, and no reaction in that of the cloth which he had obtained from his own tailor. He

described to me exactly what he saw, and what he saw was really a very slight attack of pimples of the sort which would appear, as I followed his evidence, upon an incipient attack of dermatitis.

That evidence is evidence adduced on the part of the plaintiff which is intended to persuade the court that it was something in the cloth—in the coat or trousers of the suit—which had set up the dermatitable A condition. The plaintiff, however, does not leave it there. He has called before me another gentleman, Mr. Peek, a gentleman with technical knowledge, who says that in Feb., 1938, he took portions from parts of the suit which were likely, in his opinion, to come in contact with the skin of the wearer—at the arms, under the armpits, at the neck and at B the knees, and at various parts in contact with the skin. He described to me the original synthetic indigo dye which was used in the suit—a suit which had been, if I am to accept the evidence of any of the defendants' witnesses, dyed twice—and he found the presence in that suit of quinon-dichlor-diamine, which the plaintiff says is a substance, C a chemical compound, which is irritating, and which he asks me to say is something which ought not to be present in the garments and could only get into the garments if somebody in the defendants' works had failed to exercise the care and skill which they should have exercised in superintending the cleaning and the sending home of the garments. D Mr. Peek added one other thing. He found present in the cloth which he tested an irritant, and he gave me a very long and scientific explanation, all of which is based, as I understood his evidence, on the fact that he had found some—I do not suppose more than a trace, but some—of this chemical compound in the patches of the suit which he investigated. E

On the other side, there has been evidence, and scientific evidence, by a gentleman of great distinction (who gave his evidence, if he will allow me to say so, clearly, and, I thought, fairly) to lead me to the view that it really was not possible for Mr. Peek to have found what he described in this suit, chiefly by reason of the lapse of time, and that this particular chemical compound is a volatile compound which would tend F to disappear in a very short time. I think that Professor Roberts indicated to me what the exact time was, but he said in effect that he was rather surprised at what Mr. Peek had said that he had found. One of the things about which I have to make up my mind is whether I am G to accept the evidence of one chemical expert, who comes into the witness-box and tells me on his oath that he found a particular substance, or that of another gentleman, of at least equal distinction, who comes into the witness-box and says that he could not have found such a substance. That is, frankly, a very disagreeable task for a judge to have to H undertake. I appreciate to the full the scientific details which have led Professor Roberts to come to his conclusion. Professor Roberts has told me that he found no evidence, as I understand it, of anything which could be an irritant, and certainly found no evidence and no particle of this chemical compound spoken to by Mr. Peek. I confess (without

desiring in the least to be even appearing to contrast the commonsense point of view, which is often most inexact and unscientific, with the scientific point of view) that, unless I can find in the case some plain evidence which satisfies me that there is some cause of the state of the plaintiff other than some irritant substance in the suit of clothes after
A he put it on again in July, 1937, I am driven to the conclusion that something of that sort must have been there.

Can I find any evidence of any other cause, it being borne in mind that it is for the plaintiff to satisfy me that the cause which he assigns is *the* cause? I have listened with great attention to everything that
B has been said in the course of the case. I have heard the plaintiff describe what happened to the suit of clothes when he got it home and in the intervening period before he took to wearing it, and he satisfied me by his evidence that there was no ground for saying that there was any chance of this suit of clothes having got anything of an irritant kind
C into it after it left the defendants' works, and certainly not after it was delivered at the plaintiff's house.

I gave Mr. Lynskey the opportunity of cross-examining the plaintiff on that part of the case, and, exercising his discretion, as he always does, with complete regard for his clients, he decided not to ask the plaintiff
D any questions about it.

The next question is whether or not there is any possibility that this man is an individual who is particularly susceptible to any particular kind of material. I had evidence that in some people there is such a thing as a sort of susceptibility to irritation, or, I imagine, even to
E infection, from some things which to other people would prove to be completely unirritating or completely innocuous. I listened to the medical evidence in the case. I heard Dr. MacKenna, who again gave his evidence on behalf of the defendants clearly, and, I thought, in an attempt to assist the court to the utmost of his ability, and, although
F he said that it was a possibility, I did not observe that he said with regard to this particular patient, whom he had had an opportunity of examining, that there was any such peculiarity. I am left in the position that I am satisfied by the plaintiff's evidence, if the burden of proof is upon him, that there was nothing done to the suit of clothes after it left the
G defendants' place which caused the trouble. If the burden of proof is upon the defendants, I am not satisfied by the evidence they have called upon this point. Equally, I am in the same position with regard to anything peculiar to the plaintiff himself, and no other suggestion has been made in the course of the case.

H In these circumstances, I am driven to the conclusion not only that something happened which made this suit of clothes affect the plaintiff as he has sworn to me he thought he was affected, but also that there was present in these clothes at the time when the plaintiff put them on some irritant substance which set up the dermatitis of which the plaintiff complains.

That seems to me to be the first stage in the whole matter. Then, how did it get there? The plaintiff puts his case quite simply. He says: "Here is the suit of clothes which I wore for two-and-a-half years without the least trouble. I sent the suit of clothes to the defendants and told them to clean it, and (in effect) when it comes back, as soon as I put it into use, I get this trouble." In the absence of anything A more, I think not only that I can draw the inference, but also that I am bound to draw the inference that whatever got into the suit of clothes got there while it was in the custody and control of the defendants, being worked upon by them in pursuance of their contract to do work and labour and render services. In this connection, I should like to B say that I am satisfied, from what I have heard of the case, that the defendants' plant is the best possible plant. I am satisfied that no possible attack can be made on their implements, their machinery, or the general way in which their business is carried on, and, indeed, although it is not alleged in the pleadings, this is a very substantial C place of business. I was told that only cleaning is done, either in this business or in the particular branch with which we are concerned here, and I was told that they clean something like 2,000 suits each week, and, of course, unless the most exact and careful records are kept (which probably is not commercially possible in a business of this sort, D where the total charge, including all that is done, the cleaning, delivery, packing and everything else, is only 2s. 6d.), it is almost impossible for the defendants to be able to give direct evidence as to when a particular garment, if a question arises about it, went through the plant, to call any witnesses as to who dealt with the particular article, or to E show what care was taken.

Bearing in mind that the onus of proof is not, in the view that I take of this case, on the defendants at all, because this is contract, or, at all events, warranty annexed to contract, one of the difficulties which the defendants encounter is the penalty of their very success—I gather F they are very successful people—and the result is that I am necessarily left without any evidence at all of anybody who handled the suit of clothes. There is no evidence which tells me anything about the suit of clothes from the moment that it was handed in to be cleaned to the moment when it got back to the plaintiff's place, except the general G evidence that "We do so and so," and "Our white spirit is the best white spirit," and "Our machinery is up-to-date machinery, such as is used in the great majority of places of this kind throughout the country." When I come to weigh the facts as proved to me by the plaintiff, what am I to weigh those facts against? It is that circumstance, with other H circumstances, which compels me in the end to accept the evidence which was given by Mr. Peek as to what it was that he found when he made his investigations.

I could not presume to criticise that evidence from any scientific point of view, but I followed Mr. Peek's evidence with the closest possible

attention. I could see no sign at all, either from that vague thing which is sometimes called demeanour or by comparing the different answers which he gave in examination-in-chief and in cross-examination, and comparing his evidence generally with that of the distinguished gentlemen who gave evidence for the defendants, which might lead me to cast
A any real doubt on the acceptability of that evidence. It is one of those cases in which, perhaps, some people might think that the acts of the parties and the facts of the case speak louder than any scientific deduction. I should not desire to say that that is a right view of the case, but in the result I am forced to the conclusion that—maybe by some
B mischance, maybe by some accident within the control of the defendants which could have been prevented, but, I am satisfied, by something which took place in the defendants' works—this suit got impregnated with some substance which developed an irritating quality in the suit and set up the plaintiff's dermatitis. Accordingly, I think that whether
C you call this negligence—because everybody agreed with me that in the ordinary way this ought not to happen, and one of the witnesses for the defendants was quite frank about it when he said that, under their system, this ought not to happen, and, therefore, if it does happen, it must be due to some negligent act—or whether you call it breach of
D warranty, it is the defendants who are responsible for what happened in this case.

I do not think that there is any other matter on the main issue in the action to which I need refer. I do not propose to conduct an examination of all the scientific details of the case. I appreciate, and I hope
E I have given full weight and consideration to, the points indicated by Professor Roberts as to the lasting quality, if that is the right word, in the material of the chemical compound, and as to his surprise, and as to other matters, but I do not feel that it is sufficient to enable me to come down on the side of the defendants.

F There is one other matter to which I should like to refer on this branch of the case, as I am not at all convinced that it may not have had something to do with the whole trouble. At a comparatively late stage in the evidence—that is to say, when the evidence for the plaintiff had been closed—it was brought to my attention for the first time that in
G one of the parts of the process here there is the use of benzine soap when the garment first comes in. I have followed again the scientific evidence on that point, and the suggestion of the inability of the benzine soap so to react, either on the white spirit or on any substance in the cloth or anything else, as to set up the irritant condition which was indubitably
H found, but I am bound to add that there is no evidence dealing with this particular garment, and I am not satisfied that either the benzine soap or its method of application or some negligent use in the process of cleaning was not the cause of what arose in this case.

The result is, in my judgment, that the plaintiff must succeed. The question is, for what sum? It must be remembered that the view which

I take of this case is that it is an action for breach of contract or an action for breach of warranty, which is only a correlative term annexed to the contract, and not an action for tort. The plaintiff suffered a good deal of pain and irritation. There is a claim that he suffered disfiguration, but I have not heard any evidence about it. I think that no doubt for some time he suffered from insomnia, and no doubt dermatitis of the sort which he had is a troublesome and a nasty thing. Fortunately for the plaintiff, he was employed as a chauffeur by a private employer, and the private employer, although the plaintiff could not do his work, was content to pay him his wages, and behaved as good employers usually do in the circumstances of the case, the plaintiff on his part trying to carry on to the best of his ability. I am satisfied that the plaintiff did not magnify any of his symptoms or seek to enlarge in any way on what he experienced, and I am satisfied that he was a man who was in no sense of the term seeking to malingering or to take advantage of the trouble in which he found himself. He also told me, to his credit, that he found himself completely recovered, and that, being completely recovered, there was nothing more to it.

There is some evidence in the case that a man who has suffered from dermatitis like this is susceptible to further infection in future, but on this point I think I accept the evidence of Dr. MacKenna, who indicated to me that the patient got the dermatitis again, or was likely to get the dermatitis again, only if he was in contact with the same kind of infection as that which set up the original dermatitis. From all I have heard in the case, I should think it is in the last degree unlikely that he would, and, while I take into account that fact, and the possibilities with regard to the future, I have come to the conclusion that an award of £75 is sufficient adequately and reasonably to compensate this plaintiff for his pain and suffering. There are some small items of special damage, amounting to £4 7s. 6d., which are not in contest. I add those to the £75, and I give the plaintiff judgment for £79 7s. 6d.

Judgment for the plaintiff for £79 7s. 6d.

Solicitors: *John A. Behn, Twyford & Reece* (for the plaintiff); *Houghton, Reveley, Craven & Wilkins* (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

SPANISH REPUBLICAN GOVERNMENT *v.* ABODI MENDI.[COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), **February 20, 21, 22, 1939.**]*Admiralty—Release—Arrest of vessel—Plaintiffs subsequently obtaining possession and taking out summons for release—Contempt of court—Form of order for release—R.S.C., Ord. 29, r. 1.*

The plaintiffs in an action claiming possession of a vessel were granted a warrant for its arrest, whereupon the Admiralty marshal obtained custody of the vessel, the plaintiffs then becoming responsible for his fees and expenses. On board the vessel at the time of the arrest was a part crew consisting of 10 persons, amongst whom was the defendant Captain A., the master representing the owners, and, through the owners, the nationalist government of Spain, and another person who was appointed master by action taken on behalf of the plaintiffs. The plaintiffs, having later obtained possession of the vessel, gave notice to the court and to the defendants of discontinuance of the action, and then took out a summons for release of the vessel from arrest. Prior to the hearing of the summons, the defendant, Captain A., having on one occasion gone ashore, was, on his return to the vessel, forcibly excluded therefrom by members of the crew representing the plaintiffs, and remained so excluded thereafter :—

HELD : *prima facie* the plaintiffs, on giving notice of discontinuance, were entitled to the ordinary release upon payment of the marshal's fees. The action being, however, one for possession, and the ship being in the custody of the court, the forcible exclusion therefrom by representatives of the plaintiffs of the master appointed by the owners was a contempt of court, and the order would, therefore, be that, on production to the registrar of an affidavit that Captain A. had been permitted to return on board, the release be issued from the registry.

[EDITORIAL NOTE. The release of a ship is, generally speaking, a mere matter of form, but, in the present case, the position is complicated by an act amounting to a contempt of court during the period of the arrest. In such a case, the contempt must be purged before the release can be had. The appeal to the House of Lords in *The Arantzazu Mendi* referred to in the judgment has now been decided, and appears on p. 719.

AS TO RELEASE OF SHIP, see HALSBURY, Hailsham Edn., Vol. 1, pp. 117, 118, paras. 174-176; and FOR CASES, see DIGEST, Vol. 1, pp. 168-171, Nos. 779,823.]

Case referred to :

(1) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; Digest Supp.; *on appeal from* [1938] 4 All E.R. 267.

APPEAL by the plaintiffs from an order of SIR BOYD MERRIMAN, P., dated Dec. 9, 1938. The facts are fully set out in the judgments.

G. St. C. Pilcher, K.C., and *Owen L. Bateson* for the republican government of Spain.

Sir Robert Aske, K.C., and *J. V. Naisby* for the nationalist government of Spain.

H. G. Willmer for the shipowners.

The case was before SIR BOYD MERRIMAN, P., on Dec. 9, when the following judgment was delivered.

SIR BOYD MERRIMAN, P. : On Apr. 13, 1938, the plaintiffs, the government of the republic of Spain, issued a writ against the vessel

Abodi Mendi and against Captain Aguirre, expressed to be the "late" master of that steamship, for possession of the vessel. As the result of a *praeceipe* in the prescribed form praying a warrant to arrest the ship, supported by an affidavit by a partner in the firm of the plaintiffs' solicitors, both bearing the same date, the vessel was arrested at Cardiff by the Admiralty marshal, and the warrant of arrest, duly indorsed, A was lodged in the Admiralty registry. On Apr. 22, the owners, a Spanish company, and Captain Aguirre, calling himself the "present" master, entered an unconditional appearance to the writ. On Apr. 25, solicitors on behalf of the nationalist government of Spain entered a conditional appearance without prejudice to any application to set B aside the writ and the warrant. On Oct. 4, the proceedings having meanwhile been stood over generally by consent, the solicitors for the republican government gave notice of discontinuance of the action. The owners at first signed a consent to the release of the vessel, whereupon, on Oct. 14, the plaintiffs issued a summons asking that the C warrant of arrest might be removed and that the marshal's fees from Oct. 4 until the date of release might be paid by the defendants. This summons was returnable on Oct. 18. Meanwhile, Captain Aguirre, whether as "late" or as "present" master—it is plain that these epithets epitomise the contest between the rival factions in Spain—left D the ship for a walk. On his return, he found that the crew had removed the gangway, and he has since been prevented from returning on board. On learning of this event, the owners withdrew their consent to the release.

On the hearing of the plaintiffs' summons before me on Oct. 18, it was E submitted on behalf of the plaintiffs that, as they had discontinued their action, consent on behalf of the defendants was unnecessary, and that I had no option but to order the release forthwith. Mr. Pilcher expressly admitted, however, that, if any consent on the part of the defendants were necessary, it was open to the defendants to withdraw it, on the F ground that there had been a change of circumstances before the consent was acted on. In these circumstances, the summons was adjourned, without prejudice to any right which the defendants might have to take out a *caveat* against the release of the vessel, it being understood that the *status quo* should be maintained pending the adjournment. On G Oct. 20, the solicitors for the owners issued a summons for an order for the reinstatement of Captain Aguirre on board the vessel. On the return of this summons before the registrar, the plaintiffs objected that it was an attempt to change the *status quo*, as the master had not been on board the vessel at the time when I adjourned their summons. Thereupon, the registrar, very properly, referred the owners' summons to me, H and both summonses came on together on Nov. 7.

In the owners' summons, affidavits were read on both sides. They raise highly controversial issues, and, if I were to decide these, as I certainly do not intend to do, I should be obliged, in substance, to decide

the rival claims of the nationalist and republican governments of Spain to the direction of this line of steamships registered in the port of Bilbao.

A Although the question whether or not the arrest of this vessel involves the impleading of a sovereign state has not yet actually arisen in this case, the general background of the controversy is summarised in the recent judgment of SLESSER, L.J., in the Court of Appeal in *The Arantzazu Mendi* (1). *Mutatis mutandis*, SLESSER, L.J., summarises—in substance, if not in detail—the history of this vessel also. I must refer specifically, however, to the controversy which rages round the person of Captain Aguirre. To the affidavit of Mr. Zubizarreta, filed on behalf of the B owners, is exhibited Captain Aguirre's complaint to the Glamorgan constabulary with regard to his being prevented from returning on board the vessel, which he describes as "my steamer," by certain ex-members of the crew who had remained on board against the wishes of the registered owners. The letter continues as follows :

C It is my duty to remain on the steamer to continue my duties for the registered owners of the steamer by whom I have been appointed, but I fear intimidation and I beg of you to render me the necessary assistance.

D On the other hand, the affidavits filed on behalf of the plaintiffs set out, with a wealth of detail to which I shall have to refer more particularly, the circumstances relating to requisition by the republican government summarised in the judgment to which I have already referred. They state categorically that Captain Aguirre was dismissed from the office of master on Apr. 4, 1938—that is to say, 9 days before the issue of the writ in this action—that Captain Aldamiz was duly appointed in his E stead by the Spanish consul in Cardiff and that Captain Aguirre has never since then acted as master.

F The substance of the matter, I need hardly say, is that Captain Aguirre's views on current controversies in Spain coincide with those of the owners, who, I gather, are in sympathy with the nationalist government. So long as Captain Aguirre was in charge, the owners were indifferent as to the arrest. Indeed, they may even have been content with it, as tending to preserve the ship from passing effectively into the control of the republican government under the requisition, or from even more serious dangers. On the other hand, if the plaintiffs could by any means G ensure that only those who were in sympathy with them remained on board the ship, it would obviously be to their advantage to release the ship from the arrest, which they themselves had effected, in order that she might be at their disposal.

H In these circumstances, Mr. Willmer asks me to direct that the marshal be empowered to take such steps as in his discretion he thinks fit to ensure that Captain Aguirre shall have free right of access to the ship. The submission, I need scarcely say, was supported by Mr. Naisby, appearing on behalf of the nationalist government. Neither counsel, however, was able to give me any authority justifying the making of such an order. Mr. Willmer pointed to the duty of the marshal to keep

the ship under safe arrest, and argued—as I think, rightly—that this was for the benefit of whom it might concern, including, of course, the owners. He maintained that to substitute a disobedient and disloyal master in place of one who was in sympathy with the owners was analogous to rendering a ship unseaworthy by having an incompetent master on board. It is obvious that imperfect sympathy between a master and his owners on subjects of political controversy may arise from a change of opinion on the part of the owners or of the master, or both. Moreover, coats may be turned more than once. It seems to me that it would be quite impossible to hold that the Admiralty marshal is to concern himself with considerations of this sort. At the most, he can only invoke the assistance of the police, and this the parties can do for themselves. Nor do I see how this court could come to the conclusion that it was proper to order him to intervene in this matter without deciding the very controversies which, as I have already said, are not for this court to decide. Unless Captain Aguirre was lawful master of the vessel at the time of the arrest on Apr. 13, even if Mr. Willmer's argument is accepted, there could be no ground for ordering his reinstatement for the purpose of protecting the *res*. However, this depends on whether, among other things, the requisitioning of this ship by the republican government and the dismissal of Captain Aguirre, purporting to be founded on the requisition, were, respectively, valid or invalid, since both these events are alleged to have occurred before the arrest of the ship. The defendants' summons, therefore, must be dismissed, but without costs.

I now turn to the plaintiffs' summons. The affidavit of their solicitor, Mr. Stevens, in support of the *præcipe* leading to the warrant, after referring to the requisition by the republican government and to the dismissal of Captain Aguirre from his post as master, stated that Captain Aguirre, against their will and without their consent, was about to sail the vessel from the port of Barry to some destination unknown to the plaintiffs, and that he refused to deliver up the vessel to the plaintiffs. In a second affidavit, dated Oct. 14, in support of the summons to effect the release, Mr. Stevens said that, as his clients had obtained possession of the vessel, they instructed him to discontinue the present proceedings, which he did by notice of discontinuance on Oct. 4. I pause here to observe that it is common ground that Captain Aguirre was on board the vessel up to and including Oct. 4, and there is nothing whatever on the face of these proceedings to show that, from the time of his alleged dismissal on Apr. 4 to the discontinuance of the action on Oct. 4, anything had occurred to effect any change, one way or the other, in the possession of the vessel. It is, of course, possible that the political sympathies of a sufficient majority of the crew may have changed in the meanwhile. Indeed, something of the sort is suggested by Mr. Stevens' third affidavit, dated Oct. 21, in which, after enumerating the crew on board the vessel, and saying that they are paid on behalf of the republican government,

he goes on to state that there are two other persons who are now or were lately on board—namely, the former master, Don Bonifacio Aguirre, and the steward—both of whom have refused to acknowledge the authority of the government of the republic of Spain through its consular officer. He also swears that Captain Aguirre, since his dismissal from the post

A of captain on Apr. 4 :

... has ceased to take any active part in the control of the vessel, but has permitted this to be exercised by the present captain, Don Epifanio Aldamiz, without disturbance, the orders of which captain the men now on board, with the exception of the steward, have obeyed since Apr. 4, 1938.

B This is quite inconsistent with Mr. Stevens' first affidavit, and, if it is true, it seems to me that the claim for possession and the warrant of arrest were wholly misconceived. The right to arrest in an action for possession is based on an allegation that the vessel is in the possession, or at least under the control, of someone else : R.S.C., Ord. 5, r. 16.

C This view of the matter is, if possible, made still plainer by the affidavits of Captain Aldamiz and Mr. Cabudas, the Spanish consul at Cardiff. In para. 5 of his affidavit, Captain Aldamiz says that, since Apr. 4, he and the crew on board the Abodi Mendi have been in continuous possession of the vessel on behalf of the republican government of Spain.

D In para. 12 he states as follows :

Ever since Apr. 4, when he [Captain Aguirre] was dismissed from the post of captain, although Captain Aguirre has remained on board the vessel, I have been the master and have acted as the master, and the said Bonifacio Aguirre has never acted as master or given any orders or taken any part at all in the control or command of the vessel ; I have given all orders without disturbance of any kind.

E The same, in substance, is the effect of paras. 15 and 16 of the affidavit of the Spanish consul.

In these circumstances, this action and the consequent arrest seem to me to be perilously like an abuse of the process of the court, and the circumstances in which Captain Aguirre has ceased to be physically on board the vessel appear to confirm this view. Nevertheless, Mr. Pilcher and Mr. Bateson say that I have no option but to order the instant release of this vessel, and Mr. Bateson goes so far as to argue that this follows *a fortiori* if the action is, in fact, wholly misconceived. I do not think that this is the position under the rules of court. Releases in

G Admiralty actions are dealt with by R.S.C., Ord. 29. Rule 1 provides that the property arrested by warrant shall only be released under the authority of an instrument issued from the registry, to be called a release. By r. 2, a solicitor at whose instance any property has been arrested may, before an appearance has been entered (I emphasise those words), obtain the release thereof by filing a notice that he withdraws the warrant.

H On the other hand, by r. 3, a solicitor may obtain the release of any property by paying into the registry the sum in respect of which the action has been begun. It has been decided that this sum includes a sum to cover the costs. I need not refer specifically to rr. 4 and 5, relating respectively to arrests in respect of freight and those in respect of salvage,

but r. 6 is important, as it is the only rule laying down the circumstances in which the solicitor shall be "entitled to" a release, which, again, excluding the provisions relating to a salvage action, are that he shall have filed a bail bond in the sum in respect of which the action has been begun, or paid such sum into the registry, unless there be a *caveat* against the release thereof outstanding in the *caveat* release book. The latter proviso relates to r. 8, whereby a party desiring to prevent the release of any property under arrest shall file in the registry a notice, and thereupon a *caveat* against the release of the property shall be entered in a book to be kept in the principal registry, called the *caveat* release book. Entering a *caveat* is clearly the appropriate procedure for third parties who have a claim against the ship, and in this very case a *caveat* was entered under r. 8 by third parties on Oct. 12, and was withdrawn on Oct. 14. It is unnecessary to decide whether it is ever the appropriate procedure on behalf of a party to the action who has entered an appearance but has no counterclaim.

In my opinion, in a case like the present, where the owners at any rate have entered an unconditional appearance, the wording of r. 2 is intended to make it clear that, where an appearance has been entered, the solicitor for the party at whose instance the arrest has been effected cannot obtain a release merely at his own instance. In other words, an order of the court is required unless, by virtue of R.S.C., Ord. 42, r. 23, which is of general application, the Admiralty registrar allows an agreement in writing between the solicitors to be filed and become an order of the court, as he may do if he thinks it reasonable and such as the judge would, in the circumstances, allow. I have looked at the Admiralty Rules, 1859. In substance, rr. 46-52, inclusive, relating to releases, are the same as the present rule, and I am advised that it has been the invariable practice in the registry throughout the whole period to require a consent to the release when an appearance has been entered. In most cases, the consent is given as a matter of course, but there may well be cases in which it is necessary to safeguard the position of a defendant, and I think that this case affords an excellent example. It seems to me to follow from the provisions of R.S.C., Ord. 29, r. 1, that the court must have some discretion whether or not to order the release.

I do not think that it would be just to allow the plaintiffs to obtain possession of this vessel forthwith by methods such as I have described. They invoked the peculiar jurisdiction *in rem* of the Admiralty Court, thereby securing that this vessel should be detained until subsequent events should put them in effectual control of the vessel. On these events occurring, they discontinued the action, and asked the court to order the release of the vessel. In substance, under cover of the arrest and the release combined, they seek to make their claim to possession effective without obtaining judgment in their favour. If, after the release has been ordered, however, the defendants in their turn were to claim possession and arrest the ship, it is clear that, so long as the con-

current judgments of this court and the Court of Appeal in *The Arantzazu Mendi* (1) stand, the present plaintiffs could get that writ and arrest set aside at once. On the other hand, I do not think that the court ought to prolong the arrest indefinitely, particularly if it is settled that the nationalist government is a sovereign state, and so can resist being impleaded. I understand that an appeal to the House of Lords against the judgment of the Court of Appeal in *The Arantzazu Mendi* (1) is contemplated. I think that the arrest should be continued until the position of the nationalist government in our courts is thus finally determined. The plaintiffs' summons will stand over for further consideration when the decision of the House of Lords is known, unless meanwhile the necessary consents to the release are given, or the court is otherwise satisfied that the interests of all parties are safeguarded. There will be liberty to apply at any time.

The plaintiffs appealed.

- C SCOTT, L.J.: This is an appeal from SIR BOYD MERRIMAN, P., upon a summons issued by the plaintiffs in an action started in Apr., 1938, claiming possession of the steamship *Abodi Mendi*. The plaintiffs in the action were the republican government of Spain, and the defendants were the ship itself and one Bonifacio Aguirre, the former master of the steamship. The vessel is one of several Spanish vessels which have been the subject of dispute and litigation in this country, broadly between the two governments in Spain which have been at war. This ship has been in England since the spring of 1938. On board her at the time when this action was begun was a part crew consisting of 10 persons. There were amongst those 10 persons 2 persons who, at a later stage, occupied the respective positions of master, representing the owners—that is, the defendant Aguirre, also representing through the owners the nationalist government of Spain, and another person, who at one time was chief officer and later on, in the course of 1938, was appointed as master of the ship by action taken on behalf of the republican government of Spain. When the action of possession, initiated by a writ for possession in the ordinary way in the Admiralty Division, was started on Apr. 13, 1938, the usual affidavit was sworn by a gentleman who was a partner in the firm of solicitors acting for the plaintiffs to found application for a warrant of arrest. In consequence of that affidavit stating that the plaintiffs were afraid that the vessel might sail from the port of Barry for some destination unknown, and that the defendant Aguirre refused to deliver up the vessel to them, the Admiralty marshal was put in charge of the vessel in the usual way, a custody which he exercised through his agent, one of the officials of the Board of Customs. The marshal remained on board, his fees being protected by the usual undertaking given by the plaintiffs' solicitors to see that he was paid. He had to pay the crew, these 10 men, and keep the ship safe. On Oct. 4, the plaintiff government, the republican

government of Spain, gave notice to the court and to the defendants that they wholly discontinued the action of possession. The position of the defendants was this. The defendant owners had entered unconditional appearance to the writ, but, in addition to the defendant owners, the nationalist government of Spain also entered an appearance, but they entered a conditional appearance without prejudice to an application A to set aside the writ and the arrest of the steamship. That was done, no doubt, in order to preserve the right of the nationalist government to object to the jurisdiction of the court. The position of that government is, as is common knowledge, that His Majesty's government of the United Kingdom have recognised the *de facto* sovereignty of that govern- B ment over a large part of Spain, with the corollary in litigation in these courts that that government is entitled to the privileges of a sovereign state equally with the republican government, which was, and continues as yet to be, recognised *de jure* by His Majesty's government of the United Kingdom. When the notice of discontinuance was given, the C ordinary procedure in the Admiralty court would normally be that it would result, *inter alia*, in the plaintiffs getting from the registry a release of the ship from the marshal, or rather, a release from the marshal of his duty of staying on the ship, and a termination of their own obligation to continue to pay the marshal's charges after they had once dis- D charged their liabilities to him up to date. Having regard to the position that not only was their master on board the ship, with a certain number of the crew acting under his orders on their behalf, but there was also Captain Aguirre, who was the captain appointed by the owners of the ship, and also, acting through the owners, on behalf of the E nationalist government of Spain, the plaintiffs on Oct. 14, took out a summons, and had it served on the defendants, to this effect :

Application on the part of the government of the republic of Spain that the warrant of arrest of the above vessel may be removed and that the Admiralty marshal's fees from Oct. 4, 1938, to the date of the notice of discontinuance to the date of release, be paid by the defendants. F

On the same day they filed an affidavit sworn by the same member of the firm of solicitors acting for them, Messrs. Petch & Co., stating that the writ had been issued on behalf of the government of Spain, and that appearances had been entered by the nationalist government and by G the owners and by the former master, Aguirre, but further adding :

As my clients have obtained possession of the vessel they instruct me to discontinue the present proceedings. . . . At the same time I called upon the solicitors for the various parties who had appeared to this action to consent to the immediate release of the ship in compliance with the release of the Admiralty registry. As those consents have not been given . . . H

He then asks for the help of the court. That summons was pending when, on Oct. 15, the next day, a consent to the immediate release of the ship was sent by the owners and Aguirre to the plaintiffs' solicitors, with a further consent on behalf of the nationalist government, the one signed by Messrs. Crowe & Co. on the same day to the same effect. On Oct. 18,

- the summons came on before SIR BOYD MERRIMAN, P., and on the hearing it became definitely known, if it was not known before, that on the afternoon of Oct. 15, an incident had happened which made a definite difference in the position. Captain Aguirre, the master in the employ of the owners and the master who was also representing the nationalist government through the owners, had gone ashore with a steward, who presumably held the same political views as Captain Aguirre. On returning to the ship, he found that the gangway had been raised against him, and that he was refused admittance. From that day to this he has been excluded from the ship. It is unnecessary, I think, to deal further with the summons as before SIR BOYD MERRIMAN, P., on Oct. 18. It was adjourned by him, and on Oct. 20 the owners of the ship took out a summons themselves for the hearing of an application on their part for an order for the reinstatement of Captain Aguirre on board the ship "now lying under arrest at Barry Dock," and there was an affidavit stating the facts which I have indicated shortly. That position continued until Nov. 7, when the hearing of the summons was resumed by SIR BOYD MERRIMAN, P. On that summons, SIR BOYD MERRIMAN, P., refused to give the plaintiffs what they wanted—namely, the immediate right to a release from their obligation to continue paying fees to the marshal. In other words, what they wanted was, technically, a release from the arrest. On the other hand, he dismissed the cross-summons of the owners.

- I do not think it necessary to discuss the reason for the action of SIR BOYD MERRIMAN, P., but it is necessary to state what I think was the position at that time. *Prima facie*, the plaintiffs, on giving notice of discontinuance, would have been entitled to receive from the Admiralty registry the necessary document upon which alone the marshal would go out—namely, a document called an extract from the release book, the book in which there is an entry made of the order of release addressed to the marshal. Upon getting the extract, the plaintiffs, who had caused the arrest of the ship, would be entitled to show that document to the marshal, and then, when they had discharged all their obligations to the marshal for the payment of his fees, and paid those fees pursuant to the undertaking of their solicitors, the marshal would go out. In the present case, SIR BOYD MERRIMAN, P., refused to do that, because he said that, in these circumstances, he was not going to consider the disputes between the two governments, the republican government and the nationalist government, and that he thought that, if he made the order as asked, he would in effect be doing so.
- The matter which we think is of supreme importance here—namely, the conduct of the crew representing the plaintiffs on board the ship in excluding Captain Aguirre from the ship in its relation to custody of the ship by the court—was not considered by SIR BOYD MERRIMAN, P. In our view, once the ship, in an action for possession, was put into the charge of the marshal of the Admiralty Court, all persons concerned in

the litigation were under a duty to abstain from any interference with the custody of the ship by the marshal acting on behalf of the ship. The action being an action for possession, and one of the persons on board the ship being the master of the ship appointed by the owners, a forcible exclusion of that master from the ship by persons representing the plaintiffs was an act by which the plaintiffs took the law into their own hands in a way which affected the custody of the ship which the court was retaining on account of whom it might concern, impartially on behalf of all parties. That act, in my opinion, was a contempt of court, and was a matter that it was the duty of the court to take into account in considering the order that it would make. If the order had been made as asked, the court would have been taking no account of that matter. Instead of keeping the ship *in medio*, and keeping open till the action was decided all questions of the right to possession of the ship, the result would have been to leave the ship in the exclusive possession of the plaintiffs and to deprive the owners of it. For that matter, it would also have precluded the question raised, and would have determined it in favour of the plaintiffs as against the nationalist government, who were objecting to the jurisdiction of the court. In my view, the nationalist government were not entitled to ask the court for any substantive relief. However, I express no opinion on the question whether or not that would have prevented their complaining of an act of contempt against the court. I leave that entirely open. It is enough for us to say that the owners of the ship were quite clearly entitled to raise the question. The facts proved by them—in an affidavit stating the facts which I have described and an affidavit filed by the plaintiffs on Oct. 14, to which I have referred, saying that the plaintiffs had obtained possession of the vessel, and that it was because they had obtained possession of the vessel that they instructed him, the plaintiffs' solicitor, to discontinue the action—show that the act of physical force by the crew of the vessel was an act for which the plaintiffs themselves were responsible, and the owners were, therefore, entitled to complain to the court that the court's custody had been interfered with by the plaintiffs themselves. That is the position which, on appeal from SIR BOYD MERRIMAN, P., we feel is the important one. Apart from that, the plaintiffs would have been entitled to the usual release on payment of the marshal's fees. Whether or not they would have been under obligation to continue to pay those fees in spite of the fact that the marshal was continuing in possession at the instance of the defendants would have been possibly a question, but that does not arise now. The position is that *prima facie* they are entitled to obtain the release of the ship, provided that, when the Admiralty marshal withdraws, the position is restored to that which it was before the plaintiffs took the high-handed action which they did on Oct. 15, which means that Captain Aguirre must be allowed to return to the ship in order to represent the owners' interests on board, as he did before.

The court, therefore, proposes to make this order, discharge the two orders made by SIR BOYD MERRIMAN, P., and order that, on the production to the registrar of an affidavit that the master Aguirre has been permitted to return on board, and is on board, the release be issued from the registry. There must be liberty to the plaintiffs thereupon
A to extract the release pursuant to the provisions of R.S.C., Ord. 29, and liberty also to both plaintiffs and defendant owners to apply to SIR BOYD MERRIMAN, P., if necessary. That will enable either party to apply to SIR BOYD MERRIMAN, P., either the plaintiffs or the defendant owners, if there is any difficulty in regard to the question of the
B master Aguirre returning to, and remaining on board, the ship.

CLAUSON, L.J. : I agree. I only want to add a sentence on a small point of Admiralty procedure about which I think there were signs of a little misunderstanding. As I read the rules, if a plaintiff, having started
C such an action as this, being desirous of putting an end to it, is prepared to discontinue before the defendants have entered appearances, he can, under R.S.C., Ord. 29, r. 2, get the ship released as a matter of course, without communicating with the defendants at all. Where, however, the defendants have entered appearances, as I understand the matter,
D it is the practice of the office not to let the release go, although the plaintiff has discontinued, until communication has been made to the other parties and their consents produced. I think that it was suggested that that practice of the office was wrong. I only wish to say that, as I understand the matter, that practice would seem to me to be correct,
E because, notwithstanding that the plaintiff has discontinued, the court ought not to withdraw its hand from the ship at least until an opportunity has been given to the other parties to make any observations they wish to make about it. In the normal case, there is no difficulty about it. A plaintiff wants to get rid of his obligations by the solicitor undertaking that the marshal shall be paid. The defendants are only
F too glad to get their ship free, and no trouble arises, and, accordingly, consents are given and the matter goes through. However, if for any reason the consent is not produced, the office is right in not allowing the release to go, and in pointing out that a special application must be made by the plaintiff if he desires release. This case is a very good
G example of the desirability of that, because there were very peculiar circumstances, which obviously had to be considered before the office could let the release go. I only make those observations because, so far as I am concerned, the long-established practice of the office seems to me to be perfectly right.

H FINLAY, L.J. : I also agree, though I confess that I have felt rather more difficulty in the matter than have SCOTT and CLAUSON, L.JJ. If it had been proposed to order that the marshal should be responsible for replacing Captain Aguirre on board, I should not, as at present advised, have been able to assent to that order. However, that is not now

proposed, and I am very glad indeed to be able to say that I do agree with the way in which SCOTT, L.J., has put the case, and with the order, subject to any question as to costs which counsel may desire to argue. I am glad to assent completely to the order which is proposed.

Solicitors: *Petch & Co.* (for the republican government of Spain); *H. A. Crowe & Co.* (for the nationalist government of Spain); *Ince, Roscoe, Wilson & Glover* (for the shipowners).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

NATIONAL REAL ESTATE AND FINANCE CO., LTD. B v. HASSAN.

[LIVERPOOL WINTER ASSIZES (Croom-Johnson, J.), February 17, 1939.]

Landlord and Tenant—Repairs—Forfeiture—Notice of Forfeiture—Retrospective operation of statute—Leasehold Property (Repairs) Act, 1938 (c. 34). C
ss. 1, 5.

The plaintiffs, as the lessors of property of which the defendant was tenant, served a notice to repair under the Law of Property Act, 1925, s. 146 (1), on Jan. 12, 1937. On July 13, 1937, the plaintiffs issued a writ claiming possession of the demised premises on the ground of their want of repair, and the defence to the action thus commenced was a claim for relief under the Law of Property Act, 1925, s. 146. On June 23, 1938, the Leasehold Property (Repairs) Act, 1938, came into operation, and on Oct. 28, 1938, the defendant obtained leave to amend her defence by adding a new paragraph to the effect that she would rely on the Act of 1938. It was contended that the Act had no such retrospective operation as would make it available to the defendant in this action:— D

HELD: as this was a matter of procedure, and as the Act of 1938 was, by sect. 5 thereof, made applicable to leases created, and to breaches occurring, before or after the commencement of the Act, the action though a pending proceeding at the time of the Act, must be governed by the 1938 Act. E

[EDITORIAL NOTE.] The question in this case is purely one of the retrospective effect of the Leasehold Property (Repairs) Act, 1938. It will be remembered that the House of Lords in *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1938] 4 All E.R. 747; Digest Supp., dealt with the question of a change of law while an action is pending. In that case, the change was made after judgment in the court of first instance and before the hearing in the Court of Appeal. The position is much more favourable towards retrospective operation in the case of an Act dealing merely with procedure, and the Act in question here is such an Act. It should be carefully noticed that in the present case the action was commenced before the passing of the Act, and that the Act requires the tenant to give a counter-notice within 28 days of the service of the notice under the Law of Property Act, 1925, s. 146 (1), which period had long since expired when the defence in the present action was amended. F

AS TO RELIEF AGAINST FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 257-260, paras. 290-292; and FOR CASES, see DIGEST, Vol. 31, pp. 483-487, Nos. 6322-6353.] G

Cases referred to:

- (1) *Re Athlumney, Ex p. Wilson*, [1898] 2 Q.B. 547; 42 Digest 702, 1191; 67 L.J.Q.B. 935; *sub nom. Re Athlumney (Lord), Ex p. Wilson v. Hasluck*, 79 L.T. 303. H

- (2) *Gardner v. Lucas* (1878), 3 App. Cas. 582; 42 Digest 697, 1139.
 (3) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 42 Digest 696, 1111; 52 L.J.Q.B. 44; 47 L.T. 561.
 (4) *Welby v. Parker*, [1916] 2 Ch. 1; 42 Digest 700, 1159; 85 L.J.Ch. 564; 114 L.T. 876.
 (5) *The Ydun*, [1899] P. 236; 42 Digest 699, 1156; 68 L.J.P. 101; 81 L.T. 10.
 (6) *Lauri v. Renad*, [1892] 3 Ch. 402; 42 Digest 696, 1116; 61 L.J.Ch. 580; 67 L.T. 275.
 (7) *Gardner & Co. v. Cone*, [1928] Ch. 955; 42 Digest 693, 1083; 97 L.J.Ch. 491.
 (8) *Hilliard v. Lenard* (1829), Mood. & M. 297.
 (9) *Gloucester Union v. Woolwich Union*, [1917] 2 K.B. 374; 42 Digest 693, 1086; 86 L.J.K.B. 1187; 117 L.T. 250.
 (10) *Brooks v. Brimcome*, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417.

ACTION claiming recovery of possession of a parcel of land and premises thereon, damages for breaches of covenants to repair, and mesne profits.

C The facts and the relevant sections of the Act of 1938 are fully set out in the judgment.

Ralph Etherton for the plaintiffs.

G. J. Lynskey, K.C., and *William Geddes* for the defendant.

D *Lynskey, K.C.*: The fundamental rule is admitted that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. So also is the subsidiary rule that a statute is not to be construed so as to have a retrospective operation greater than its language renders necessary: *Lauri v. Renad* (6) and *Gardner & Co. v. Cone* (7). If, however, a statute is clearly intended to have retrospective operation, effect must be so given to it. The defendant relies on two points. First, sects. 1 and 5 of the Act must be read together. Sect. 5 relates, not only to leases created, but also to breaches occurring, before the commencement of the Act. It makes no difference whether or not the action in respect of the breach was itself commenced before the date of the passing of the Act. Any other construction would involve reading words into the Act. The language is here plainly retrospective in intent. Secondly, the Act deals with a matter of procedure, and Acts dealing with procedure apply even to pending actions. [Counsel referred to MAXWELL ON THE INTERPRETATION OF STATUTES, p. 199, *Hilliard v. Lenard* (8), *Welby v. Parker* (4) and *The Ydun* (5).] A case very similar to the present was *Quilter v. Mapleson* (3).

H *Etherton*: The Act is not applicable at all, for the defendant has not served a counter-notice. In any event, the Act does not relate to procedure, but affects rights. In law, forfeiture has already occurred, and possession dates from the issue of the writ. The plaintiff has a right to be governed by sect. 146 of the Law of Property Act alone. Further, one must not give greater retrospective effect than is necessary. Sect. 5 makes no reference to notices, and the construction urged on behalf of the defendant is not a "necessary" one. [Counsel referred to *Gloucester*

Union v. Woolwich Union (9) and *Brooks v. Brimecome* (10).] The Act does not specifically refer by sect. 5 to sect. 1. Even though the Act deals with procedure, yet it also deals with rights. Its operation is mixed, and, as rights are involved, the ordinary strict rule of construction must apply.

CROOM-JOHNSON, J. : On Mar. 14, 1854, the trustees of Mrs. Ann Molyneux's Charities executed a lease with other parties of certain properties in Faulkner Street in the city of Liverpool, now known as 157, Faulkner Street. The term demised by that lease was 99 years from Dec. 25, 1851, the yearly rent being £10 10s. By divers mesne assignments and acts in law, the reversion expectant on the determination of that lease had become, at some time prior to July 13, 1937, vested in the plaintiffs, the National Real Estate and Finance Co., Ltd., and the leasehold interest had become vested in the defendant, Mrs. J. Hassan, a widow, who is now in possession of the premises. It was agreed before me that the rateable value of these premises at all material times was £100 or less for the purposes of this argument, and it was further admitted that there is a residue unexpired of about 15 years of the demised term.

On Jan. 12, 1937, the plaintiffs served upon the defendant a notice of breach of covenant and schedule of dilapidations pursuant to the Law of Property Act, 1925, s. 146. Thereafter, the plaintiffs alleged that that notice had not been complied with, and claimed that, by reason thereof, a proviso for re-entry contained in the lease had become operative, that the lease had been forfeited, and, accordingly, that they were entitled to possession of the premises. On July 13, 1937, the plaintiffs issued their writ in this action. In that writ, they claimed recovery of possession of the premises in question, damages for breach of covenant to repair the premises, and mesne profits. In due course, they delivered a statement of claim which is in the form familiar to those of us who have had experience of the ordinary common law action for forfeiture, as it is called, though it is really an action for the enforcement of a right of forfeiture already accrued to the plaintiffs, or claimed to have accrued to the plaintiffs, before the day of the issue of the writ.

In due course, the defendant delivered her defence in that action. It followed familiar lines in such cases, and wound up with a claim for relief under the Law of Property Act, 1925, s. 146 (2). That defence was delivered on Nov. 4, 1937. On June 23, 1938, the royal assent was given, and there came into effect, an Act of Parliament the short title of which is the Leasehold Property (Repairs) Act, 1938. That Act of Parliament, to which I shall have to refer in more detail hereafter, amended the law relating to the enforcement by landlords of obligations to repair and similar obligations arising under leases, and, upon that happening, the defendant applied for leave to deliver an amended defence, and on Oct. 28, 1938, obtained an order enabling her to do so.

On Nov. 2, 1938, the defendant delivered her amended defence pursuant

to that order. The amendment consisted of the insertion of a new para. 8 as follows :

In addition to all other grounds of defence, the defendant will rely on the Leasehold Property (Repairs) Act, 1938.

A The defendant claimed that that defence went to the very root of the whole action, and, in those circumstances, on Dec. 21, 1938, an order was made that the action should be set down for hearing before a judge alone on the preliminary point of law, pursuant to R.S.C., Ord. 25. It would have been more convenient if the order had said, in terms, precisely what was the preliminary point of law which was to be determined, but
B the parties in this case, by their counsel, have agreed before me that the point they wish determined, and the only point they wish determined, is whether the Leasehold Property (Repairs) Act, 1938, is retrospective in this regard—namely, whether it applies to a case in which, before the passing of the Act, a writ had been issued as in this action. That in-
C volves a consideration of a number of points, and primarily involves the question of the proper construction of the 1938 Act.

Before I consider the Act itself, I should state the principles, as I understand them, which are the determining factor in such a matter. I take them from MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn.,
D merely adding that there has been really no argument at the bar as to the adequacy or correctness of this statement of the law. First of all, there is a passage at p. 189 :

E Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. *Nova constitutio futuris formam imponere debet, non præteritis*. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

F To that I may add a passage from the well-known judgment of R. S. WRIGHT, J., in *Re Athlumney, Ex p. Wilson* (1), at pp. 551, 552 :

G Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

On this, MAXWELL ON THE INTERPRETATION OF STATUTES says, at p. 190 :

H The same rule involves another and subordinate rule to the effect that a statute is not to be construed to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain.

The author goes on to deal with matters of procedure, and says, at p. 199 :

The general principle, however, seems to be that alterations in procedure are retrospective, unless there be some good reason against it.

Then he quotes in support of that proposition from the opinion of LORD

BLACKBURN in *Gardner v. Lucas* (2), at p. 603, to which my attention has been directed.

In those circumstances, I proceed to examine the state of affairs which existed when the Act of 1938 was passed. With the exception of a right of relief relating to forfeitures in respect of non-payment of rent, up to Jan. 1, 1882, a landlord was entitled to forfeit a lease for breach of a repairing covenant. The Conveyancing Act, 1881, s. 14, however, provided for a procedure, as it seems to me, by which the rights of the landlord were suspended until a notice of breach was given to the tenant and a reasonable opportunity had been given to him of repairing the breach or of tendering amends. That section was repealed, and was re-enacted in sect. 146 of the Act of 1925, to which I have already referred, but it seems to me that it is still a procedural section. However, I do not base the judgment which I am delivering on that particular view of the matter. When Parliament came to deal with the matter in 1938, it did so largely, if not entirely, by amending and stiffening the procedure indicated in sect. 146.

I do not propose to go into more detail in considering this Act of Parliament—that is to say, in reading it out aloud—than I am obliged. It is sufficient, therefore, for me to say that, under sect. 1 (1) of the Act of 1938, a lessee who has been served with the notice under sect. 146 is given the right within 28 days to serve a counter-notice that he claims the benefit of the 1938 Act. Sect. 1 (2) deals with what is to happen to a right to damages for a breach of a repairing covenant to which alone the Act of 1938 relates, and it provides that a right to damages for a breach of such a covenant shall not be enforceable by action commenced at any time at which 5 years or more of the term of the lease remain unexpired unless the lessor has served on the lessee, not less than one month before the commencement of the action, the notice specified in the Law of Property Act, 1925, s. 146 (1), and, where a notice is served under this subsection, the lessee may within 28 days from the date of service serve on the lessor a counter-notice to the effect that he claims the benefit of this Act. The precise extent of that subsection may have to be considered hereafter. I am inclined to think that it is an express statutory prohibition against commencing an action for damages, as distinct from an action for recovery of possession of the demised premises, unless a notice under sect. 146 of the 1925 Act has been given. What follows is a little curious. So far, nothing has been said to alter the rule laid down by sect. 146 as to a claim for forfeiture, but in subsect. (3) it is provided as follows :

Where a counter-notice is served by a lessee under this section, then notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.

Subsect. (4) lays a further burden on the landlord with regard to the form of the notice which has to be served under subsect. (1) or

under subsect. (2). It seems to suppose that there will be two notices in future, one a notice dealing with the claim for damages under subsect. (2), but subsect. (4) says that neither of those notices in fact is to be valid :

A . . . unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under this Act to serve on the lessor a counter-notice claiming the benefit of this Act, and a statement in the like characters specifying the time within which, and the manner in which, under this Act a counter-notice may be served and specifying the name and address for service of the lessor.

B Subsect. (5) lays down what has to be proved by the lessor when he applies to the court for leave to bring his proceedings by way of an action for recovery of possession or damages under subsect. (3), and I do not think that I need refer further to it. Sects. 2, 3 and 4 are not important for the present purpose, but sect. 5 is all important. It provides as follows :

C This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

It is, therefore, quite plain that, in a sense, this Act of Parliament was intended by the legislature to have a retrospective effect. It was to apply to all contracts by way of lease made before the Act was passed
D and to all breaches of covenant occurring before the commencement of the Act, and I should be disposed, myself, to think that those words are all-embracing, and have the effect of covering all cases. They are words of general signification in a statute which is dealing with the procedure to be adopted by a lessor who is seeking to get either recovery
E of the premises or damages in an action, and I think that Mr. Lynskey is right when he says that procedure does not mean procedure necessarily in the court, but that it is any procedure prescribed by an Act which is intended to regulate the enforcement of rights. However that may be, in view of the argument on each side which has been addressed to me, I
F think that I had better consider the case apart from that general consideration. This action embraces a claim for recovery of possession as well as a claim for damages. So far as the claim for damages is concerned, in my view, sect. 1 (2) makes that claim unenforceable by virtue of the express language which is used in the subsection :

G A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which . . .

When one looks at the language of sect. 5, dealing with breaches occurring in leases created before the commencement of the Act, I am inclined to think that that emphasises the point which I have indicated.
H Subsect. (3), provides as follows :

. . . no proceedings, by action or otherwise, shall be taken by the lessor . . .

Mr. Etherton has taken the point that the word " shall " is really future in its signification, and I think that there is a good deal in what he has said in regard to it, but, after all, this is only, as I see it, an amendment of

something which I regard as procedural under the Act of 1925. It is a mere amendment of procedure, and I think that, when the matter comes into court, the court must have regard, at the moment when the action is being tried, to the procedure which then exists. In *Quilter v. Mapleson* (3), the court was dealing with a point not very dissimilar from this, and, in giving his judgment, BOWEN, L.J., said, at p. 677 :

No doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure, it does not modify the clear words of a statute.

What was it that the legislature was engaged in doing ? I think that I am entitled to look—indeed, I think that I must look—at the general intention of the statute. It was obviously intended, as I have said, to put a further brake on landlords who were seeking at some period of time longer than 5 years before the end of the term accorded by the lease to obtain possession of property—namely, determining the lease which was that of their tenant. It was plain that the legislature wished to put a stop to it, and it was quite plain that the legislature was intending the Act to apply to breaches occurring before the Act had been passed. A similar sort of question arose with regard to actions of this nature on the passing of the Conveyancing Act, 1881. In *Quilter v. Mapleson* (3), to which I have already referred, a landlord brought an action to recover the demised property under a proviso of re-entry for breach of the covenant to insure, and the defendant claimed relief, which he could then claim under one of the Common Law Procedure Acts. The plaintiff obtained judgment on a day before Jan. 1, 1882, the date when the Conveyancing Act came into operation, and, between the date of the judgment and the date of the coming into operation of the Act—namely, on Aug. 4, 1881—the defendant appealed. The result of the appeal was that the plaintiff never obtained possession, and the appeal actually came on to be argued after the Act had come into operation. It was held, dealing with the very same topic as that which the Act of 1938 deals with, that the Act of 1881 extended to breaches committed before the Act and to proceedings pending when the Act came into operation, and that, as the landlord had not obtained possession, the action was still pending—in a limited sense, which I will explain in a moment—and there was jurisdiction to grant relief to the tenant under the subsection of the then sect. 14 of the Act of 1881. The action was pending in the sense that the appeal was going on, and that the appeal was by way of re-hearing. It is worthy of note that the Act of 1881 contains no words such as I find in sect. 5 of the Act of 1938. Nevertheless, the court apparently treated the matter as a matter of procedure. They certainly came to the conclusion that this was something which was intended to put a brake on the plaintiff in this kind of action to recover possession, and that it was retrospective in effect.

I do not refer in any detail to *Welby v. Parker* (4), cited to me by Mr. Lynskey. That seems to me to have been a decision on the express

language of the section which I should have thought was tolerably plain. Also, I think I might just mention the observations of A. L. SMITH, L.J., in *The Ydun* (5), at p. 245.

- It seems to me, therefore, that the necessary result of this statute is that, when the action comes on for hearing, as it does come on now on
- A this preliminary point, the court must have regard to what is laid down in the 1938 Act as to how sect. 146 of the Act of 1925 is to be interpreted. The result may work some hardship on the plaintiff, but I do not find myself able to get away from the intention of the statute, the plain words of sect. 5, and the general scheme indicated in sect. 1.
- B I ought, I think, to deal with one other argument of Mr. Etherton's. He says that sect. 5 could have been framed in such a way as to show quite plainly the intention which I am holding was the intention of the legislature, and he says that, as there is a section which is dealing with notices and giving rights to the defendant to do certain things, inasmuch
- C as notices are not specified in sect. 5, therefore sect. 5 does not refer to the notices. I think that sect. 5 is dealing with those breaches of the lease which go fundamentally to the root of the whole matter, and it necessarily covers what I may call the adjectival clauses dealing with the particular way in which those breaches are sought to be enforced. The result is
- D that I hold that the Act of 1938 does apply to these proceedings, and that the plaintiffs must pay the costs of this hearing. Inasmuch as questions have arisen in the past as to whether these hearings of a preliminary point of law are hearings which finally dispose of the rights of the parties or are interlocutory matters, I give leave to appeal.
- E Solicitors: *Tanner & Worley* (for the plaintiffs); *Herbert J. Davis, Berthen & Munro* (for the defendant).

[Reported by M. D. CHORLTON. Barrister-at-Law.]

Applied. DOLLFUS MIEG, ETC. v.
BANK OF ENGLAND. [1949] 1 All

F

THE ARANTZAZU MENDI.

Dictum of LORD ATKIN, at p. 722, referred to. SAYCE v. THE AMEER OF BAHAWALPUR. [1952] 1 All E.R. 326. Observation of LORD ATKIN, at p. 722, applied by VISCOUNT JOWITT and LORD TUCKER. UNITED STATES OF AMERICA v. DOLLFUS MIEG ET COMPAGNIE S.A. [1952] 1 All E.R. 572.

Dictum of LORD ATKIN, at p. 721, applied. SAYCE v. BAHAWALPUR STATE (AMEER). [1952] 2 All E.R. 64.

(Lord Atkin, Lord Thankerton, Lord Russell of Macmillan and Lord Wright), **January 24, 26, 27, 30, February 2, 23, 1939.**

- G *Shipping—Foreign-owned vessel—Requisition by both de jure and de facto governments—Claim for possession—Impleading a foreign government.*

The ship *Arantzazu Mendi*, described as of the port of Bilbao, arrived in London on Aug. 11, 1937. On June 19, 1937, Bilbao had been captured by General Franco's forces, and on June 28, 1937, the ship was requisitioned by a decree of the Spanish republican government of that date. On Aug. 24, 1937, the owners issued a writ *in rem* for the possession of the ship, and she was arrested. On Mar. 2, 1938, the ship was requisitioned by the nationalist government of Spain. Notices of requisition were served on the owners on behalf of the republican government on Mar. 23, 1938, and on behalf of the nationalist government on Apr. 5, 1938. On Apr. 13, 1938, the owners declared that they freely submitted to the requisitioning of the nationalist government, and on the same date the republican government issued a writ claiming to have possession

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of the ship adjudged to them. The previous writ of Aug. 24, 1937, had been discontinued on Apr. 12, 1938, but the ship remained in the custody of the marshal by reason of the failure to meet a claim for the daily expenses while the ship was in such custody. The ship was, therefore, still within the custody of the marshal, and the arrest was not withdrawn at the time of the arrest in the present action. The nationalist government moved to set aside this second writ, on the ground that it impleaded a foreign government. The Foreign Office stated that the *de jure* government of Spain was the republican government, but that the nationalist government was the *de facto* government of the larger portion of the country:—

HELD: (i) as the nationalist government had been recognised by His Majesty's government as a *de facto* government not subordinate to any other government in Spain, it was a sovereign state, and could not be impleaded.

(ii) the nationalist government was in possession of the ship at the material date by the master and crew acting with the consent of the owners. A ship arrested does not, by the mere fact of arrest, pass from the possession of its then possessors to a new possession by the marshal. His right is not a right in possession, but one of custody.

Order of the Court of Appeal ([1938] 4 All E.R. 267) affirmed.

[EDITORIAL NOTE.] In this case, the House of Lords has affirmed the decision of the Court of Appeal. On the point as to the requisition of the ship by the Spanish governments, the opinion of their Lordships merely affirms what was said in the Court of Appeal, but there is discussed herein a further matter—namely, the nature of the possession of the marshal of the Admiralty Court. When a ship is arrested, possession is taken thereof by the ship keeper, who is a representative of the marshal, and such possession is not possession in law, but is more properly described in law by the word “custody.” This aspect of the matter is dealt with by LORD ATKIN, and his opinion will be found of considerable importance in the consideration of the effect of the arrest of a ship.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 1, p. 95, para. 121; and FOR CASES, see DIGEST, Vol. 1, pp. 109-111, Nos. 127-146.]

Cases referred to:

(1) *Compañía Naviera Vascongado v. Cristina, The, The Cristina*, [1938] A.C. 485; [1938] 1 All E.R. 719; Digest Supp.; 107 L.J.P. 1; 159 L.T. 394.

(2) *Kelantan Government v. Duff Development Co.*, [1923] A.C. 395; Digest Supp.; 129 L.T. 356; *affd.*, [1924] A.C. 797; *previous proceedings*, [1923] 1 Ch. 385.

APPEAL from an order of the Court of Appeal (SLESSER, FINLAY and GODDARD, L.JJ.), dated Nov. 1, 1938, and reported [1938] 4 All E.R. 267, affirming a decision of BUCKNILL, J., dated June 17, 1938, and reported [1938] 3 All E.R. 333. The facts and the arguments are fully set out in the opinion of LORD ATKIN.

G. St. C. Pilcher, K.C., Owen L. Bateson and John G. Foster for the appellants.

Sir Robert Aske, K.C., J. V. Naisby and R. Valls for the respondents.

LORD ATKIN: My Lords, this was an appeal from an order of the Court of Appeal dismissing an appeal from an order of BUCKNILL, J., in the Admiralty Division by which he ordered that the writ and all further proceedings in this action and the arrest of the steamship *Arantzazu Mendi* be set aside. The writ issued on Apr. 13, 1938, was expressed to be between the government of the republic of Spain, as

the plaintiff, and the steamship or vessel Arantzazu Mendi and Eugimo Neuterice, the late master of the steamship, as the defendants, and commanded the defendants to cause an appearance to be entered for them in the Admiralty Division. The plaintiffs' claim was to have possession of the steamship adjudged to them.

- A The writ appears to me to have been wholly irregular. It purported to make a chattel (the ship) a defendant, and to order the chattel to enter an appearance. I think that it might have been set aside, unless amended, on that ground alone; and that no warrant of arrest should have been issued on it. It makes it no better that the form was obviously
- B adopted to seek to evade the difficulty that might have been caused if the plaintiffs had described the proposed defendants in terms that would have included the nationalist government of Spain, subject to whose directions the master and crew were holding the vessel. However, this point does not arise. The nationalist government of Spain entered a
- C conditional appearance, and then moved to set aside the writ and the arrest on the grounds that the action impleaded a foreign sovereign state and that the ship was in their possession. BUCKNILL, J., made the order applied for. He was affirmed by the Court of Appeal, and on Feb. 2 this House dismissed the appeal from this order. We then
- D stated that we would give our reasons for the decision at a later date, and this I proceed to do.

My Lords, in the events that have happened, it does not seem necessary to discuss this case at much length. The question is whether the nationalist government of Spain represent a foreign sovereign state in the sense

E that entitles them to immunity from being impleaded in these courts, and, if so, whether they are impleaded in the action by reason of being in possession of the ship in question. I state the question in that form as being sufficient to dispose of the present case. As, in my opinion, there is no doubt that the nationalist government was in fact in possession

F of the ship, the question does not arise which was discussed in *The Cristina* (1)—whether, on a writ framed in the ordinary form of a writ *in rem*, and not having specified defendants, the mere fact that a foreign sovereign state was claiming to be in possession, or to be entitled to possession, was sufficient to show that the state was impleaded, without

G proof that the claim was rightly or reasonably made. On the question whether the nationalist government of Spain was a foreign sovereign state, BUCKNILL, J., took the correct course of directing a letter, dated May 25, 1938, to be written by the Admiralty registrar to the Secretary of State for Foreign Affairs, asking whether the nationalist government

H of Spain is recognised by His Majesty's government as a foreign sovereign state. I pause here to say that not only is this the correct procedure, but it is the only procedure by which the court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign state. This, I think, is made clear by the opinions in this House in the *Kelantan* case (2).

With great respect, I do not accept the opinion, implied in the decision of LORD SUMNER in that case, that recourse to His Majesty's government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign A in the family of states, and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.

The answer of the Foreign Secretary was given in a letter dated May 28, 1938. After stating that His Majesty's government recognises Spain as a foreign sovereign state, and recognises the government of the Spanish republic as the only *de jure* government of Spain or any part of B it, the letter proceeds as follows :

5. His Majesty's government recognises the nationalist government as a government which at present exercises *de facto* administrative control over the larger portion of Spain. C

6. His Majesty's government recognises that the nationalist government now exercises effective administrative control over all the Basque provinces of Spain.

8. The nationalist government is not a government subordinate to any other government in Spain.

My Lords, this letter appears to me to dispose of the controversy. By "exercising *de facto* administrative control" or "exercising effective D administrative control," I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, and adopting or imposing laws regulating the relations of the inhabitants of the territory with one another and with the government. It necessarily implies the ownership and control of E property, whether for military or civil purposes, including vessels, whether warships or merchant ships. In those circumstances, it seems to me that the recognition of a government as possessing all those attributes in a territory while not subordinate to any other government in that territory is to recognise it as sovereign, and, for the purposes of inter- F national law, as a foreign sovereign state. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished. In the present case, we appear to be dealing with a claim based upon a legislative decree affecting G merchant shipping registered at Bilbao in the Basque provinces, the territory specially designated in para. 6 of the Foreign Office letter. That the decree, therefore, emanated from the sovereign in that territory there can be no doubt. There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a state *de facto* as opposed to recognition *de jure*. All the reasons for H immunity which are the basis of the doctrine in international law as incorporated into our law exist. There is the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if government property is seized or injured. The non-belligerent state which recognises

two governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal courts. For these reasons, I think that it was established by the Foreign Office letter that the nationalist government of Spain at the date of the writ was a foreign sovereign state, and could not be impleaded.

- A On the question whether that government was in possession of the ship, so that the claim of the writ was to take possession from it and transfer it to the plaintiffs, there seems to me little difficulty. Following a decree for requisition made by the nationalist government, it is proved that on Apr. 13, 1938, the owners agreed to the requisitioned vessel being
- B at the free disposal of the nationalist government, while on Apr. 5 the master had undertaken to retain possession at the disposal of the nationalist government. The vessel had in fact been arrested on Apr. 24, 1937, in a possession action by the owners, the Compañía Sota y Aznar, against the Bay of Biscay Co., Ltd., Don Ramo de la Sota Aburto and others, which was terminated by a consent order dated Mar. 28, 1938.
- C During this period, the ship had been lying in the Surrey Commercial Dock with a master and crew on board, and the marshal's representative, "the ship keeper," maintaining the arrest. After the consent order, the ship keeper remained on board under a claim for the daily expenses
- D "while the ship is in the custody of the marshal," as expressed in the Supreme Court Jurisdiction Order, 1930, S. IV, B. 93. As a result, the arrest was not withdrawn at the time of the arrest in the present action. Founding on this, the plaintiffs say that the ship was in the possession of the marshal, and could not, therefore, be in the possession
- E of the nationalist government. This seems to me to be based upon a misapprehension of the position created by the arrest. The ship arrested does not, by the mere fact of arrest, pass from the possession of its then possessors to a new possession of the marshal. His right is not possession, but custody. Any interference with his custody will be properly punished
- F as a contempt of the court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. There may be some doubt even whether the sheriff's officer, who has levied under a *fieri facias*, is in fact in possession. However, his
- G case is quite different, for he acts under a direction of the court to make of the goods of the defendant so much money. He has the right to sell, and, therefore, to hand over possession to the purchaser. His case, therefore, need not be discussed here. A bare arrest appears to me, however, clearly to give custody, and not possession. The argument on
- H this footing fails, and the simple fact emerges that the nationalist government was in possession of this ship at the material date by the master and crew acting with the consent of the owners. For these reasons, my Lords, the appeal was, in my opinion, rightly dismissed.

LORD THANKERTON: My Lords, I agree.

LORD RUSSELL OF KILLOWEN: My Lords, I agree. The letter addressed to the Secretary of State was one which invited an answer to a question of fact—namely, whether or not the nationalist government of Spain was recognised by His Majesty's government as the government of a foreign sovereign state—but the answer of May 28, 1928 (in para. 9), poses another, and a quite different, question—namely, whether the nationalist government should be so regarded. The earlier portion of the letter, however, contains statements (I refer to paras. 5, 6 and 8) which can lead to only one conclusion of fact—namely, that His Majesty's government does recognise the nationalist government as the government of a sovereign state which has the larger portion of Spain (including, in particular, the Basque provinces) under its exclusive authority and control. In these circumstances, and for the reasons stated by my noble and learned friend LORD ATKIN, the unavoidable result was that the appeal was dismissed.

LORD MACMILLAN: My Lords, I agree with the reasons which have been stated by my noble and learned friend LORD ATKIN for dismissing this appeal.

LORD WRIGHT: My Lords, I agree, and merely add a few words because of what might appear to be a difficulty in respect of the final paragraph of the letter of May 28, 1938, from His Majesty's Secretary of State for Foreign Affairs. The court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's government for this purpose, in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the court on grounds of law. However, I do not think that in this case the Foreign Office meant that they should be so open. The Foreign Office stated the precise facts as then existing in regard to recognition by His Majesty's government, by the decision of which recognition is given or withheld. The question of law left to the court was the effect of these facts on the issues before the court. For the purposes of this case, the letter of the Foreign Office appears to me to have stated sufficiently and in substance that the nationalist government of Spain had been recognised by His Majesty's government as a *de facto* government, not subordinate to any other government in Spain, and ruling over the larger portion of Spain, within which is included Bilbao, the vessel's port of registry. That statement is, in my opinion, sufficient, when taken together with the other facts of the case, to bring into operation the principles of law expounded by this House in *The Cristina* (1), with the result that the appeal was rightly dismissed.

Appeal dismissed, with costs.

Solicitors: *Petch & Co.* (for the appellants); *H. A. Crowe & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

**SEDLEIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR
FOREIGN MISSIONS.**

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.J.J.), **January 24,
25, February 23, 1939.**]

A *Nuisance—Private nuisance—Created by trespasser—Creation unknown to occupier—Right of stranger to abate—Whether occupier liable for failure to abate.*

The respondent college was the owner of property adjoining the appellant's premises. The boundary of its property on that side had originally been a ditch and a hedge, their relative positions changing along the boundary. Where the appellant's garden adjoined the college property, the ditch abutted on the appellant's garden, the hedge being on the side of the ditch nearer to the college property. It was admitted that, applying the usual presumption, the ditch at this point belonged to the college. About 1934, when a block of flats was erected upon the western side of the appellant's premises, the ditch had been piped in by the county council. No permission was obtained from the college, and the fact of these pipes having been put in was not at any material time brought to the notice of the college authorities. No proper guard was put at the entrance to the pipe to prevent its being blocked by *debris*. The pipe becoming blocked, the appellant's garden was flooded, and he claimed damages from the college, on the ground that the pipe was a nuisance :—

D **HELD :** the college owed no duty to the appellant to abate a private nuisance which had been created on its land by a trespasser, and of which it had no notice.

Decision of BRANSON, J. ([1938] 3 All E R. 321) affirmed.

E **[EDITORIAL NOTE.** The law applicable to the circumstances of this case has received very little judicial consideration. The occupier of land who is aware of a nuisance existing upon his property is under a duty to abate it, but this is not the case where he has no knowledge of its existence and it is not brought about by an act or default of his or one for which he is responsible as being done by his servant or agent. There is no duty cast upon an occupier to go about his land searching for nuisances which may or may not exist, and if, as in the present case, unusual weather or any other cause, by reason of some unsuspected defect, produces damage to neighbouring property, the owners of such property have an equal opportunity to the innocent occupier of abating the nuisance.

F **AS TO CONTINUING A NUISANCE,** see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148 ; and **FOR CASES,** see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to :

- G** (1) *Saxby v. Manchester & Sheffield Ry. Co.* (1869), L.R. 4 C.P. 198 ; 36 Digest 214, 572 ; 38 L.J.C.P. 153 ; 19 L.T. 640.
- (2) *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341 ; 36 Digest 214, 575 ; 93 L.J.K.B. 261 ; 130 L.T. 522.
- (3) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, 311 ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.* (1866), L.R. 1 Exch. 265 ; *revisg.* (1865), 3 H. & C. 774.
- H** (4) *Graves v. Legg* (1854), 9 Exch. 709 ; 12 Digest 416, 3351 ; 23 L.J.Ex. 228 ; 23 L.T.O.S. 254 ; *subsequent proceedings, sub nom. Greaves v. Legg* (1856), 11 Exch. 642 ; *sub nom. Graves v. Legg* (1857), 2 H. & N. 210.
- (5) *Knott v. London County Council*, [1934] 1 K.B. 126 ; Digest Supp. ; 103 L.J.K.B. 100 ; 150 L.T. 91.
- (6) *Todd v. Flight* (1860), 9 O.B.N.S. 377 ; 31 Digest 345, 4879 ; 30 L.J.C.P. 21 ; 3 L.T. 325.

(7) *Barker v. Herbert*, [1911] 2 K.B. 633; 36 Digest 197, 374; 80 L.J.K.B. 1329; 105 L.T. 349.

APPEAL by the plaintiff from a judgment of BRANSON, J., dated June 22, 1938, and reported [1938] 3 All E.R. 321. The facts are fully set out in the judgment of the court delivered by MACKINNON, L.J.

G. Granville Sharp and *H. V. Lloyd-Jones* for the appellant, the plaintiff. *A. Hubert Hull* for the respondents, the defendants.

Sharp: The judge held as a fact that the culvert without the gratings was a nuisance. This is a case of a nuisance known to the trustees of the society through the knowledge of their servants, the lay brothers. The judge was wrong in ruling that the principle of *Rylands v. Fletcher* (3) did not apply here. It was the duty of the respondents to keep the ditch clean, and they did not do what was reasonable to have the obstruction removed so as to enable the ditch to function properly. [Counsel referred to *Job Edwards, Ltd. v. Birmingham Navigations* (2), *Graves v. Legg* (4) and *Knott v. London County Council* (5).] B

Hull: On the evidence before the judge, it was not established that the culvert was on land in the occupation of the society. Assuming that it was, it was not negligent on their part to take no steps to get it removed. At the time the culvert was constructed, the owner of Holcomb Court asserted sufficient ownership to make an agreement with the local authority to construct it. We are not dealing here with ordinary conditions. The evidence is that there was a cloudburst. The question of negligence does not really arise. Even if the respondents were liable to keep the ditch clean, the evidence is that they did so regularly. To render an occupier of land liable, it is not enough to show that he knew of the existence of the nuisance. *Job Edwards, Ltd. v. Birmingham Navigations* (2) and *Saxby v. Manchester & Sheffield Ry. Co.* (1) distinguish a private nuisance from a public nuisance. They show that the owner of land on which there is put by a trespasser something which is a private nuisance is not liable for it. C

Sharp, in reply: Neither *Saxby's* case (1) nor *Job Edwards's* case (2) covers the facts of this case. They made no difference to the previously accepted law of nuisance. *Saxby's* case (1) ought not to be applied here, because the respondents knew that the culvert was there. There is a general duty on an occupier not to do on his land anything calculated to damage his neighbour. It was negligent to keep the pipe as it was. [Counsel referred to *Todd v. Flight* (6) and *Barker v. Herbert* (7).] D

MACKINNON, L.J. [delivering the judgment of the court]: The plaintiff is the owner and occupier of a house and garden known as *H* 1, Victoria Road, Mill Hill. To the north of his plot of land is a field, numbered 609 in the Ordnance survey map, which is owned by the trustees of the defendant society. On the southern edge of that field is a hedge, and to the south of the hedge there is a ditch. There was evidence that periodically this ditch had been cleaned out by the E

defendants' servants. Upon this, and upon the presumption that the area of a ditch alongside a hedge belongs to the owner of the hedge, there was ground for inferring that the area of the ditch was the property of the defendant trustees, though no other evidence of their title was given. The judge dealt with the case on the basis that the area of the ditch was

A owned by the defendants, and we do the like on this appeal.

To the west of the plaintiff's plot of land was another plot, on which stands a block of flats called Holcomb Court. Before 1934, the ditch, as an open watercourse, flowing from east to west, continued along the northern edge of Holcomb Court to a roadway called Lawrence Street,

B running from north to south on the western side of Holcomb Court. In 1934, the then owners of Holcomb Court made an agreement with the Middlesex County Council under which the latter undertook to substitute a pipe or culvert, 15 ins. in diameter, in the line of the ditch along the north side of Holcomb Court. They had no right to do that, as the ditch

C was not their property, but was the property of the defendant society. The county council, however, did the work, made the culvert, and covered the top of it with earth. At the western end, the culvert was connected with a manhole and sewer in Lawrence Street. The eastern end of the culvert was carried to a point about 2 ft. to the east of the

D fence dividing the plaintiff's plot from the Holcomb Court plot. To prevent the possibility of wood, leaves or other refuse carried down by the stream blocking the opening of the 15-inch pipe, it would have been proper practice to fix a grid or grating in the ditch a little to the east of the opening of the pipe. This the county council evidently recognised,

E since they provided such a grid, but their workmen did their work so carelessly that, instead of fixing the grid in the ditch where it should have been, they left it sticking in the cement up above the pipe, where it was quite useless. There was, therefore, the danger that, at a time of heavy rainfall, refuse might be washed into the opening of the pipe so

F as to block it, whereby water might accumulate in the ditch to the east of the pipe and overflow from the ditch.

A lay brother of the defendants, charged with the periodical duty of cleaning out the ditch, observed the work being done by the county council people. Not unnaturally, he assumed that they were authorised.

G If it crossed his mind that the society owned the ditch which was being interfered with, he assumed that they had given authority for the work. In any case, he made no report of the incident to his superiors, and they were unaware that any trespass had been committed, as in fact it had, upon their land.

H No trouble occurred in 1934, 1935 or 1936. The lay brothers carried out the work of cleaning the ditch down to the opening of the culvert in those years twice a year, in February and November. There was evidence that they did so in Feb., 1937, and no evidence that on that occasion they did not do so properly. On Apr. 20, 1937, there was an abnormally heavy rainfall. Somewhere in the evidence it was called a

cloudburst. Much water came down the ditch. Unfortunately, refuse of some sort got jammed in the opening of the pipe, and so obstructed it. The water rose in the ditch, overflowed, ran southwards down the plaintiff's garden, and so caused damage to his house and garage. A witness for the plaintiff described how he waded into the water, and pushed at the mouth of the pipe with a long pole until something gave way there, whereupon the water flowed away down the pipe and the flood abated. A

The plaintiff issued his writ against the defendants on Nov. 3, 1937, claiming "damages for negligence and for nuisance." He alleged in his particulars (a) that the pipe was inadequate in size to carry off the water in the ditch, (b) that the protecting grid above-mentioned was not provided, and (c) that the defendants failed to keep the ditch clear of leaves and other refuse. As to (a), there was no proof in fact. If the pipe had not been choked, it would have been quite large enough. As to (c), on the facts of the cleaning twice yearly by the defendants, there was really no case of failure made out. The real complaint was (b), the absence of the grid or grating. B C

Though negligence as well as nuisance was spoken of in the statement of claim, the case appears to have been argued before BRANSON, J., as a claim for nuisance, and is, in his judgment, dealt with only on that ground. BRANSON, J.—as we think, rightly—treated the claim of nuisance as being the creation of the pipe, in place of the former open watercourse, without a protecting grid to prevent its getting choked so as to cause a flood. This clearly had been created by the Middlesex County Council when trespassing upon the land of the defendant society. On those facts, he held that the case fell within the authority of *Saxby v. Manchester & Sheffield Ry. Co.* (1) and of *Job Edwards, Ltd. v. Birmingham Navigations* (2) in this court, in which *Saxby's* case (1) was expressly approved. We think that he was right in that view. It is true that the decision in *Saxby v. Manchester & Sheffield Ry. Co.* (1) has been adversely criticised by high authority. It is true that SCRUTTON, L.J., in the *Job Edwards* case (2) delivered a weighty dissentient judgment. It is true that it may be difficult to see, on principle, why there should be a rule as to a public nuisance different from that as to a private nuisance. None the less, it remains clear that the judgments of the majority of the court in *Job Edwards, Ltd. v. Birmingham Navigations* (2) decided that, where a private nuisance has been created upon a man's land by a trespasser, he is not liable for it, and that, in case of such a private nuisance, created without his authority by another, mere failure on his part, or even refusal, to remove the nuisance does not involve him in liability for its results. D E F G H

Mr. Granville Sharp, in his reply, sought to evade the difficulty put in his way by this decision by putting his case on the ground of negligence rather than on that of nuisance. We have said that there seems no trace in the judgment of BRANSON, J., of this having been argued before

him. Nevertheless, we do not think it can avail. Negligence must mean the breach of some duty of care to the plaintiff. If, when the Middlesex County Council made on the defendants' land this erection which was a potential source of danger to the plaintiff, the defendants, as this court has held, owed no duty to the plaintiff to mitigate that potential source of danger when it is called a private nuisance, it cannot be that they owed such a duty when it is described in slightly different language, omitting the word "nuisance" and substituting the word "negligence." Call the default of the defendants what one likes, it must in fact be a failure to fulfil a duty to the plaintiff to obviate, or render innocuous, the effects of the misdoing of the Middlesex County Council in 1934. Moreover, it seems to us that *Job Edwards, Ltd. v. Birmingham Navigations* (2) is a clear authority that the defendants did not owe that duty to the plaintiff. In the result, this appeal fails, and must be dismissed with costs.

Appeal dismissed, with costs. Leave to appeal to the House of Lords.

Solicitors: *Maltz, Mitchell & Co.* (for the appellant); *Witham & Co.* (for the respondents.)

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. KETTER.

[COURT OF CRIMINAL APPEAL (Humphreys, Singleton and Lewis, JJ.),
February 20, 21, 1939.]

Aliens—Acquisition of British nationality—Mandated territory—Turkish subject resident in Palestine—In possession of passport marked "British passport, Palestine"—British Nationality and Status of Aliens Act, 1914 (c. 17), s. 27—Treaty of Peace with Turkey signed at Lausanne on July 24, 1923, art. 30—Palestinian Citizenship Order, 1925 (S.R. & O., 1925, No. 777).

The appellant was convicted for that being an alien he had failed to report his change of address, and had also failed to comply with a deportation order, and the question which arose on appeal was whether he was an alien within the meaning of the British Nationality and Status of Aliens Act, 1914. He was born in Jerusalem of Jewish parents, and was, at the time of the passing of the Palestinian Citizenship Order, 1925, a Turkish subject habitually resident in Palestine. In 1937, he came to England with a passport granted to him by the High Commissioner for Palestine and indorsed "British passport, Palestine." It was contended (i) that the passport was a British passport, (ii) that Palestine had been transferred to Great Britain, and that, therefore, under art. 30 of the Lausanne Treaty, the appellant *ipso facto* became a British subject, (iii) that the Palestinian Citizenship Order, 1925, had no effect, as it was made by the mandatory, and not by the administration of Palestine, as provided by the mandate:—

HELD: (i) the passport was not a British passport.

(ii) there was no provision in art. 30 for transfer of territory to Great Britain, which merely exercised the mandate on behalf of the League of Nations. The appellant did not, therefore, become a British subject under this article.

(iii) even assuming that the Order of 1925 was void, (which proposition the court was far from accepting) the appellant would not have

become a Palestinian subject, but would have remained a Turkish subject.

(iv) nothing had been done in law to make the appellant a British subject.

EDITORIAL NOTE. This case considers the position of citizens of a mandated territory. Such territories have never been annexed to the British Empire in any sense that could make the citizens thereof British subjects, and, in view of this, it seems impossible to escape the conclusion that such citizens retain their original nationality. However, the court, before reaching this conclusion, had to consider the effect of the Palestinian Citizenship Order, 1925, but this did not purport to divest such citizens of their nationality or to invest them with a new one. A

AS TO ACQUISITION OF BRITISH NATIONALITY, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 464-470, paras. 784-793; and FOR CASES, see DIGEST, Vol. 2, pp. 188-190, Nos. 513-525.] B

Case referred to:

- (1) *A.-G. v. Goralschwili* (1925), *McNair's Annual Digest of Public International Law Cases*, 1925-1926, p. 47.

APPEAL against a conviction at the Central Criminal Court on Dec. 13, 1938. The question argued upon appeal was whether the appellant was an alien within the meaning of the British Nationality and Status of Aliens Act, 1914. The facts are fully set out in the judgment of the court delivered by SINGLETON, J. C

H. Lester for the appellant. D

J. Buzzard for the Crown.

SINGLETON, J. [delivering the judgment of the court]: The appellant, Isaac David Ketter, was convicted on Dec. 13, 1938, before the Common Serjeant at the Central Criminal Court on two counts of an indictment. The first count alleged that on Nov. 12, 1938, he being an alien who had effected a change of residence from one registration district to another, he failed to report his arrival to the registration officer within 48 hours of his arrival in the registration district into which he had moved. The second count alleged that on Nov. 25, 1938, he being an alien subject to an order made by the Secretary of State for the Home Office varying the conditions of the grant to Isaac David Ketter of leave to land, which condition required him to leave the United Kingdom by Sept. 30, 1938, he failed to comply with that order. On Dec. 15, he was sentenced to 11 days' imprisonment, and the Common Serjeant further said that the appellant would be recommended for deportation. It was understood and intended that he would be sent to Palestine on a ship which was due to sail on Dec. 20, but on Dec. 18 the appellant gave notice that he desired to appeal to this court against his conviction, "and to challenge the recommendation." E
F
G

According to the appellant's evidence, he was born in Jerusalem on Nov. 16, 1911, of Jewish parents. He came to England in 1937, armed with a passport which was granted to him by His Majesty's High Commissioner for Palestine, and which had on its back the words: "British passport, Palestine." He was permitted to land on certain conditions. H

A He remained in this country for a long period, and that period was subsequently extended from time to time. By an order of the Secretary of State for Home Affairs dated Sept. 14, 1938, the appellant was ordered to leave the country on Sept. 30, 1938. We are not concerned with the terms of that order, or with the reasons for making that order. We assume that there were grounds for making it. It was for failing to comply with that order that the appellant was indicted in the second count of the indictment.

B The only question argued before this court was whether the appellant was an alien within the meaning of the British Nationality and Status of Aliens Act, 1914. It was not disputed that he committed the offences alleged against him if in fact and in law he was an alien within the meaning of that Act. By sect. 27, the expression "alien" means "a person who is not a British subject." By the same section, as amended by the Acts of 1918 and 1933, the expression "British subject" means :

... a person who is a natural-born British subject, or a person to whom a certificate of naturalisation has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory.

D It is common ground that, in any such proceedings as were taken, the onus of proof that a person is not an alien lies upon the person himself.

E At the trial at the Central Criminal Court, Mr. Lester, on behalf of the appellant, based his case wholly, or almost wholly, on the passport which was issued to the appellant, which he claimed was a British passport. The passport was unfortunately sent back to Palestine by the appellant himself, and at the trial two passports were exhibited in order to explain the difference between a British passport and a British passport, Palestine. The Palestine passport is issued by His Majesty's High Commissioner, and the jury added to their verdict a rider that that wording was misleading, no doubt because of the words "British passport."

F It is difficult to see that this of itself could lead the appellant to think that he was a British subject, and it is still more difficult to see how it could make him one.

G On the hearing of the appeal, Mr. Lester put his case on much wider grounds. He referred to the Lausanne Treaty—to give it its proper title, the Treaty of Peace with Turkey, signed at Lausanne on July 24, 1923—and in particular he referred to art. 30 which deals with nationality. That article provides as follows :

H Turkish subjects habitually resident in territory which in accordance with the provisions of the present treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the state to which such territory is transferred.

Counsel submitted that Palestine was transferred to Great Britain, and that, consequently, every Turkish subject habitually resident in Palestine became *ipso facto* a national of Great Britain. He agreed that the appellant had been a Turkish subject. Certain territories which had been

part of Turkey were transferred to other states, and it appears to us that art. 30 is intended to deal with the position of those left in territory which was transferred, and to deal with that position only. In order to show that there had been a transfer of Palestine to Great Britain, Mr. Lester relied on the mandate for Palestine of 1922, which was confirmed on July 24, 1922. The mandate itself begins by making certain recitals A

Whereas the principal allied Powers have agreed, for the purpose of giving effect to the provisions of art. 22 of the Covenant of the League of Nations, to entrust to a mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and whereas the principal allied Powers have also agreed that the mandatory should be responsible for putting into effect the declaration originally made on Nov. 2, 1917, by the government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and whereas the principal allied Powers have selected His Britannic Majesty as the mandatory for Palestine; and whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and whereas by the aforementioned art. 22 (para. 8) it is provided that the degree of authority, control or administration to be exercised by the mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations; confirming the said mandate, defines its terms as follows: B

Art. 1: The mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate. C

Art. 7: The administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine. D

Art. 12: The mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue *exequaturs* to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits. E

None of the other articles is of much importance, except perhaps art. 5, which provides as follows: F

The mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the government of any foreign power.

The true effect of this is, as the recital says, that His Britannic Majesty accepted the mandate in respect of Palestine, and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it. There was no provision in art. 30 for the transfer of territory to Great Britain. If there had been, there would have been no need for the mandate. G

The Palestine Order in Council, 1922, followed on Aug. 10, 1922, and by that order in council the territories to which the mandate applied were dealt with, and provision was made in Part II for the appointment of a High Commissioner and other officials. Part III dealt with the legislature, and Part V with the judiciary, and Part VIII, which was general, contained three paragraphs, to which I will refer: H

87. The High Commissioner may by proclamation in the Gazette at any time

within one year from the date of the commencement of this order, and provided he has previously obtained the approval of the Secretary of State, vary, annul or add to any of the provisions of this order in order to carry out the purposes of the same, and may provide for any other matters necessary in order to carry into effect the provisions thereof.

88. His Majesty, his heirs and successors in council, may at any time revoke, alter or amend this order.

A 89. There shall be reserved to His Majesty, his heirs and successors, the right, with the advice of his or their Privy Council, from time to time to make all such laws or ordinances as may appear to him or them necessary for the peace, order and good government of Palestine in accordance with the mandate conferred on him.

B In 1925, there came into being the Palestinian Citizenship Order, 1925 (S.R. & O., 1925, No. 777). That order was made, as appears from the order itself, by virtue

. . . and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise. . .

C The Foreign Jurisdiction Act, 1890, s. 16, defines certain expressions, and in particular defines the expression "foreign country" as "any country or place out of His Majesty's Dominions." The order contains two recitals :

Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within Palestine : and whereas it is desirable to regulate the grant and acquisition of Palestinian citizenship . . .

D Para. 1 of the order provides as follows :

(1) Turkish subjects habitually resident in the territory of Palestine upon Aug. 1, 1925, shall become Palestinian citizens.

E On Aug. 1, 1925, the appellant was a Turkish subject habitually resident in Palestine, and *prima facie* the order would seem to make it clear that he then became a Palestinian citizen. Mr. Lester, on his behalf, argued that the Palestinian Citizenship Order, 1925, has no force or validity, as it was made by the mandatory, and not by the administration of Palestine, who were responsible for making a nationality law under art. 7 of the mandate. It would appear that distinction is drawn between the F mandatory and the administration of Palestine, and it is said that, if certain things could only be done by the administration of Palestine, it matters not that in the Palestine Order in Council, 1922, it was sought to reserve certain powers to the Crown, or that it was sought to exercise those powers by the Palestinian Citizenship Order, 1925.

G Even if we accepted Mr. Lester's argument that the Order of 1925 was void and had no effect—and we are far from saying that we accept it—the result would be that the appellant had not become a Palestinian subject, but remained a Turkish subject. Mr. Lester argued that Great Britain had no power, by order in council or otherwise, to make the H appellant a national of any country other than Great Britain. It is sufficient to say that nothing has been done in law to make him a citizen of Great Britain.

To revert to the British Nationality and Status of Aliens Act, 1914, s. 27, as amended, the appellant is not a natural-born British subject, or a person to whom a naturalisation certificate has been granted, nor has

he become a subject of His Majesty by any annexation of territory. There has been no annexation by this country of Palestine. It therefore follows that he is not a British subject. He is an alien with in the meaning of the Acts of 1914 and 1918.

Our attention was called to *A.-G. v. Goralschwili* (1), a case in the High Court of Palestine. The facts of that case were that an application A was made by the Italian government to the government of Palestine for the extradition to Italy of two persons resident in Jerusalem who were charged with complicity in the fraudulent bankruptcy of a certain person in Italy. The Anglo-Italian Extradition Treaty, made in Feb., 1873, was applied to Palestine, in accordance with the Palestine Extradition Ordinance, 1924, s. 4. That treaty included a clause providing B that British subjects should not be surrendered to Italy and Italian subjects should not be surrendered to Great Britain. The accused persons in Palestine were alleged to have been Ottoman subjects. They had applied for, and obtained, provisional certificates of special citizenship, which were issued by the government prior to the enactment of the Palestinian Citizenship Order, 1925. It was contended that they C should be treated as British subjects, because, in the absence of a Palestinian citizenship, the subjects of a mandated territory obtained the nationality of the mandatory state. An order for their extradition was D made by the president of the district court sitting as a magistrate, who held, on the point of nationality, that the accused persons could not be treated as British subjects, and, therefore, could not be surrendered. On application to the High Court of Palestine for a writ of *habeas corpus*, it was held that, even assuming that the accused persons were ex-Ottoman E subjects resident permanently in Palestine, they had not become British subjects. The Crown has not acquired full sovereignty by accepting the mandate for Palestine, and the subjects of the mandated territory did not become British subjects, and might be surrendered to Italy if an extradition offence had been committed by them. There follows a note F to the effect that an application for special leave to appeal from the judgment of the High Court to the Judicial Committee of the Privy Council was granted on Feb. 24, 1925. The application, however, was not pursued, and no decision was given by the Privy Council on the merits of the case. It is satisfactory to know that our view in the G present case accords with the view of the Supreme Court of Palestine in the case with which they had to deal. The appeal fails, and must be dismissed. As, however, the appellant was given leave to appeal, the time during which he has been awaiting his appeal will count towards his sentence. H

Appeal dismissed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Anthony Pickford*, City Solicitor (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 946 OF 1926), THE DEBTOR v. OFFICIAL RECEIVER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Clauson, L.JJ.), **February 24, 27, 1939.**]

A *Bankruptcy—Discharge—Order for payment from income for benefit of creditors—Order intended to be operative after discharge but in error made to cease on discharge becoming effective—Jurisdiction of court to vary order—Bankruptcy Act, 1914 (c. 59), ss. 26 (8), 108 (1).*

B On Sept. 23, 1926, the appellant was adjudicated bankrupt. On June 30, 1936, he applied for his discharge, and at the same time the Official Receiver made an application under the Bankruptcy Act, 1914, s. 51 (2). Upon these applications orders were made suspending the discharge for 6 months from Dec. 15, 1936, and ordering that an annual sum of £312 be paid out of the salary of the bankrupt during the bankruptcy by monthly payments, the first payment to be made on Dec. 26, 1936, and to be continued monthly until the court ordered to the contrary. The words "during the bankruptcy" were inserted *per incuriam*. As a result of the inclusion of those words the order ceased to operate upon the discharge becoming effective, as it did on June 15, 1937. In Oct., 1938, an application was made to the registrar to vary the order by the deletion of these words and the substitution of words which would continue the payments by the now discharged bankrupt:—

C **HELD:** (i) the court had jurisdiction under the Bankruptcy Act, 1914, s. 108 (1), to entertain such an application after the discharge of the bankrupt had taken effect.

D (ii) the court had power under the Bankruptcy Act, 1914, s. 26 (8), to vary the order for payment of the annual sum after the expiration of the period of suspension of the discharge from bankruptcy.

[EDITORIAL NOTE.] The question here is one of the jurisdiction of the Bankruptcy Court to make orders binding a discharged bankrupt to make payments for the benefit of the creditors entitled to prove in the bankruptcy. By an error in the wording of the order, the payments to be made by the bankrupt for the benefit of creditors in the bankruptcy were made to cease on the discharge becoming effective. It was argued that the order could not be varied after the discharge had become effective, but it is held that the court has power to do so under the statute.

F AS TO EFFECT OF ORDER FOR DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 350-354, paras. 471-477; and FOR CASES, see DIGEST, Vol. 4, pp. 579, 580, Nos. 5320-5324.]

Cases referred to:

- G (1) *Re Jeavons, Ex p. Mackay* (1873), 9 Ch. App. 127; 4 Digest 537, 4945; 43 L.J.Bey. 105; 29 L.T. 713; subsequent proceedings, *sub nom. Re Jeavons, Ex p. Brown* (1874), 9 Ch. App. 304.
- (2) *Re May, Ex p. May* (1884), 12 Q.B.D. 497; 4 Digest 538, 4947; 50 L.T. 744.
- (3) *Re Pickard, Ex p. Official Receiver*, [1912] 1 K.B. 397; 5 Digest 1032, 8435; 81 L.J.K.B. 330; 105 L.T. 832.
- H (4) *Re Tobias & Co., Ex p. Tobias*, [1891] 1 Q.B. 463; 4 Digest 540, 4976; 60 L.J.Q.B. 244; 64 L.T. 115.
- (5) *Re Gold, Ex p. Gold* (1891), 8 Morr. 45; 4 Digest 574, 5279.
- (6) *Re Tregaskis, Ex p. Tregaskis* (1889), 6 Morr. 309; 4 Digest 543, 5008.
- (7) *Re Huggins, Ex p. Huggins* (1889), 22 Q.B.D. 277; 4 Digest 574, 5276; 58 L.J.Q.B. 207; 60 L.T. 236.
- (8) *Re A Debtor, Ex p. The Debtor* (No. 1088 of 1923), [1924] B. & C.R. 1; Digest Supp.

- (9) *Harman v. Official Receiver, Petitioning Creditors and Trustee*, [1934] A.C. 245; Digest Supp.; 103 L.J.Ch. 158; 150 L.T. 501.
- (10) *Winsford Urban District Council v. Cheshire Lines Committee* (1931), 21 Ry. & Can. Tr. Cas. 10; Digest Supp.
- (11) *Phillips v. Batho*, [1913] 3 K.B. 25; 11 Digest 458, 1149; 82 L.J.K.B. 882; 109 L.T. 315.

A

APPEALS from two orders of a registrar, dated Oct. 20, 1938, and Dec. 2, 1938, respectively. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

G. O. Slade and G. F. Kingham for the appellant.

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The Solicitor-General (Sir Terence O'Connor, K.C.) and V. R. Aronson for the respondent.

Slade: Under the Bankruptcy Act, 1914, s. 28, the bankrupt is entitled to an effective order of discharge. Sect. 28 (2) says that the effect of an order of discharge is to release the debtor from all debts provable in the bankruptcy other than those specifically excepted. A condition cannot be imposed upon an order of discharge which has already become effective. Formerly, a discharge could not be suspended and a condition imposed. The Bankruptcy Act, 1914, s. 26 (8), now enables that to be done. The powers of suspending and of attaching a condition, however, must be exercised concurrently. This is not what the registrar has done in the present case. The application is an abuse of sect. 108, because it is an attempt to impose upon the debtor a more onerous obligation after he has ceased to be a bankrupt. Sect. 108 should be read in the light of other provisions of the Act. If sect. 26 enables a discharge to be given, and it is given, there is no jurisdiction under sect. 108. A bankrupt should know the precise terms on which he has been granted his discharge. The debtor in the present case was granted a discharge, with a suspension, and without a condition, and therefore he ceased to be amenable to the bankruptcy jurisdiction when the order became effective. The effect of this variation is not to make the condition and the suspension operate concurrently, which is all that is authorised by sect. 26 (8). They will not proceed concurrently, because one has ceased. There are two cases in which sect. 108 has been considered: *Re Jeavons, Ex p. Brown* (1), and *Re May, Ex p. May* (2). Those two cases say that the power given by the section must be very delicately exercised. *Re Pickard, Ex p. Official Receiver* (3) is very much in favour of my argument. None of the cases says that the power can be exercised *nunc pro tunc*. *Re Tobias & Co., Ex p. Tobias* (4) was a case in which the application by the bankrupt had been refused absolutely and he applied for a re-hearing. It was according to the practice as laid down in that case, that the present application came before the registrar.

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The Solicitor-General: There is no doubt that the order which has been made in the present case could have been made in the first instance, and it would then have been a good order. With regard to the latter part of the order, which relates to what is to happen after the income tax

claim has been paid off, if it had been in the first order, it would have carried out the intention of the registrar. The order refers to an annual payment. The debtor acted upon it for a year after the suspension had expired. The orders made in 1936 followed a long-established practice which dated back to *Re Gold, Ex p. Gold* (5). The practice has never
A changed, and was followed as recently as 1912 in *Re Pickard, Ex p. Official Receiver* (3). The practice was based upon the view that the Bankruptcy Act, 1914, s. 51 (2), contemplates payments after the discharge has run out. The difficulty arose from the adoption of form 152. The rules state that the forms in the appendix, where applicable, and,
B where they are not, like forms, with such variations as may be required, shall be used. The form used contains the troublesome words "during the bankruptcy." One view for which *Re Gold, Ex p. Gold* (5) is an authority is that those words could be struck out. Unfortunately, however, they have been left in. It was stated on behalf of the appellant
C that there was no jurisdiction to vary the order when the period of suspension had run out and the debtor had no debts, and that there is no bankruptcy jurisdiction when once a man has been discharged. The fallacy of that lies in thinking that the order of discharge puts an end to the bankruptcy. There is an opinion held by experienced practitioners
D that bankruptcy never ends. Sect. 26 (2) contemplates an order being made after a discharge has been granted. It is explicit in subsect. (9) that the order of discharge can be revoked. The proposition that the bankruptcy ends on discharge is clearly not a tenable one. This matter is covered by *Re Tregaskis, Ex p. Tregaskis* (6). *Re Huggins, Ex p. Huggins* (7) decided that there could not be suspension coupled with a
E condition, and that such an order could not be made. That has been rectified by the Bankruptcy Act, 1914, s. 26 (8). There are other instances of alteration of status, as, for instance, where a receiving order has been made, or where adjudication has taken place. There are cases
F in which the court has revoked the receiving order or the adjudication. In *Re A Debtor, Ex p. The Debtor* (No. 1088 of 1923) the court dismissed a petition and rescinded a receiving order, subject to certain conditions. As the conditions were not fulfilled, the court rescinded its own order under sect. 108 (1). In *Harman v. Official Receiver, Petitioning Creditors and Trustee* (9), the Court of Appeal rescinded an order which it had made
G annulling an order of adjudication. In *Winsford Urban District Council v. Cheshire Lines Committee* (10), MacKINNON, L.J., said that, as regards any order made by this court, an application could be made to review it, and, if necessary, to rescind it. The application would not, however,
H be entertained except for good reasons, but there was no doubt that it can be made. In the present case, the bankruptcy is still in being, and the order carries conditions with it. The court had ample jurisdiction to vary the order which was made varying the terms on which it was granted.

Kingham, in reply : Bankruptcy does not end on discharge. What

is not affected by a discharge is the property which, under the Bankruptcy Act, 1914, s. 38, vests in the trustee, by reason of the bankruptcy. *Re Tregaskis, Ex p. Tregaskis* (6) is very different from the present case. In *Re Tregaskis, Ex p. Tregaskis* (6), the discharge was granted subject to a condition, and the application which was made was in respect of the condition, which was still subsisting. Sect. 108 says that the court has power to rescind. It must, however, be in a proper case. This application relates to the condition only. So far as *Re A Debtor, Ex p. The Debtor* (No. 1088 of 1923) (8) is concerned, that was a case in which there was an application under sect. 5 (3) to rescind a receiving order on the ground that it ought not to have been made. The matter has nothing to do with the present case. *Harman v. Official Receiver, Petitioning Creditors and Trustee* (9) does not affect the matter either. In *Phillips v. Batho* (11), it was said by SCRUTTON, L.J., that judgments as to status are *in rem* and binding against all the world.

SIR WILFRID GREENE, M.R. : On Aug. 26, 1926, a receiving order was made against the appellant, and on Sept. 23, 1926, he was adjudicated bankrupt. On June 30, 1936, he applied for his discharge. At or about the same time, the official receiver made an application under the Bankruptcy Act, 1914, s. 51 (2), which empowers the court to make orders as to payments of salary or part of salary to the trustee in bankruptcy for application in such manner as the court may direct. The bankrupt was in receipt of a substantial salary, and that was the reason why that application was made. Those two applications were disposed of by Mr. Registrar PARTON in two orders. The first order was dated Dec. 15, 1936, and it was made on the debtor's application for his discharge. The order stated that proof had been made of the facts (i) that the assets were insufficient to pay 10s. in the £, and (ii) that the bankrupt had brought on his bankruptcy by unjustifiable extravagance in living. Those are matters which, under the Bankruptcy Act, 1914, s. 26, have to be dealt with. The order suspended the bankrupt's discharge for 6 months, and discharged him as from the expiration of the 6 months—that is, as from June 15, 1937. Then it contained these words :

... without prejudice to any application or order made or to be made under the Bankruptcy Act, 1914, s. 51 (2).

Those words were inserted because, as the registrar knew, and as everybody knew, the official receiver's application under sect. 51 (2) was about to be dealt with. It was in fact dealt with 2 days later by an order of Dec. 17, 1936. That order recited that the bankrupt was in receipt of net earnings and salary amounting to at least £2,500 per annum, and that it appeared just and reasonable to the court :

... that the annual sum of £312, a portion of the said salary of the bankrupt ought to be paid to the official receiver as trustee, by monthly payments of £26 during the bankruptcy in order that the same may be applied in payment of the debts of the bankrupt, and that the first of such payments ought to be made on Dec. 26,

1936, and be continued monthly until this court [shall make order to the contrary.

Then the order provided :

. . . the said sum shall be paid by the said bankrupt in manner aforesaid out of the bankrupt's said salary.

Then liberty was reserved to either party to apply.

At the date when those two orders were made, it was the intention of the registrar, as was perfectly well understood by the parties, that the order with regard to the payment of £312 per annum was an order that should continue to operate even after the 6-months period of suspension had elapsed, and further, under the references in the order of Dec. 17, 1936, and the liberty to apply, it was, to the knowledge of everybody, in contemplation that at a later stage some application would fall to be made, and, in particular, an application by the official receiver in the light of the following circumstances. At that date—that is to say, in Dec., 1936—the bankrupt, under an arrangement with the Inland Revenue authorities, was making payments of £20 per week in respect of an undischarged income tax liability, and, as soon as that arrangement had been worked off and those payments came to an end, it was contemplated that an additional sum would be ordered to be paid out of his salary to the official receiver—that is to say, a sum in addition to the £312 per annum already ordered. The date for discharge duly came, and after the discharge, for a substantial period of, I think, a year, or thereabouts, the bankrupt continued to make the monthly payments directed by the order of Dec. 17. His solicitors then took the point that, under the order, the obligation to make payments came to an end when the discharge date arrived, and they claimed that the bankrupt was thereupon free from his obligation under the order. They further claimed repayment of the sums which had been paid in respect of the period subsequent to the discharge.

The result of that was an application to Mr. Registrar PARTON which, in its final form, raised questions as to the effect of the orders of Dec. 15 and Dec. 17, and as to the jurisdiction to make them. On July 6, 1938, Mr. Registrar PARTON made an order to the following effect. He first of all declared that the court had no jurisdiction to make it a condition, in granting the bankrupt his discharge, subject to a suspension, that the same be without prejudice to an order to be made under sect. 51 (2) of the Act, so far as the words “without prejudice to any order to be made under sect. 51 (2)” are intended to operate after the period of suspension runs out. That means, I understand, that it would not be permissible, in an order directing discharge after a period of suspension, to reserve to the court power to make an order under sect. 51 (2) after the date when the suspension ran out. Secondly, he declared :

. . . that the order of Dec. 17, 1936, was not made under or by virtue of the words “without prejudice” . . . in the order of discharge of Dec. 15, 1936, but under the power conferred by sect. 51 (2) which can be exercised by the court at any time

up to the discharge of a bankrupt taking effect, and that such an order comes to an end on the discharge becoming effective. . . .

Thirdly, he declared :

. . . that the words "during the bankruptcy" in the order of Dec. 17, 1936, refer to the period during which the respondent remained undischarged.

No appeal was brought from that order, and, on this appeal as between **A**
the parties, it must be taken that that order is a binding order. The
effect of it, of course, was that the order for payment of the monthly sums
came to an end when the discharge took place—that is to say, on June 15,
1937. It appears that the form of order which was adopted by Mr.
Registrar PARTON in his order of Dec. 17, 1936, is a form which has been **B**
in use for a great many years. It appears to have been generally under-
stood—and certainly Mr. Registrar PARTON, as he himself tells us in his
judgment, always understood—that the effect of that order was to make
payments of this character continue to be exigible after the suspension
had come to an end. That was the intention of the registrar, and **C**
it was what was in contemplation by either party, as I have already
said. When he delivered judgment on those questions, the registrar
indicated at the end of his judgment that the case was one where the court,
if it had jurisdiction, might review its previous order, and make an order
of the kind which it had intended to make originally. Acting on the **D**
suggestion so made, the official receiver made an application for a review
under the Bankruptcy Act, 1914, s. 108 (1). That application was dealt
with by Mr. Registrar PARTON in two stages. First of all, he dealt with
the question whether or not, in the circumstances of the case, he had
jurisdiction under sect. 108 (1) to re-open the matter, and, on the second **E**
occasion, he dealt with the matter on the merits. Pursuant to an appli-
cation to this court, an arrangement was made by which both those
matters could conveniently come before this court together, and they now
so come. The orders against which the appellant appeals are two. One
of those orders is dated Oct. 20, 1938. That was an order under which **F**
Mr. Registrar PARTON, having decided that there was jurisdiction, made
the consequential order for the hearing of the respondent's application
for discharge on Dec. 15, 1936, to be re-heard for the purpose of enabling
the court to determine whether, and in what manner, the order made
on such application on Dec. 15, 1936, should be reviewed or varied. **G**
The other order is dated Dec. 2, 1938, and it is to this effect. First of
all it varied the order of Dec. 15, 1936, by striking out the words :

. . . without prejudice to any application or order made or to be made under the
Bankruptcy Act, 1914, s. 51 (2).

In lieu thereof the following words were substituted : **H**

. . . subject to the condition that the respondent do, notwithstanding the limitation
of the suspension of his discharge from bankruptcy to the period of 6 months from
Dec. 15, 1936, pay to the official receiver as trustee, for distribution among the
creditors in the bankruptcy, out of his future earnings after acquired property and
income, until the said creditors shall have received 10s. in the £, the sum of £312
per annum by equal monthly instalments of £26 each until the termination of the

existing arrangement between the respondent and the Commissioners of Inland Revenue whereby he is paying £20 per week to the said commissioners, and thereafter £800 per annum by equal monthly instalments of £66 13s. 4d. each, the first of the above-mentioned instalments to be paid on Jan. 2, 1939.

Then the official receiver was given leave to apply as to the larger payment on evidence of the termination of the arrangement with the Inland Revenue authorities, or on evidence that the respondent was unduly delaying the completion of that arrangement.

From those two orders the debtor appeals, and he raises a number of points. The point which logically comes first is as to the jurisdiction of the court to review the order of Dec. 15, 1936. It was said, in the first place, on behalf of the appellant, that the jurisdiction under sect. 108 (1) does not continue after the discharge has taken effect. It was suggested at one period in the argument that, in the present case, to assert that that jurisdiction continued would in effect be to enable the court in some way to alter the status of the bankrupt by putting him back into bankruptcy. I may say at once with regard to that argument that, whether or not the court, in a proper case, has that power to alter the status of the bankrupt under the section, in the present case nothing of the sort has been done. The bankrupt was discharged. His discharge is effective, and he remains discharged. He is no longer an undischarged bankrupt, and there is nothing in this order which puts him back into that condition. The order is entirely without prejudice to the discharge, and merely does what could admittedly, by a proper form of words, have been provided in the original order for discharge. It continues the personal order against the bankrupt in such a way that it operates after his discharge, and imposes upon him liability in respect of after-acquired property which would not vest in his trustee in bankruptcy. Therefore, in my opinion, the suggestion that this in some way interferes with the status of the former bankrupt is entirely unjustified.

The main argument on this head—namely, that the jurisdiction of the court under that section ceases when the bankrupt is discharged—is put in this way. It is admitted that in the order of discharge, whether or not it contains a suspension clause, it is competent to the court to insert a condition such as that with which we are now dealing, which will continue to operate after the discharge has become effective. That is conceded. It is also conceded that, in a case where that has been done, the court, under sect. 108, retains its jurisdiction to vary any such condition, even though the discharge has become effective. For instance, supposing a bankrupt's discharge were suspended for one year and the order imposed a condition upon him that for 3 years he should make certain payments out of his salary or some other source, there would be a case where the order for payment would continue for 2 years after the discharge. It is not suggested that, in the second year or in the third year, the court would not have jurisdiction to vary that condition, and it is obviously for the benefit of bankrupts in general that the court should have such a power. It could vary such a condition by reducing

the amount if it became impossible or if it became a hardship on the bankrupt to pay it. Similarly, if it can do that, it must have the power to raise the amount if, owing to a change in the bankrupt's circumstances, it is right and proper that he should make a larger payment. Therefore it is conceded that the jurisdiction under sect. 108 (1) is not terminated by the mere discharge in bankruptcy. However, it is said that, as a condition of its continuance, there must be in existence at the time when the jurisdiction is invoked some subsisting, continuing and operating order. In the case that I have put, there would be in the second year and the third year an order still in operation. The bankrupt would, so to speak, still be on the string, although he had obtained his discharge, because the Court of Bankruptcy had kept its hand upon him. In the present case, it is said that, having regard to the construction which the registrar has put upon his own order, and his declaration as to its effect, the string was cut as soon as the period of suspension came to an end, and there was no foundation upon which the court's jurisdiction under sect. 108 (1) could be based. I am quite unable to find from the language of the section any ground whatsoever for drawing a distinction of that kind. The language of the section is perfectly general: "every court having jurisdiction in bankruptcy under this Act." The court had jurisdiction in bankruptcy under the Act. The order of discharge did not take away the jurisdiction of the Court in Bankruptcy, because admittedly the discharge of the bankrupt does not put an end to the bankruptcy regarded as a series of judicial and administrative acts and rights and powers. It is true that the discharge of the bankrupt has the effect which the statute states, but that does not mean that as from the date of discharge there is no court having jurisdiction in bankruptcy within the true meaning of sect. 108 (1). That would be a perfectly hopeless construction. The court, therefore, fulfils the definition laid down. Its power is to review, rescind, or vary any order made by it under its bankruptcy jurisdiction. The order which Mr. Registrar PARTON has reviewed was made by him under his bankruptcy jurisdiction, and accordingly the language of the section, if properly construed according to its ordinary meaning, is amply sufficient to cover this case. Moreover, I can find no justification for writing into that clear language some qualification which would exclude its application in such a case as the present. Therefore I come to the conclusion, and quite clearly come to the conclusion, that Mr. Registrar PARTON had jurisdiction under the section.

Here another point was taken to which I must refer, and it was this. It was said that the result is absurd, because the order of discharge discharged the debtor, according to the language of sect. 28, from all debts provable in the bankruptcy, with certain exceptions. It is said that the order must be bad, or that it is meaningless in that it directs that the payments to be made under it are to be applied in distribution among the creditors in the bankruptcy. It is said that there are no creditors in the bankruptcy of this debtor, because he has been discharged, and

the effect of that is to discharge him from all his debts. That I can deal with in a sentence or two. The phrase "the creditors in the bankruptcy" in the order has a perfectly clear meaning. It means those persons who were creditors in the bankruptcy, and the fact that the debtor is, by the order of discharge, released from his antecedent liability

A to pay those debts does not make those persons any the less "creditors in the bankruptcy." It is perfectly clear what persons are meant by that order, and I can find no such objection to the order as is suggested by Mr. Slade.

- The next point that was taken was this. It was said that the power
- B of attaching conditions to a bankrupt's discharge in a case where the discharge was suspended must be exercised concurrently with the power of suspension. For that, reliance was placed upon the Bankruptcy Act, 1914, s. 26 (8), which must be read in conjunction with sect. 26 (2), which empowers the court to grant or refuse discharge, to suspend its
- C operation, or to grant a discharge subject to conditions. It is said that, where there is an order for suspension, the only power to impose conditions is a power to do so concurrently, that in the present case the power to order suspension was exercised by the order of Dec. 15, 1936, while the conditions were imposed by the order of Dec. 2, 1938, and that
- D this was not a concurrent exercise of the two powers. There again, in my opinion, there is no substance in that argument at all. It seems to me that, if one reads those provisions of sect. 26 together with sect. 108 (1), as one is bound to do, it is impossible to say that an imposition of a condition under the power in sect. 108 (1) is not a concurrent exercise
- E within the meaning of sect. 26 (8). One test of that can be obtained by reference to a point to which I have referred earlier in this judgment. Take a case where a bankrupt has obtained his discharge subject to suspension for one year, with the condition that he shall, during 3 years from the order, make certain payments. It is not disputed, as I have
- F already said, that after the expiration of the first year the court can alter those conditions, can cut them down, can add to them. That would not be a concurrent exercise of the power of imposing conditions in the narrow sense in which Mr. Slade would have us construe those words. However, even he was constrained to admit that in such a case the court
- G would have jurisdiction by a subsequent order, after the discharge had become effective, to impose a new condition by calling for a further or a different class of payment. If that is a concurrent exercise, the present is a concurrent exercise. All I need say is that all these provisions must be read together, and must be made to work together, and, once that is
- H appreciated, the point really raises no difficulty at all.

Finally, an argument was put before us based on the merits of the case. I do not wish to say anything about the details of this case more than that the case is one in which, as it seems to me, on the merits, the rigour of the bankruptcy law under the present powers of the court could, and should, properly be applied to this debtor. I can see no ground

whatsoever for criticising the fairness or propriety of the order which the registrar has made. If that order had been made in the first instance, as indeed it was considered that it had been made, no complaint could possibly have been made. It is said, and it is said truly, that the jurisdiction under sect. 108 (1) to re-hear is one that must be exercised with great caution. That does not mean that the very beneficent and useful powers which the section confers, both from the point of view of debtors and from the point of view of creditors, ought not to be exercised in a proper case. There is always a danger when one is told (and quite rightly told) that some particular power of the court must be exercised with great caution. The court may be led to think that "safety first" is the best motto in such matters, but the power is there, and is intended to be exercised, and, in a proper case, ought to be exercised. In the present case, not only do I think that the power, in the circumstances of the particular case, ought to have been exercised, but also I think that it has been exercised in a perfectly proper and just manner. In the result, therefore, the appeal fails on all points, and must be dismissed with costs.

MACKINNON, L.J. : I agree, and I do not think that I can usefully add anything.

CLAUSON, L.J. : I agree. I only wish to add this caution. There was no appeal from the judgment of Mr. Registrar PARTON which was delivered on July 6, 1938, and this case, of course, has been argued, and has had to be argued, in this court on the footing that that decision was correct. As there is no appeal, it is not for us to express any view about it, but I think that it is only right, as an assistance to those who have to administer the Act, to point out that any court which has to consider a similar problem in the light of the judgment of Mr. Registrar PARTON of July 6, 1938, will not be able to consider the problem without having regard to the reasons for the present judgment which have been expressed by SIR WILFRID GREENE, M.R.

Appeals dismissed, with costs.

Solicitors : *Amery-Parkes & Co.* (for the appellant); *The Solicitor, Board of Trade* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

MARRISON v. BELL.

[COURT OF APPEAL (Scott, Finlay and du Parcq, L.J.J.), February 27, 1939.]

Master and Servant—Remuneration—Wages—Illness—Deduction of benefits received under National Health Insurance Act, 1936 (c. 32).

A An employee fell ill on Dec. 4, 1937, and, upon his return to work on Mar. 26, 1938, was given notice to terminate his employment. No wages were paid to him in respect of the period between those dates, but he received the benefit to which he was entitled under the National Health Insurance Act. In an action to recover his wages, it was contended that, having received the benefit under the National Health Insurance Act, he was not entitled to recover his wages :—

B HELD : the benefits conferred by the National Health Insurance Act are intended to be an addition to the financial emoluments of the workman, and he was, therefore, entitled to recover his wages in full for the whole period of his illness up to the time his employment was duly determined.

[EDITORIAL NOTE. For many years now the question has been argued whether C a workman in receipt of benefit under the National Health Insurance Acts ought not to give credit for the same when claiming his wages during a period of sickness. This argument has often been supported by the contention that the employer pays, at any rate, a part of the contributions to the fund from which such benefits are paid. The better view has always been that no deduction is possible, and indeed for some years now a precedent of a clause in service agreements making special D provision for such deduction has been published. This view has now been indorsed by the Court of Appeal, basing their decision upon the old authority of *Cuckson v. Stones* (1), which has always been regarded as establishing the proposition that full wages are payable during sickness, apart from a special provision or determination of the contract by notice. It is pointed out in the careful and closely reasoned judgment of SCOTT, L.J., that there is really no hardship on the employer, since in E practically every case he can determine his liability by giving a week's notice to the employee. Of course, in cases where a longer notice may be necessary, it is not uncommon to make special provision for illness, and in such cases the circumstances are often such that the Insurance Acts do not apply. Some consideration is given also to the much discussed case of *Elliott v. Liggins* (5), which dealt with the rather similar position in respect of workmen's compensation. This has usually been F justified upon the provision in the Workmen's Compensation Acts against double remedies, but the judgment herein gives an additional reason for the application of a different principle in that case—namely, that the compensation is based upon a calculation dependent upon his average weekly earnings.

AS TO WAGES DURING SICKNESS, see HALSBURY, Hailsham Edn., Vol. 22, p. 134, para. 222 ; and FOR CASES, see DIGEST, Vol. 34, p. 86, Nos. 631-640.]

G Cases referred to :

(1) *Cuckson v. Stones* (1858), 1 E. & E. 248 ; 34 Digest 71, 483 ; 28 L.J.Q.B. 25 ; 32 L.T.O.S. 242.

(2) *Warren v. Whittingham* (1902), 18 T.L.R. 508 ; 34 Digest 86, 634.

(3) *Niblett v. Midland Ry. Co.* (1907), 96 L.T. 462 ; 34 Digest 86, 639.

H (4) *Storey v. Fulham Steel Works Co.* (1907), 24 T.L.R. 89 ; 12 Digest 377, 3121.

(5) *Elliott v. Liggins*, [1902] 2 K.B. 84 ; 34 Digest 490, 4063 ; 71 L.J.K.B. 483 ; 87 L.T. 29 ; 4 W.C.C. 11.

(6) *Warburton v. Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663 ; 12 Digest 378, 3122 ; 86 L.J.K.B. 529 ; 116 L.T. 107 ; 10 B.W.C.C. 93.

APPEAL by the plaintiff from an order of His Honour Judge ESSENHIGH,

BB*

sitting at the Sheffield County Court, dated Nov. 18, 1938. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

W. A. Macfarlane for the appellant.

John Neal for the respondent.

Macfarlane : At common law, it is well settled that a servant's incapacity through temporary illness does not dissolve the contract, or disentitle him to his wages. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, paras. 221, 222, and *Cuckson v. Stones* (1).] There is nothing in the National Health Insurance Acts to support the judge's view that the common law is in any way changed as affecting persons insured under the Acts. Sect. 47 of the Act of 1911 did contain a provision expressly modifying the right to wages, but this section was expressly repealed by the 1918 Act, and has not been replaced in any way by the subsequent Acts. It would be inconsistent with the system of the Acts to read into them any such provision. The various benefits under the Acts are given without reference to the servant's wages. In this respect, they are based on a principle quite different from that of the Workmen's Compensation Acts. None of the benefits under the 1936 Act is calculated in reference to the right to wages. The common law is untouched. [Counsel referred to *Warren v. Whittingham* (2), *Storey v. Fulham Steel Works Co.* (4), *Niblett v. Midland Ry. Co.* (3), *Warburton v. Co-operative Wholesale Society, Ltd.* (6) and *Elliott v. Liggins* (5).]

Neal : The judge was right. A workman cannot take both benefits and wages at one and the same time. *Cuckson v. Stones* (1) and the other cases cited have never been applied to the case of a weekly servant. If a weekly wage-earner is away from work for, say, 3 weeks, that is enough to frustrate the object of the contract. Under the Workmen's Compensation Acts, a man gets only half wages. Unless sickness benefit is alternative to wages the servant would get more when he was sick than he would when he was at work. A contract of employment may continue while wages cease to be paid. [Counsel referred to *Warburton v. Co-operative Wholesale Society, Ltd.* (6).] The case should be sent back to the judge to find the facts, if the argument as to frustration weighs with the court. The question is whether or not the basis of the contract has gone if the man is unable to come to work.

SCOTT, L.J. : In this case, a workman appeals from the decision of His Honour Judge ESSENHIGH, sitting at Sheffield, who dismissed his claim for arrears of wages during a period of incapacity by illness. The judge decided, without considering any of the decided authorities bearing on the matter, in favour of the defendant, on the ground that, in a case where the National Health Insurance Act gives the workman rights to various benefits under that Act during any period of incapacity by illness entitling him to those benefits, there is a term implied in the contract of service that, whilst in receipt of benefit, the workman's contract, under

which he has the right to receive wages, is modified by an implied term that the right to wages is wholly suspended. In my view, there is no such implied term.

- A It is desirable to state the facts quite shortly in order to see how the question arose. The plaintiff in the case had been employed as a salesman by the defendant's father for a period of 14 years till May, 1937, when the father died. The son, the defendant in the county court and the respondent here, had been a partner, or otherwise concerned, in the father's business, and, on the father's death, took over the business, and
- B took over the persons employed by his father. The terms of service under which the plaintiff had been employed were that he was paid £3 10s. per week as a salesman of fruit and vegetables outside the defendant's shop, the shop being that of a wholesale tobacconist, and the plaintiff's engagement being a weekly engagement. That is all we know
- C about the terms of service, and we must take it that those were all the express terms. On Dec. 4, 1937, which was a Saturday, the plaintiff became ill, and the defendant was informed of the fact on Monday, Dec. 6. The plaintiff was admitted to hospital, and ultimately, on Mar. 26, 1938, the defendant gave the plaintiff notice to terminate the
- D contract of service. Hence the action which was brought shortly afterwards.

- The defence set up is that it was an implied condition of the contract that it should be discharged in the event of the plaintiff being unable through incapacity to perform his services, with an alternative
- E that the illness of the plaintiff constituted a breach of the contract. With that we need not trouble further, as it was obviously not a breach of the contract. The county court judge decided the case, not on the ground that the contract was wholly terminated, but on the ground that, although it was not terminated, the right to wages under it was brought to an end.
- F The reason that he did not decide that the contract was brought to an end was, I think, that, on the correspondence that passed between the parties, it was quite impossible for him to take that view.

- On Apr. 8, the plaintiff's solicitors wrote to the defendant stating the facts, and referring to the illness through rheumatism of the plaintiff,
- G and added :

Our instructions are that on Saturday, Mar. 26 last when our client presented himself at your place of business you gave him a week's notice. This was the first intimation our client had that you were terminating his employment. Our instructions are to apply to you for our client's £3 10s. a week up to the expiration of his notice on the 2nd instant.

- H It is clear from that that the plaintiff was taking the view that he had received a proper notice to terminate his employment on that date. That view was assented to by the defendant himself, because, in answer to that letter, on Apr. 11, he writes a letter the second paragraph of which is as follows :

In accordance with the terms of Mr. Marrison's engagement as a shop assistant he was given a correct and proper notice to terminate his employment with me.

For your information, Mr. Marrison was duly paid £3 10s. on the 26th ultimo, in lieu of him working the week's notice.

On those facts, it was clear that the parties treated the contract of service as continuing until the expiration of that notice, and, therefore, it was impossible for the county court judge to uphold the defence, the terms of which I have stated. We have been furnished by counsel for the appellant workman with a copy of the notes of the judge's judgment, and from those notes, which are accepted by counsel for the respondent as approximately accurate, we find the views expressed by the judge :

I find as a fact that Mr. Marrison never received any wages when off sick. When off sick, in the absence of any express contract, no wages due.

That is a statement of a proposition of law that, unless the right to wages is expressly preserved by an express term of the contract, wages are not due during sickness. It then appears that the county court judge said that the employment was still in existence, but that there was no contract for any specific period, and that the case must be

... decided on its own particular facts. It is a question if a man is not working by reason of sickness, he is entitled to wages. We have no authority at all in regard to position of a man under National Health Insurance Act.

He then expressed the view that it would be inequitable for a man to be entitled to his wages at a time when he was receiving benefit under the National Health Insurance Act, and held that that was a sufficient reason to support his general view that there is no such right to wages during sickness as had been alleged on behalf of the plaintiff.

The county court judge supported his view by reference to two cases, to which I will now refer shortly. A long series of decisions has been given in our courts, making it quite clear that the common law of this country does not recognise any such rule in contracts of service as is suggested by the county court judge. On the contrary, those cases say, in my opinion quite clearly, that, under a contract of service, irrespective of the question of the length of notice provided by that contract, wages continue, through sickness and incapacity from sickness to do the work contracted for, until the contract is terminated by a notice by the employer in accordance with the terms of the contract. An argument based upon the doctrine of frustration was addressed to us by the respondent's counsel. I say nothing more about it for the moment, but I will deal with it presently. Apart from that, the law, I think, is quite clear, and to the effect that I have stated. The first and leading case on the subject is *Cuckson v. Stones* (1). That case, very different in its facts from this case, was the first of the decided cases on this particular topic. There, an employee employed under an agreement in writing for a period of 10 years to act as a professional brewer to the defendant fell sick, and was unable to work for a considerable time, but, during the time that he could not work, he gave some assistance to his employer in teaching him how to do the work himself. The question in the case was primarily whether or not the plea was demurrable. The plea in question averred that :

... the plaintiff was not, during any part of the time for and in respect of which

such wages are by that count claimed, ready and willing or able to render, and did not in fact during any part of such time render, the agreed or any service.

On a rule as to entering the verdict on that plea, the court held that a verdict in favour of the plaintiff given by a jury ought not to be disturbed, and that the rule granted for the purpose ought to be discharged. LORD CAMPBELL, C.J., delivering the judgment of the court, said, at p. 257 :

The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that, under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week : and, while the contract remained in force, we see no difference between his being so disabled for a day, or a week, or a month.

That, then, was the decision in the case of a contract for 10 years of definite service.

Next in order of date comes *Warren v. Whittingham* (2). As appears from the headnote in that case, the plaintiff there was engaged by the defendant :

... for a period of 5 years at a yearly salary, the plaintiff undertaking to devote the whole of his time to the defendant's business. During the period the plaintiff became temporarily ill and was in consequence prevented from performing his work. HELD, that the plaintiff was entitled to salary during the time of his illness.

In that case, BRUCE, J., who regarded the case as covered by *Cuckson v. Stones* (1), to which he referred, added that he could not find that that decision had ever been questioned, and said, at p. 509 :

In the present case the plaintiff was ready and willing to perform his work and was only prevented by temporary illness.

Judgment was given for him accordingly.

After that came *Niblett v. Midland Ry. Co.* (3). That was a case that came before the Divisional Court, consisting of DARLING and PHILLIMORE, JJ. As stated in the headnote, the plaintiff was a railway employee, who, upon entering the company's service

... signed an undertaking to abide by the rules of the company. One of these rules required him to join the railway company's friendly society, which was independent of the company, but to the funds of which the company contributed. By the rules of the society a member was entitled to sick pay during illness, but not if he was receiving wages from the company. The plaintiff became ill in Feb., 1905, and received sick pay until September, when he received notice terminating his employment.

It was held that he was not entitled to his wages during the period of his illness, on the ground that, having regard to the rules which had to be signed by an employee as a term of his contract of service, the rules must be read into the contract of service, and that, when so read in, they necessarily involved the implication of a term of the contract of service to the correlative effect of the rules of the society—namely, that, whilst entitled to sick benefit, his right to wages should be suspended. That, again, was a case in which the principle laid down in *Cuckson v. Stones* (1)

was recognised by the court. The decision, however, was that, by reason of the special terms of that contract, the ordinary principle of law was excluded. Both the judges expressed their decision in those terms.

The case next in order of date is *Storey v. Fulham Steel Works Co.* (4), a decision of the Court of Appeal, consisting of LORD ALVERSTONE, C.J., and BUCKLEY and KENNEDY, L.JJ. In that case, there was an agreement for 5 years, and the same sort of question arose. There was a passing reference to the doctrine of frustration, but the decision of the case was that *Cuckson v. Stones* (1) had expressed the ruling principle in such cases.

The next case is *Elliott v. Liggins* (5), in which a different question was raised for the first time—namely, accepting the rule laid down in *Cuckson's* case (1) that there was no implied term suspending the right to wages during incapacity by illness, none the less, if a workman so employed under such a contract claimed compensation under the Workmen's Compensation Act, 1897, and was in receipt of compensation during partial incapacity for work (compensation being based, as is well known, upon the basis of his average weekly earnings), must the Act be treated as introducing a modification of the contract of service, which had the effect of depriving the workman, whilst claiming from his employer compensation which may be described as roughly half the weekly wages, from at the same time recovering from his employer his whole weekly wages? LORD ALVERSTONE, C.J., said, at p. 86:

It seems plain from the sections to which I have referred, and from the fact of the plaintiff having given notice and received this weekly payment, that his conduct was inconsistent with the view that he was still entitled to the whole of his original wages. . . . I think that a workman who takes the benefit of the Act on the ground of his incapacity to earn wages, and obtains compensation based on the footing of those wages, cannot turn round and say that he is entitled to the balance of his wages during the time in which he has been disabled from work and receiving compensation.

It is to be observed that LORD ALVERSTONE, C.J., does not in express terms say that the Act in question shall be interpreted as modifying the contract of employment, and does not give a specific legal reason for this conclusion. DARLING, J., however, came nearer to the reason, because he said, at p. 86:

The compensation is, therefore, payable in lieu of the wages which he has lost.

In the same case, CHANNELL, J., said, at p. 87:

. . . I think the best way of putting it is that the plaintiff, by claiming and accepting something which is absolutely inconsistent with his right to claim his wages, is estopped from saying that he is entitled to recover those wages.

The last case to which I need refer is *Warburton v. Co-operative Wholesale Society, Ltd.* (6), a case which was heard first before a Divisional Court and then in the Court of Appeal. The headnote is as follows:

The fact that a workman stays away from work and receives compensation from

his employers during temporary incapacity for work resulting from injury received by him during the course of his employment does not of itself terminate the employment, even though the contract of employment is merely at will.

A This is one of the cases mentioned by the county court judge in his judgment, and no doubt he had that decision in mind when he held that the contract of employment was not terminated by the plaintiff's illness. In that case, where the workman was suing for wages, LORD COZENS-HARDY, M.R., said, at p. 665 :

It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence.

B. He then refers to *Cuckson v. Stones* (1) as the authority. It is to be observed that that sentence is absolutely unlimited and unqualified in its terms, and a direct negative to the view of the county court judge in this case, and to the argument of the respondent that the wages ceased to be payable at common law as a result of incapacity to work by reason of temporary illness. LORD COZENS-HARDY, M.R., goes on to say, at p. 665 :

D I think this principle must apply to a case where a workman is receiving compensation under the Workmen's Compensation Act. It was held in a Divisional Court in the case of *Elliott v. Liggins* (5) that the service was not ended, although the man could not, while in receipt of compensation, receive wages, and apparently not even wages less the compensation. I feel some difficulty in understanding the ground upon which the latter point was decided, and I desire to keep an open mind if it should hereafter be necessary for this court to consider it.

In the same case, WARRINGTON, L.J., said, at p. 667 :

E It is clear that mere absence from work owing to illness or accident does not determine the contract of service : *Cuckson v. Stones* (1) ; and I am unable to see how a claim to and receipt of compensation under the Act [the Workmen's Compensation Act] could have that effect.

Also, SCRUTTON, L.J., said, at p. 668 :

F Under decided cases a servant incapacitated by illness and in the absence of notice under the contract does not cease to be employed unless the illness is such as seriously to interfere with or frustrate the business purpose of the contract.

He refers to *Cuckson v. Stones* (1) and *Storey v. Fulham Steel Works Co.* (4), and then says, at p. 668 :

G But, though still in employment, he is not entitled to full or any wages while receiving sick pay under the rules [made part of the contract as in *Niblett's case* (3)] or compensation under the statute [as in *Elliott's case* (5)]. The reason for this latter proposition is based either on an implied contract that a man who is receiving money because he is not able to work should not also claim the full money he would receive were he able to work, or, as in *Elliott v. Liggins* (5), on some kind of estoppel, which I do not clearly understand.

H Those are all the cases which have been decided in our courts bearing on this question, though in the Manx court there was a decision the other way, to which I do not think I need refer.

As, in the contract of employment, by reason of the incorporation of rules, as in *Niblett v. Midland Ry. Co.* (3), one may imply a term of the

contract suspending wages during the receipt of the benefit which those rules contemplate shall take the place of wages, so, in my view, it also results from the cases that, where, under the Workmen's Compensation Act, a man is getting half his wages in the form of compensation, it is right to interpret that Act as suspending the right at common law to the receipt of full wages during incapacity from accident or from a disease within that Act. I think that that is the true ground upon which to base the suspension of wages where, by reason of incapacity, a man is receiving compensation under the Workmen's Compensation Act. A

It is sought to say that that same principle which applies in the case of the Workmen's Compensation Act ought also to apply where a servant is in receipt of benefit under the National Health Insurance Acts, the Act in question being the Act of 1936, which is the last of the series of statutes which began with the Act of 1911. The first comment on that argument is that the benefits conferred by that last Act and by its predecessors are in their nature additional benefits conferred on the classes who come within the scope of those Acts, being mostly persons engaged as workmen. Those benefits are intended to be an addition to such financial emoluments as the workman may have during his life, to improve his position by giving him medical assistance, disablement benefit and others of a long list of additional benefits which will improve his lot. Those benefits are, in their nature, irrespective of the amount of wages as determined by the workman's individual contract of service. Rights are given independently of any relation between the rights and the wages as a general principle through the Acts, and there is absent—at any rate, from most of the earlier Acts, and certainly from the Act of 1936—any such ground as there is in the Workmen's Compensation Act for supposing that Parliament intended by the Act which conferred the benefits of Health Insurance to take away from the workman any right to wages that he might have. I suppose that the great majority of employed persons in this country are employed on terms of a week's, or, at any rate, a month's, notice—mostly a week's notice—and consequently there is no social need for protecting the employer from the liability of having to go on paying wages, since he can always terminate that liability within a short time. B C D E F

Putting it quite shortly, I can see no ground in that Act, the provisions of which we have considered, for saying that in it is to be implied a term modifying all contracts of service of persons who come within the scope of these benefits. I think that it is enough for the decision of this case to express the decision of the court in that negative form. I do not propose, therefore, to examine the particular provisions of that Act to which we have been referred. On those grounds, I think that the judge was wrong in his decision, and that the plaintiff succeeds in his action. The appeal will be allowed, with costs here and below. G H

FINLAY, L.J. : I am of the same opinion, and, though we are differing

from the judge in the court below, SCOTT, L.J., has explained the grounds of our decision so fully that I do not, for myself, desire to add anything.

DU PARCQ, L.J. : I agree, and I also think that it is unnecessary for me to add anything.

A *Appeal allowed, with costs in both courts.*

Solicitors : *Hoskings & Berkeley*, agents for *J. W. Fenoughty, Ashton & Co.*, Sheffield (for the appellant) ; *Gregory, Rowcliffe & Co.*, agents for *W. B. Siddons*, Sheffield (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

B

R. v. LARGE.

[COURT OF CRIMINAL APPEAL (Humphreys, Singleton and Lewis, JJ.),
February 20, 21, 1939.]

C

Criminal Law—Manslaughter—Ill-treatment of young person—Judge's direction to jury—Substitution of verdicts—Joinder of offences—Undesirability—Criminal Appeal Act, 1907 (c. 23), s. 5 (2)—Children and Young Persons Act, 1933 (c. 12), s. 1 (4).

D

The appellant was charged upon the first count of an indictment with the manslaughter of her foster-child, and upon a second count of the same indictment with having wilfully ill-treated him in a manner likely to cause him unnecessary suffering, or injury to his health. Medical evidence showed that the child had died from suffocation directly attributable to 2 blows on the head which had caused concussion, but there was no evidence as to how the blows had been received. In the summing up on the manslaughter charge, the judge directed the jury that any carelessness on the part of the accused might be sufficient to justify a verdict of manslaughter. On the second count, he directed them that the charge was an alternative one, in case they thought the manslaughter charge had not been proved, and that the act of ill-treatment must be a wilfully conscious act on the part of the accused. The jury returned a verdict of guilty on the charge of manslaughter, and indicated that they would return a similar verdict on the second count, but the court took the view that this count was included in the first count, and it was not, therefore, proceeded with:—

E

HELD : (i) the judge had misdirected the jury, in that he had suggested that an act of carelessness might justify a verdict of guilty of manslaughter.

F

(ii) this was a case in which the court should act on the power given to it by the Criminal Appeal Act, 1907, s. 5 (2), and substitute for a verdict of guilty on the first count one of guilty on the second count, with, in this case, a reduction of sentence.

G

(iii) it was preferable that no additional count should be added to an indictment for manslaughter.

H

[EDITORIAL NOTE.] This case emphasises, perhaps, rather than decides, two points in connection with the law relating to manslaughter. To prove that charge, the prosecution must show a conscious act of the accused leading up to the death of the deceased. It is, therefore, improper to suggest to the minds of the jury that an act of carelessness might be the foundation of a verdict of guilty upon such a charge. There is importance, too, in the repetition of the warning that counts charging other offences should not be included in an indictment of murder.

AS TO MANSLAUGHTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 438-446,

Cases referred to :

- (1) *R. v. Bateman* (1925), 94 L.J.K.B. 791; Digest Supp.; 133 L.T. 730.
- (2) *R. v. Stringer*, [1933] 1 K.B. 704; Digest Supp.; 102 L.J.K.B. 206; 148
L.T. 503; 24 Cr. App. Rep. 30.

APPEAL against conviction at the Central Criminal Court upon a charge of manslaughter. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

The Children and Young Persons Act, 1933, s. 1 (4), provides as follows :

Upon the trial of any person who has attained the age of 16 years and is indicted for infanticide or for the manslaughter of a child or young person under the age of 16 years of whom he had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section to find him guilty of that offence.

A. M. Lyons, K.C., and *F. D. Levy* for the appellant.

G. B. McClure for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: This appellant, Dorothy Kate Large, was convicted at the Central Criminal Court upon the first count of an indictment, which contained two counts. The first count charged her with the manslaughter of Charles Hyde, who was in fact a child between 3 and 4 years of age. The second count charged her in the terms of the Children and Young Persons Act, 1933, with having been a person who, having the custody of Charles Hyde, wilfully ill-treated him in a manner likely to cause him unnecessary suffering or injury to his health. Mr. McClure, in the course of his argument, now regrets having inserted that second count in the indictment, because, as he has quite properly pointed out, the jury, if for any reason the charge of manslaughter was not made out, could, on the evidence of that charge, have convicted the accused of the offence within the terms of the Children and Young Persons Act, 1933, s. 1 (4). The appellant was also indicted for the murder of that child, but upon that indictment the prosecution offered no evidence, and she was acquitted. She now appeals from the conviction of manslaughter, but does not desire to appeal from the sentence which was passed upon her—the extremely lenient sentence of 12 months' imprisonment. The grounds of appeal are confined to allegations that the judge misdirected the jury on a question of law. It is not contended, and cannot be contended on the facts of this case, that there was not ample evidence on which the jury could return a verdict of guilty on a proper direction. That that is so may be shown by a very short statement of the facts of the case.

The appellant had in her custody and control a child between the age of 3 and 4 years, she apparently having adopted the child, which was referred to as her foster-child, for a consideration. She received money

for looking after the child. She was given a good character, and there was no evidence that she was otherwise than kindly disposed to the child up to the day of the child's death. That occurred on Dec. 1, 1938, the child having been in her custody for nearly a year. On that day, the accused told the police, she told her friends, she told her neighbours, and she told everybody with whom she came into contact, that she was very much distressed by the fact that she had taken the child to a shop and there he had disappeared. She had lost him. She meant that he had been stolen by somebody, and she persisted in telling that story over a period of many hours—in fact, for days. That story was completely and entirely untrue, because the dead body of the child was found by the police in the place where the appellant had placed it. She had at first placed the dead body of the child in the loft of her house, then had put it in the pram, and then had put the pram in the garden of her house, where it was subsequently discovered.

The *post mortem* examination was made by Sir Bernard Spilsbury, whose experience is second to none. He gave evidence that upon the body of that child there were no less than 27 distinct bruises, of which 9 were on the head, and 2 were such that, in the opinion of that eminent authority, one or both would be likely to cause concussion of the brain, and its attendant unconsciousness. The child died from suffocation, and suffocation was, in the opinion of Sir Bernard Spilsbury, whose view was not in any way different from that of another doctor who also saw the body, caused by the fact that, one or both of the bruises on the head having caused unconsciousness, the child vomited just about the moment unconsciousness supervened. Some of the vomit had got into its mouth, and since the child was lying on its back, and was unconscious, some of the vomit found its way into the air passages, so that the child died of suffocation.

In seeking for an explanation of that child's death, the main question was how those two bruises came to be on the child's head. In the opinion of Sir Bernard Spilsbury, they were quite incompatible with anything but direct violence, caused by something striking the child's head. It was suggested that one of the bruises might have been caused by the child falling out of bed. That was said by Sir Bernard Spilsbury to be impossible, for more than one reason. The bruises were such that they could only be accounted for by the child standing up in bed and then falling over and hitting his head on the floor. In that case, Sir Bernard Spilsbury pointed out that the child would become unconscious from concussion, in which case the evidence for the defendant was completely untrue, because she said that she came back after some long period of absence and found the child hanging over the side of the bed with his head hanging down. It was quite impossible, according to the evidence, for the bruises to have been caused by the child's falling on the floor, because he would have lost consciousness, and would never have got back to bed at all.

That was the evidence, and the whole material evidence, in the case. The accused, who gave evidence on her own behalf, said that, on coming back from her shopping on that morning, she found the child in bed, with his head hanging downwards. She had left him without any marks on him except some which it was not suggested were caused by any impropriety of the accused and which had no connection with the death of the child, and with that exception the child had no mark upon him. She gave no explanation whatever of the terrible state in which the child in fact was when his body was found. She suggested—and the suggestion was put forward to the jury by her counsel—that most of the bruises, at all events, could be explained by the fact that the child was trying to get away from the bed, and trying to get out of the window, and so forth. That may have been true of some of them, but what goes to the very root of the matter is that she had no explanation to offer for those two bruises, one or both of which caused concussion and unconsciousness, which in turn caused the child's death. It was in these circumstances that the judge who presided at the trial had to direct the jury on the charge of manslaughter.

The judge commenced his summing up by giving to the jury the best possible indication on the subject of onus of proof, and then he proceeded to give to the jury that definition of the crime charged in the indictment (I am referring to the first count of the indictment only) which is usually to be found in a summing up. He stated the law as follows :

Manslaughter consists in the unlawful killing of another. It means this, that the prisoner has done something in an unlawful act which has brought about the death, and, if by any carelessness or by any act that she had done which you think is of a culpable character, then she is guilty of manslaughter ; but you have got to find that what she has done has brought about the death. In this case, what is said is that there is no real evidence of the person who struck the blows, but the position is this, that she was left alone with that child.

The judge then referred to the fact that, when she was left alone with the child, he had no marks upon him.

Mr. McClure, for the Crown, has not found it possible to argue that that definition of manslaughter contained in those words which I have read is a correct definition of the law. The court has carefully considered that passage in the summing up with a view to seeing whether or not it is possible to regard it as a mere indication of some way in which manslaughter might be committed, but, having regard to the language used, and to the direct intimation of the judge to the jury that he is dealing with the facts of this case—an intimation that they may find that what the defendant had done was in fact through carelessness on her part—the court feels itself bound to say that that is a misdirection, and, unfortunately, a misdirection upon the vital question of the meaning in law of the expression “manslaughter.”

The judge continued his summing up, and in the many passages to which we have been referred he speaks of the act which the accused had committed as an act which must have caused the death of the child.

In the last passage of the summing up, in which he left the matter to the jury, so far as the law is concerned, he observes as follows :

You have got to say whether in this case, either by some act that she did or by some of the circumstances in which she dealt with that child, she did anything which was responsible for the child's death.

A

In the opinion of this court, that expression is only likely to confirm to the jury the view which we know the judge never intended to indicate—namely, that any carelessness on the part of the accused might be sufficient to justify a verdict of manslaughter. It is true that there is a passage in which the judge stated the law in the manner in which he would desire to state it, and which is correct. He was speaking of the case for the prosecution and of the act done by the woman, and he said :

B

The little acts of dirtiness and so forth caused him to be offensive to the foster mother, and because of that she became bad-tempered, and in a fit of bad temper inflicted a wound which brought about this unconsciousness. Of course, if that was the circumstance, she might be found guilty of manslaughter.

C

That correct statement of the law being found wedged in as it is between those passages which I have read, the court has come to the conclusion that the jury might still have been misled as to what is necessary in law to constitute the crime of manslaughter.

D

It is only necessary to say in regard to that matter that the crime of manslaughter, so far as it may be caused by a negligent act, has been the subject of many cases. There was the judgment, which has become almost a classic, delivered by LORD HEWART, L.C.J., in *R. v. Bateman* (1), which has recently been approved in the House of Lords, and it is not necessary to refer to any of the cases to see that carelessness is one of the things which will not be alone sufficient to justify a conviction of manslaughter.

E

Mr. McClure has told us, and we accept what he says without any hesitation, that there was no suggestion of neglect at all on the part of the prosecution, and that the only case for the prosecution was, as the judge put it, that this woman of good character, who was usually good-tempered, had lost her temper, and perhaps her head, because of the dirty habits of the child, and had inflicted on the child a wound from which he had died. That was the case for the prosecution. The judge, in the course of his summing up, referred to the second count of the indictment, and he directed the jury as to the nature of their power in regard to the second count, which he said was an alternative charge, if they came to the conclusion that the offence of manslaughter had not been made out. He said :

G

H

Then you have to say to yourselves, if you do not think that anything she did was responsible for the child's death, or was properly put in the category of manslaughter : Did she do anything in the way of a conscious act that would cause that child, or did cause that child, unnecessary suffering ? That is described in the indictment as wilful ill-treatment. Wilful ill-treatment merely means that her conscious mind goes with the act which she does.

That, in the opinion of this court, is a perfectly correct statement of the law with regard to the offence under the Children and Young Persons

Act, 1933, s. 1 (1), a charge which was the subject of the second count of the indictment.

Unfortunately, we cannot lose sight of the fact that the very fact that the judge was emphasising to the jury, in that passage, that the act must be a conscious one, does rather draw attention to the omission of any suggestion of the necessity for a wilful conscious act when dealing with the charge of manslaughter. However, with regard to the charge of causing unnecessary suffering by ill-treatment, the definition is one with which the court sees no reason to quarrel. It is quite true, as Mr. Lyons has pointed out, that the judge, referring to what might amount to ill-treatment causing unnecessary suffering, made a passing reference to the fact that the child was very ill and that she omitted to call a doctor. In truth, that observation had no relevance to the case, and this court is not concerned with the suggestion that the appellant erred in not calling in a doctor. That was a mere illustration of causing unnecessary suffering by neglect, and is immaterial in this case. A B C

So far as the first count is concerned, upon that incorrect summing up, the jury found the prisoner guilty, with a strong recommendation to mercy, and the clerk of the court then said: "You also find her guilty upon the second count of cruelty to the child?" The foreman then made a very sensible observation: "Well, does not that go with the other?" The clerk of the court said: "I think it does, my Lord." D The judge said: "I should think it is more or less included in the other." Then he is reported to have made a strange observation: "You would not find a verdict of guilty on both." We do not know why they should not. "I should think that, if you find her guilty on the first count, it is included in the latter." E The foreman said: "We thought so." Then junior counsel who was assisting Mr. McClure said: "My Lord, the prosecution do not in the least press the matter." The judge said: "I should have thought it would have been more satisfactory to discharge her on the second count." F No doubt he meant "discharge the jury," and so discharge her. Then the clerk of the court said: "You will be discharged from giving a verdict upon the second count of the indictment." The indictment is properly so marked: "Guilty on Count 1. Count 2 not proceeded with."

I have already indicated the grounds on which we think the verdict of manslaughter cannot stand. There has been substantially a misdirection, and it is impossible to say what this jury would have done if properly directed, and therefore it is impossible to apply the well-known proviso. Our attention has been called to a provision contained in the Criminal Appeal Act, 1907, s. 5 (2), under which this court sits, H which provides as follows:

Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by

the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

A We have heard Mr. Lyons' objection to the legality or propriety of that subsection being adopted in this case, but, in our opinion, it is a right course for us to take in the peculiar circumstances of this case. In this case, in the circumstances, the jury have indicated quite clearly that, if the matter had been left to them, they would have been disposed to return a verdict of guilty on the second count of the indictment, and that they have not done so only because a superior power has directed that no verdict was required on that count. Accordingly, the court will act on the power given to them by that subsection.

B With regard to the sentence, the judge passed what I have already characterised as an extremely lenient sentence—namely, 12 months' imprisonment—on the charge of manslaughter. That being so, we think that we ought not to allow that sentence to stand on what is undoubtedly the lesser charge of cruelty to a child, and, in substituting, as we do, a verdict of guilty on the second count of the indictment for the verdict of guilty on the first count of the indictment, we reduce the sentence to one of 6 months' imprisonment.

C We think it right to add that this present case appears to illustrate the difficulty which arises from an unnecessary multiplication of counts in an indictment for manslaughter. There is authority in *R. v. Stringer* (2) a judgment of this court, delivered by AVORY, J., to the effect that it is unusual, and a course which ought not to be followed, to add any other count to an indictment for manslaughter. In the present case, without any second count the jury could have found the appellant guilty of cruelty to the child on the charge of manslaughter. In future, we think that it is better that no other count should be added to an indictment for manslaughter. That has always been the practice in murder cases. It was formerly the practice in manslaughter cases, and this court repeats now that it should be the practice in the future.

F Solicitors: *Edgar H. Hiscocks* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

EDWARDS v. QUICKENDEN.

[COURT OF APPEAL (Scott, Clauson and Finlay, L.JJ.), **February 13, 1939.**]

H *Admiralty—Jurisdiction—Collision—Collision of rowing boats on tidal river.*

On May 8, 1938, a collision between two rowing boats occurred on the River Thames, near Hammersmith. The plaintiff was in a single sculling skiff, and as a result of the accident sustained personal injuries which he alleged had been caused by the negligent steering of an eight belonging to the Westminster Bank Rowing Club. He commenced an action in the King's Bench Division, claiming damages against the defendants, who

were officials of the club. After the defendants had put in a defence and counterclaim, a summons was taken out to transfer the action to the Admiralty Division. This summons was dismissed by the master, but an appeal to the judge in chambers was allowed and the action ordered to be transferred subject to the consent of the President of the Admiralty Division. The plaintiff appealed to the Court of Appeal:—

HELD: as no reason had been shown for interfering with the judge's discretion to make the order, the appeal should be dismissed.

[EDITORIAL NOTE.] In the fourteenth century, there was a considerable conflict between the common law courts and the court of the Lord High Admiral as to their jurisdiction in maritime matters. In the reign of Richard II, the Admiralty jurisdiction was confined by statute to things done upon the sea, and "in great ships, being and hovering in the main stream of great rivers, only beneath the bridges nigh to the sea, and in none other places of the same rivers." The text of this statute varies in the ancient documents in which it appears, and, in any event, it only applied to the death of a man and mayhem. The civil jurisdiction of the Admiralty has been confined within similar limits.

AS TO ADMIRALTY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 79, 80, paras. 92, 93; and FOR CASES, see DIGEST, Vol. 1, pp. 107-109, Nos. 96-125.]

Case referred to:

- (1) *General Steam Navigation Co. v. London & Edinburgh Shipping Co.* (1876), Bitt. Prac. Cas. 127; 1 Digest 175, 870.

APPEAL by the plaintiff from an order of ASQUITH, J., dated Jan. 27, 1939. The original action arose out of a collision which occurred on May 8, 1938, on the Surrey side of the River Thames, near Hammersmith Bridge, between a single sculling skiff in which the plaintiff was sculling and one of the eights of the Westminster Bank Rowing Club. The action was started by ordinary writ in the King's Bench Division, but the defendants, the secretary and treasurer of the Westminster Bank Rowing Club, filed a defence in Admiralty form and applied to have the action transferred to the Admiralty Division and tried with nautical assessors. This application was refused, but ASQUITH, J., reversed that decision, and ordered that, subject to the consent of SIR BOYD MERRIMAN, P., the action should be tried in the Admiralty Division.

A. J. F. Wrottesley for the appellant.

Stephen Murray for the respondents.

Wrottesley: There are no sufficient grounds here on which the judge could make an order. The procedure of the Admiralty Division is so unsuited to this sort of case as to cause the possibility of serious injustice to the plaintiff. I refer to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22, regarding the Admiralty jurisdiction of the court. In the Merchant Shipping Act, 1894, s. 742, a ship is defined as "any vessel not propelled by oars." [Counsel referred to *General Steam Navigation Co. v. London & Edinburgh Shipping Co.* (1).] I do not contend that ASQUITH, J., had no discretion to make the order which he made, but that there is no justification for the exercise of that discretion in the way in which it was exercised.

Murray was not called upon.

- SCOTT, L.J. : This is an appeal from an order of ASQUITH, J., transferring to the Admiralty Division a case arising out of a collision between two rowing boats on the River Thames at Hammersmith. The plaintiff appeals from that order. He can only succeed if he can show (i) that the judge had no jurisdiction to make the order, or (ii) that he acted on a wrong principle of law, or (iii) that the decision, although purporting to be an act of discretion, would result in some grave injustice. None of those propositions could be established here. Under the Supreme Court of Judicature (Consolidation) Act, 1925, the Admiralty Division was selected as the division to which all matters within the former jurisdiction of the Lord High Admiral should be assigned. That jurisdiction extended to the place at Hammersmith where the collision which is the subject of this action occurred. If the writ had been issued in that Division, it would have remained there, and nobody could have objected. No error in law is alleged, and we cannot see that the judge's order would cause any injustice. The appeal must be dismissed, with costs.

CLAUSON and FINLAY, L.JJ., agreed.

Appeal dismissed, with costs.

- Solicitors: *Berry Tompkins & Co.* (for the appellant); *Edward & Childs* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

E PHILIPPSON v. IMPERIAL AIRWAYS, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **January 19, 20, 23, 24, March 2, 1939.**]

- Street and Aerial Traffic—Carriage by air—International carriage—Construction of contract—"High contracting parties" to Convention of Warsaw—Carriage by Air Act, 1932 (c. 36), s. 1 (2).*

A consignment note for the carriage of gold from England to Belgium by air was subject to general conditions of carriage based on the Convention of Warsaw. The convention came into force on Feb. 13, 1933. Great Britain ratified on Feb. 14, 1933, but Belgium did not ratify until Oct. 11, 1936. The contract in the present case was made in Mar., 1935, and, by the conditions, international carriage included all carriage by air between places within the territories of the high contracting parties to the convention of Warsaw. By the Carriage by Air Act, 1932, it was provided that His Majesty may by order in council from time to time certify who are the high contracting parties to the convention, any such order being conclusive evidence of the matters so certified. Belgium was never so certified under this Act at any material time :—

HELD : (i) the Carriage by Air Act, 1932, did not affect the construction of the conditions in the present case.

(ii) (LORD RUSSELL OF KILLOWEN and LORD MACMILLAN dissenting) : the term "high contracting party," as used in the convention, must be construed as including signatory states, whether or not they had

ratified, and also acceding states. International carriage within the terms of the present contract was, in the convention, intended to be defined as carriage to and from the territory of the signatories, whether or not they eventually ratified the convention and made the convention part of their domestic law. The carriage in question was, therefore, international carriage.

(iii) (*per* LORD THANKERTON and LORD WRIGHT): a limitation of liability in a contract of carriage must be in plain words, and, if there is any ambiguity as to the limitation, it must be decided in favour of the appellant, since the contract was drawn by the respondents.

Order of Court of Appeal ([1938] 1 All E.R. 759) *reversed*.

[EDITORIAL NOTE.] The construction of the contract for carriage of goods by air prepared by the air navigation companies has given rise to a considerable difference of judicial opinion. Although the Court of Appeal affirmed the decision of PORTER, J., they did not construe the provisions of the contract in quite the same way as he did. In the House of Lords, the opinions of their Lordships are still more diverse, and the opposite conclusion to that reached by the judges in the lower courts only prevails by a majority vote. The question underlying the whole matter is whether the term "high contracting party" used in the contract means what those words mean in the Convention of Warsaw itself, or whether, as the minority of the House of Lords think, they must refer to someone who binds himself contractually. A convention is negotiated and concluded by the plenipotentiaries of high contracting parties, but the latter do not in fact bind themselves by the convention until it has been subsequently ratified and made a part of the domestic law. Such a convention, however, will speak of the parties as high contracting parties, and, as the contract refers to the convention, the majority of the House of Lords have taken the view that the parties to the convention itself are the high contracting parties referred to in the contract, although they may not have subsequently ratified the agreement.

AS TO CARRIAGE BY AIR, see HALSBURY, *Hailsham Edn.*, Vol. 31, pp. 939-957, paras. 1601-1669; and FOR CASES, see DIGEST, Supp., *Street and Aerial Traffic*, Nos. 260a-260f. FOR THE CARRIAGE BY AIR ACT, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 865.]

Cases referred to:

- (1) *Elderslie S.S. Co. v. Borthwick*, [1905] A.C. 93; 41 Digest 446, 2800; 74 L.J.K.B. 338; 92 L.T. 274; *affg.*, [1904] 1 K.B. 319.
- (2) *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.*, [1908] A.C. 16; 41 Digest 474, 3056; 77 L.J.K.B. 82; 97 L.T. 812.
- (3) *Grein v. Imperial Airways, Ltd.*, [1937] 1 K.B. 50; [1936] 2 All E.R. 1258; Digest Supp.; 106 L.J.K.B. 49; 155 L.T. 380.

APPEAL from an order of the Court of Appeal, dated Mar. 3, 1938, and reported [1938] 1 All E.R. 759, affirming a decision of PORTER, J., dated June 8, 1937, and reported [1937] 3 All E.R. 318. The facts and documents, and the arguments, are fully set out in the opinions of their Lordships.

Sir Robert Aske, K.C., and *W. L. McNair* for the appellants.

A. T. Miller, K.C., and *H. G. Robertson* for the respondents.

LORD ATKIN [read by LORD THANKERTON]: My Lords, this is an appeal from an order of the Court of Appeal affirming an order of PORTER, J., answering questions put as preliminary points of law in an action by the present appellants against the respondents for the loss of a parcel of gold consigned by the plaintiffs for carriage by the defendants

by air from London to Brussels. The action proceeded till the pleadings were closed, and thereupon application was made that apparently every issue that was in controversy between the parties should be tried as a preliminary point of law. What advantage the parties gained over the trial of the action in due course it is difficult to see, unless, indeed, they
A sought to gain some priority over other litigants. However, the questions were formulated and ordered to be tried, and this appeal ensues.

The questions arise solely, on the terms of the contract of carriage between the parties, which is contained in an air consignment note dated Mar. 5, 1935. It is in English and French, and is expressed to be in the
B form of the International Air Traffic Association, and is issued by Imperial Airways, Ltd., who express themselves to be members of the International Air Traffic Association. The goods to be carried are one box of sovereigns and gold dollars of a market value of £10,600, to be carried from Croydon to Haren airport in Belgium for a freight of 1 per mil.,
C i.e., £10 12s. The document is signed by the consignor under the following clause :

The consignor hereby expressly declares that the above particulars furnished by him or his agent are correct and that he is aware of and accepts the general conditions of carriage more particularly referred to on the back of this document.

D In my opinion, this is a written contract, signed by the consignor, and the whole of the contractual terms are to be found on the face of the document. On the back, under the heading "Conditions of carriage," are to be found three paragraphs, the first of which is as follows :

E Carriage by air. The general conditions of carriage of goods are applicable to both internal and international carriage.

These general conditions are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of that convention. A further paragraph deals with combined transport—that is, air-rail transport—and a further paragraph
F is headed "Liability." This begins by saying that in all cases the liability of the air-carrier is limited to a maximum of 250 French francs per kilogram, and states an exception for loss by negligent navigation or on proof that all necessary measures have been taken to avoid damage. This paragraph, in my view, merely summarises the stipulations in the
G general conditions which have been defined in the first paragraph, though the summary omits the detailed qualifications. There is nothing in these paragraphs which in any way modifies the general conditions, and, whether they seek to modify them or not, they would not in any case form part of the written contractual terms. There follows a state-
H ment, in English only, that Imperial Airways are not common carriers, and that there is not implied in the contract of carriage any warranty of fitness for carriage. I do not think that these words at the back are incorporated into the contract of carriage. The contractual terms, then, as to liability must be found in

. . . the general conditions of carriage more particularly referred to on the back . . .

It is common ground that what are incorporated into the contract are the general conditions of carriage of passengers and baggage which have been agreed between the members of the International Air Traffic Association and are to be found, together with the appropriate forms, in an orange book issued by the association from The Hague. For the purposes of this judgment, the following articles are relevant: art. 1, paras. 1, 2 (1) (2); art. 4, para. 4 (5) (b); art. 7, para. 3; art. 19, paras. 2, 4; art. 20, paras. 1 (3) (4), 2; art. 23, paras. 1 (1) (2), 2. The result is that, though the carriers by art. 20, para. 1 (1), say they are liable for all damage to goods, by art. 20, para. 1 (3), they introduce exceptions if they prove that they have taken all necessary measures to avoid damage. There is a general exception of negligent navigation, and by art. 20, para. 2, they limit their liability to 250 francs per kilogram unless the consignor makes a special declaration of value and pays the supplementary charge required. All these exceptions, however, by art. 7, para. 3, are cut out in the case of international carriage as defined by art. 1, para. 2, unless the air consignment note contains as a particular inserted by the carrier a statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of Oct. 12, 1929. On the further question of limitation of actions, by art. 23, para. 1 (1), claims for damage arising out of international carriage as defined by art. 1, para. 2, are extinguished if the action is not brought within 2 years. In respect of all other claims, the limitation period is, by art. 23, para. 1 (2), 6 months. The result is that, if this is not international carriage as defined, the exceptions, including the limit of liability, apply, and, further, the period of limitation is 6 months. If this is international carriage, the exceptions, including the limit of liability, do not apply unless the carrier has inserted the express reference to the Warsaw rules as to liability, and in any case the period of limitation is 2 years. In the present case, the alleged loss took place when the goods were in the custody of the carriers at Croydon in Mar., 1935, and the action was commenced in Feb., 1936. If, therefore, this is not a case of international carriage, the action is out of time, and no further point need be considered. If it was international carriage, the action is within time, and the question of the exception has to be determined. It is convenient to dispose of this last point at once. In my opinion, it is impossible for the carrier to establish that he has inserted in the air consignment note as an additional particular the statement which is required by art. 4, para. 5 (b). The only suggested compliance is that the general conditions which are incorporated conform in general to the rules relating to liability set out in the convention. This does not seem to me in any way to carry out the requirement of the article, and, in these circumstances, in pursuance of art. 7 (3), the carrier is not entitled to avail himself of the exceptions, including the limitation of liability.

The contest is thus reduced to the single question whether or not this

carriage fell within the special categories of international carriage defined by art. 1, para. 2 (2), of the general conditions. The subparagraph should be read as a whole :

A (2) The special categories of international carriage referred to in subpara. (1) of this paragraph include all carriage by air in which according to the contract made by the parties the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two high contracting parties to the Convention of Warsaw for the unification of certain rules relating to international air transport of Oct. 12, 1929, upon which these conditions are based or within the territory of a single contracting party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power even though that Power is a non-contracting Power.

B International carriage, then, for the purpose of the clause, may be taken to be carriage between two places within the territory of two "high contracting parties" to the Convention of Warsaw. The carriage in this case was between two places within England and Belgium. At the date of the carriage, England had signed the convention by her plenipotentiaries, and had ratified it, while Belgium had signed, but had not, at that time, ratified, as afterwards she did. The respondents say that, until Belgium ratified, she was not a high contracting party. To ascertain what the contract between the parties means by high contracting parties to the convention, the correct course, in my opinion, must be to look at the convention itself. The phrase is one of diplomatic usage, and its use in these general conditions, based, as they expressly are, on the convention, must, I think, depend upon the meaning in the convention. This is made clearer by the fact that the definition of international carriage in art. 2 (2) of the general conditions repeats *verbatim* the language of art. 1 (2) of the convention, except that the last words of the condition—"even though that Power is a non-contracting Power"—are found in the convention to be : "even though that Power is not a party to this convention." The French version of the convention is "autre Puissance même non contractante." I expect that it will be found that the French version of the general conditions uses the words of the convention, and the English of the conditions appears to be the more accurate translation. I do not think that there is any difference in meaning.

G When one turns to the convention, one finds that in more than one article it is made plain that the term "high contracting parties" means, or, more accurately, includes, all the signatories :

H 36. The convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish government to the government of each of the high contracting parties.

37. (1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which will notify the deposit to the government of each of the high contracting parties. (2) As soon as this convention shall have been ratified by 5 of the high contracting parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the high contracting parties who shall have ratified and the high contracting party who deposits his instrument of ratification on the ninetieth day after the deposit. (3) It

shall be the duty of the government of the republic of Poland to notify to the government of each of the high contracting parties the date on which this convention comes into force as well as the date of the deposit of each ratification.

38. (1) This convention shall, after it has come into force, remain open for accession by any state. (2) The accession shall be effected by a notification addressed to the government of the republic of Poland, which will inform the government of each of the high contracting parties thereof.

39. (1) Any one of the high contracting parties may denounce this convention by a notification addressed to the government of the republic of Poland, which will at once inform the government of each of the high contracting parties. A

40. (1) Any high contracting party may, at the time of signature or of deposit of ratification or of accession declare that the acceptance which he gives to this convention does not apply to all or any of his . . . territory . . .

I find it impossible to make sense of these provisions, except by giving high contracting parties the meaning of signatories, extending it to non-signatories who take advantage of the provisions as to accession. It is all the signatories who have a right to a certified copy under art. 36, and to be given notice of deposit of ratification and the date on which the convention comes into force under art. 37 (1) (2). "As soon as this convention shall have been ratified by 5 of the high contracting parties" cannot mean "ratified by 5 of the 5 who have ratified." All the signatories are entitled to notice of accession under art. 38, and any of them may denounce the convention, whether they have ratified or not, and all of them are entitled to information of denunciation under art. 39, while art. 40 makes certain that which was plain enough before, for it provides for a declaration by any high contracting party at the time of signature. This article also makes plain that a state which accedes is a high contracting party, for it expressly calls it so. B
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If, therefore, there were any doubt as to the meaning of high contracting party in diplomatic usage, this convention has provided its own dictionary. Therefore, I am driven to the conclusion that the words in art. 1 of the conditions have the same meaning as they have in art. 36, 37, 38, 39, 40 of the convention, and mean signatories. It is a perfectly correct use of the phrase. The parties have concluded a convention by their plenipotentiaries, and, though they are not to be bound by the convention as a whole until they have ratified, yet before ratification they have the rights and duties given to them by the articles above-mentioned. As pointed out in OPPENHEIM ON INTERNATIONAL LAW, Vol. I, Chap. 5, s. 510, the two stages of consent by signature and subsequent ratification are not to be confused. The consent is always by signature. I think, therefore, that international carriage in the convention is intended to be defined as carriage to and from the territory of the signatories, whether or not they eventually become bound to make the provisions of the convention part of their domestic law. This would appear to me to be quite a reasonable stipulation to make. That is to say, it leads to no absurdity which might drive one to some other construction. It follows a somewhat close analogy in the convention and Acts relating to carriage of goods by sea. The provisions there are not limited to carriage of goods to foreign countries which are either parties to the original convention or have bound themselves by ratifica- E
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tion. In the present case, international navigation is limited, but to the very extensive territories of the signatories, and not to the territories only of those who have ratified or acceded.

Art. 28 provides as follows :

- A (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.

- B It was argued that that indicates that, in that article, at any rate, high contracting party must mean a party bound by the convention. I do not think that this article affords any ground for departing from the meaning of the phrase in arts. 36-40. It would be quite a reasonable provision for any state ratifying the convention to enforce in its domestic law, especially if, as I think, the definition of international traffic is as wide as I take it to be. Having, therefore, come to a clear conclusion
- C in my own mind as to the meaning of high contracting parties to the convention in the convention itself, I own that I find the greatest difficulty in putting a different construction on the words when used in a commercial document, the conditions of which are said to be based on that convention. The business man is referred to that convention, and,
- D if he looks at it at all, which is unlikely, it appears to me that the last thing that he would do is to say to himself that " high contracting parties to the convention " in his consignment note means something different from what it means in the convention itself, to which he is referred. The result is that, in my judgment, on the terms of the conditions, this
- E carriage fell within the special categories of international carriage there defined, that the period of limitation was 2 years, and that the plaintiffs' claim was brought in time, and, as the other defences failed, he should have the questions answered in his favour.

- F There remains, however, the question, which has not yet been discussed, as to the effect of the Carriage by Air Act, 1932, passed by this country to give effect to the convention. By that Act, as from a day to be certified by order in council, the provisions of the convention are to have the force of law in the United Kingdom in relation to any carriage by air to which the convention applies. By sect. 1 (2), however, His
- G Majesty may by order in council from time to time certify who are the high contracting parties to the convention, and in respect of what territories they are respectively parties, and any such order shall be conclusive evidence of the matters so certified.

- H It is in respect of the Act, amongst other matters, that differences of opinion appear in the courts below. PORTER, J., who tried the case, took substantially the same view of the construction of the conditions and conventions that I have expressed above. However, he came to the conclusion that, for an English court, the certificate contained in the order in council was conclusive for all purposes as to who were the high contracting parties to the convention, and, as at the material time

Belgium had not become a high contracting party by order in council, he could not treat her as such for the purposes of this contract. SLESSER and CLAUSON, L.JJ., did not agree with the view of PORTER, J., as to the effect of the Act, but they came to the conclusion that "high contracting parties to the convention" in art. 1 meant only parties bound by ratification or accession. GREER, L.J., agreed with this A view of the convention, and also agreed with the construction of the Act adopted by PORTER, J.

My Lords, I do not find myself in agreement with the construction of the Act which makes it affect this contract. For the purposes of contracts of air carriage upon which the Act imposes the conditions of the convention, the legislature may, and does, define the contracts to which, B for that purpose, the convention is said to apply. I think it may be assumed that, for the purpose of the Act, the legislature intended to confine international carriage to the territory of states bound by the convention. The result is perhaps remarkable, for, until there is an C order in council, it matters not whether or not the state is in fact bound. It was pointed out to us that, in practical working, there had been delays of several months before states in fact bound by ratification had been certified as high contracting parties. However, we are not dealing with conditions the result of a statute, but with contractual conditions D independent of the statute, and for their purposes I venture to think that the statute has no operation at all.

For these reasons I think that this appeal should be allowed, that the order below should be discharged, and that in its place the questions should be answered as follows: E

1. (a) Whether the contract of carriage contained in the consignment note was subject to the Carriage by Air Act, 1932?—No.

(b) If so, whether the consignment note satisfied the requirement of art. 8 (g) of the convention set out in Sched. I of the Act?—Does not arise.

(c) If the answer to (a) was "Yes" and the answer to (b) was "No," whether the defendant company had any defence to the plaintiffs' claim?—Does not arise.

2. (a) Whether the carriage governed by the consignment note was international carriage as defined by art. 1 (2) of the general conditions of the carriage of goods?— F Yes.

(b) If so, whether the consignment note satisfied the requirement of art. 4 (5) (b) of the conditions?—No.

(c) If the answer to (a) was "Yes" and to (b) was "No," whether the defendant company had any defence to the plaintiffs' claim?—No.

3. Whether the plaintiffs' claim was barred by the conditions because the action was not begun within 6 months of the loss?—No. G

4. Whether there was (a) within the meaning of art. 22 (2) of the convention set out in Sched. 1 of the Act, or (b) within the meaning of art. 20 (2) (i) of the conditions a special declaration of value and supplementary payment made and, if so, what was the effect in law?—(a) and (b), Does not arise.

5. The measure of damages, if any?—£10,600 and interest.

The plaintiffs should have the costs here and in the courts below. H

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion of my noble and learned friend LORD ATKIN, which I have just read, and, subject to one doubt, as to which I desire to express my view, he has so fully and precisely expressed an opinion identical with

my own that it is sufficient to state my agreement therewith. The one point on which I have felt some doubt is as to the meaning of high contracting party as used in the Convention of Warsaw, but I may say at once that such doubt would not affect my concurrence in the motion proposed by my noble and learned friend LORD ATKIN, for reasons which

A I will explain.

Belgium having been the place of destination of the consignment here in question, the question is whether at the date of the consignment note—Mar. 5, 1935—Belgium, which admittedly had not yet ratified the convention, was a high contracting party to the Convention of Warsaw within the meaning of art. 1, para. 2 (2), of the general conditions of carriage, known as the orange book. In the first place, I may state that, in my opinion, this question must be decided on construction of the terms of the contract as expressed. The court has no right to assume any antecedent probability of the International Air Traffic Association having intended to confine the international carriage provided for in the orange book to cases where the places of departure and destination were within the territory of high contracting parties who had ratified the convention. I do not know, and I have no right to assume, that the policy of the association proceeded on this view, or whether the association aimed at the inclusion, in contracts with its customers, of the territories of signatories of the convention who had not yet ratified it, though their plenipotentiaries had signed it. In the second place, it seems to me to be illegitimate to dissect the phrase, and to consider first what “contracting parties” would have meant if it had stood alone, and then to see if any meaning can be given to the word “high.” I regard as important the subsequent words: “upon which these conditions are based.” I find, then, that a phrase, unusual in commercial contracts, is used in a commercial contract, coupled with a statement that the contractual provision is based on a well-known form of diplomatic convention in which that phrase is in familiar use, and I feel compelled to come to the conclusion that the meaning of the phrase in the commercial contract is derived from, and based upon, the meaning which it bears in the diplomatic document thus referred to. I am glad to find that so far the three judges of the Court of Appeal came to the same conclusion, but, on consideration of the terms of the convention, they came to a different conclusion from that expressed by my noble and learned friend LORD ATKIN. I have had the privilege also of considering the opinion about to be delivered by my noble and learned friend LORD RUSSELL OF KILLOWEN, and I observe that he differs on both these points from the judges of the Court of Appeal, though he arrives at a similar conclusion by a different road.

Turning to the terms of the convention, I agree with the view expressed by LORD ATKIN as to arts. 36-40, but I think it may be said that the high contracting parties referred to in art. 1 (2) and art. 28 can only apply to those who have bound themselves by ratification. It seems to me that the convention has been drawn on the footing that all the signatories

have ratified. If I am correct in the above construction of arts. 1 (2) and 28, it will follow that the phrase as used in the orange book is ambiguous, in which case I am of opinion that the principle applied in *Elderslie S.S. Co. v. Borthwick* (1) and *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.* (2) falls to be applied here, and that the respondents, who prepared the contract, must take the consequences of their failure to make clear to the other contracting parties the limitation which they claim, and that the appeal succeeds on this point.

LORD RUSSELL OF KILLOWEN: My Lords, two things in this case seem to me plain. The first is that, since Belgium had not at the date of the consignment note—namely, Mar. 5, 1935—ratified the Warsaw Convention, the carriage of goods by air which was contemplated in, and covered by, that note (which I will refer to as the carriage in suit) was not one to which the convention applied. The second is that the provisions of the convention as set out in the Carriage by Air Act, 1932, Sched. I, had not the force of law in relation to the carriage in suit. The rights of the parties to this litigation must depend, accordingly, upon the true construction of the contract between them, and upon nothing else, and, in particular, they must depend upon the true construction of the general conditions of carriage of goods which form part of the contract by virtue of the passage in the consignment note which runs as follows:

The consignor hereby expressly declares that the above particulars furnished by him or his agent are correct, and that he is aware of and accepts the general conditions of carriage more particularly referred to on the back of this document.

It is common ground that these are the general conditions which appear on pp. 87-103 (inclusive) of the appendix. Some reliance was placed by the respondents upon certain other phrases relating to liability which are found on the back of the consignment note, but I am not satisfied that they purport to do more than summarise certain provisions of the general conditions, or that (if they depart in any way from the general conditions) they have any contractual force.

There are two main questions which arise for determination on this appeal, the answers to which depend upon the true construction of the general conditions—namely, (i) was the right of the appellants to damages extinguished because their action was not brought within a period of 6 months? and (ii) was the liability of the respondents limited in amount to the sum of 250 francs per kilogram? The second question obviously does not arise if the first question is answered in the affirmative.

I will take first the question of the extinction of the appellants' right to damages. That is dealt with in the general conditions by "art. 23. Limitations of Actions," which, so far as material, provides as follows:

1 (1) The right to damages arising under the provisions of art. 20, in connection with art. 1, para. 2, shall be extinguished if an action is not brought within 2 years, which may be reckoned either from the date of arrival, or from the date on which the carriage stopped. (2) All other rights arising out of the contract of carriage shall be extinguished if an action is not brought within a period of 6 months.

It is beyond dispute that, under this contract, all rights arising out of it will be extinguished if no action is brought within 6 months, unless the right be a right to damages to which art. 23, para. 1 (1), applies. Further, it is beyond dispute that art. 23, para. 1 (1), only applies if the carriage in suit, which no doubt was international carriage, falls within one of the special categories of international carriage defined in art. 1, para. 2 (2). The provisions of art. 1, paras. 1 and 2, are all-important. Their wording is as follows :

Art. 1 : Transport undertakings and consignments to which these conditions are applicable.

Para. 1. These conditions are applicable to all carriage (internal and international) of goods performed by an air transport undertaking (carrier) which is a member of the International Air Traffic Association. Nevertheless the special provisions referred to in para. 2 (1) of this article are only applicable to the special categories of international carriage defined in para. 2 (2) of this article.

Para. 2. (1) The provisions of art. 4, para. 4 (5), art. 7, para. 3 (second sentence), art. 8, para. 4 (4), art. 13, para. 4 (1) (third sentence), art. 20, para. 1 (2), art. 22, para. 4 (2), and art. 23, para. 1 (1) are applicable only to the special categories of international carriage defined in subpara. (2) of this paragraph. (2) The special categories of international carriage referred to in subpara. (1) of this paragraph include all carriage by air in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two high contracting parties to the Convention of Warsaw for the unification of certain rules relating to international air transport of Oct. 12, 1929, upon which these conditions are based, or within the territory of a single contracting party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is a non-contracting Power.

The only special category of international carriage into which the carriage in suit could possibly fall is that which is defined as one in which :

... the place of departure and the place of destination ... are situated ... within the territories of two high contracting parties to the Convention of Warsaw.

In the carriage in suit, the place of departure was in Great Britain, and the place of destination was in Belgium. At the date of the consignment note, however, although Great Britain had ratified the convention, and was bound by its terms to the other nations which at that date had ratified it and become bound by its terms, Belgium had not ratified the convention, and was not subject to its provisions. It is true that Belgium had, by representatives, signed the convention when it was originally signed by some (but not all) of the Powers named as parties thereto, but such signature carried with it no consequences. By its own terms (art. 37), the convention required to be ratified, and it only came into force at all if and when 5 parties had ratified it, and then only on the ninetieth day after the deposit of the fifth ratification. Thereafter it only came into force as between them and any other party on the ninetieth day after the deposit of that party's ratification. There was no obligation of any kind to ratify, and even after ratification there was complete freedom to "denounce"—that is, to withdraw—from the convention.

The sole question which has to be answered on this part of the case can now be posed. Was Belgium on Mar. 5, 1935, a high contracting party

to the Warsaw Convention *within the meaning of the contract*? My Lords, I emphasise the last six words because, in my opinion, it is wholly irrelevant to inquire whether or not Belgium was at that date a high contracting party within the meaning of the convention. I have no doubt that Belgium was a high contracting party within the meaning of many of its clauses. A Power, however, may well be a high contracting party within the meaning of the convention, or within the meaning of some of its clauses, and yet not be a high contracting party within the meaning of the contract. The words which we have to construe are "high contracting parties to the convention." The words are not "high contracting parties within the meaning of the convention," or "described in the convention" or "referred to in the convention," nor does any one of those phrases represent the normal meaning of the words used in the contract. The words used in the contract describe, according to their normal meaning, parties who are in fact high contracting parties to the convention—that is, who have contracted to be bound by the terms of the convention.

Let me consider whether there is anything in the contract, or in the surrounding circumstances, which would justify us in saying that the parties to the contract or either of them used the words in a sense other than their normal meaning. In this consideration, certain relevant matters must be borne in mind. (1) This is not a diplomatic document couched in the language of diplomacy. It is a commercial contract for the carriage of goods. If it be true (as to which I know not) that in the language of diplomacy a contracting party, provided he be "high," includes a party who does not contract, then I can only say that lawyers and diplomats speak in different tongues, and that without some special context a reference to a contracting party (whether high or lowly) in a commercial contract is a reference to someone who binds himself contractually. The words in their ordinary meaning are inapt to describe someone who is free from all contractual bond, or (in this case) to include a Power which, to use the words of the very clause which we are construing, is a non-contracting Power. (2) The contract is a common form contract (applicable to all carriage of goods internal and international) prepared by the air navigation companies in view of the provisions which would apply in the cases of international carriage which would be governed by the convention as different Powers from time to time ratified it. This form was presumably prepared with an eye to the advantage and protection of the companies. However, as regards international carriage between two countries which would become bound by the convention, the power of the companies to frame the provisions of their common form of contract was limited and restricted by the provisions of the convention. It was, therefore, necessary to provide in the contract that, in such cases of international carriage, the provisions of the convention should apply. However, the necessity for this would exist only in those cases of international carriage to which the convention would apply, and there is no

- reason which suggests itself, or has been suggested to me, why the companies should be willing to vary the provisions, which (apart from the convention) they deemed necessary and proper, and for which they stipulated in regard to all carriage of goods by air, except in cases where the binding force of the convention would compel them so to do. (3) All
- A the 7 provisions of the general conditions which are enumerated in art. 1, para. 2 (1), and which are only to apply to the special categories of international carriage as defined, are provisions which had perforce to apply if the carriage was governed by the convention. I will take the last two as samples. Art. 22, para. 4 (2), of the general conditions carries
- B out the compulsory provisions of art. 28 (1) and art. 32 of the convention, and deprives the companies in the cases of the "special categories" of international carriage of the benefit of only being sued in the court of their principal place of business. Art. 23, para. 1 (1), carries out the compulsory provisions of art. 29 (1) and art. 23 of the convention, and
- C deprives the companies, in the like cases, of the benefit of the 6-months' limitation.

- When these considerations are borne in mind, the reason and necessity for art. 1, para. 2, of the general conditions become plain. The only reason and the only necessity for its insertion are to be found in the
- D compulsion of the convention, and that compulsion only exists (a) where the two Powers which own respectively the place of departure and the place of destination are both bound by the convention, or (b) where, the two places being within the territory of a Power so bound, there is an agreed stopping-place within the territory of another Power, even though
- E that Power is "a non-contracting Power"—that is, is not so bound. Once the reason for the definition of "special categories" of international carriage is seen, the limits of the definition become apparent. The compulsion of the convention operates both to produce the definition and to define its scope.
- F I can conceive no reason for suggesting that the carrier here used the words "high contracting parties to the convention" in a sense other than the meaning which they normally bear—namely, as a description of Powers which are contractually bound by the convention. Nor can I see any ground for suggesting that the customer who signed the contract and
- G read (if he ever did read) the general conditions would, or could, imagine that the words in question applied to, or included, a Power which had not contracted, and which in fact and in law was what the clause itself calls "a non-contracting Power." In my opinion, there is no ambiguity in the clause. It means what it says—namely, parties who are contractually
- H bound by the convention.

It is suggested that the true view is that the companies were satisfied with the provisions of the convention as to international carriage, and were, accordingly, willing that those provisions should apply to all international carriage between countries which either at any time by ratification or accession became bound by the convention, or had signed

without thereafter becoming bound by ratification. Such international carriage might well cover the whole of the habitable globe, and it is not easy, on this view, to understand how or why it could have been worth while to set up or define any special categories of international carriage at all. For the reasons which I have stated, I feel no doubt that the words "high contracting parties to the convention" in this contract mean Powers which are contractually bound by the provisions of the convention—namely, Powers which have signed and ratified and Powers which have acceded. I am in agreement with the unanimous opinions of GREER, SLESSER and CLAUSON, L.JJ. A

As regards the second question, this does not, in my view, arise. If it did, the same reasoning would apply in favour of the respondents. In my opinion, there was neither a special declaration of value made, nor a supplementary charge paid, under art. 20, para. 2 (1), of the general conditions. Consequently, the limitation of liability thereby provided would apply. The carrier would not be deprived of this benefit by the second sentence of art. 7, para. 3, of the general conditions, since that provision only applies to the special categories of international carriage, and the carriage in suit does not come within them. If, however, my view on the first question were wrong, and the carriage in suit comes within the special categories, then I would be of opinion that the carrier could not claim the benefit of the limitation of the *quantum* of liability, because the consignment note did not contain the statement required by art. 4, para. 4 (5) (b), of the general conditions. However, as already indicated, I think that the order of the Court of Appeal should be affirmed, and I would dismiss this appeal. B C D E

LORD MACMILLAN: My Lords, I agree with what I understand to be the opinion of all your Lordships that the conditions on which the respondents undertook to convey by air the consignment of gold coins in question from Croydon to Brussels are, in terms of the relative consignment note, to be found in the general conditions of carriage of goods annexed to the agreement concerning the contract of carriage by air made in 1931 between the air navigation companies, members of the International Air Traffic Association. The agreement was entered into subsequent to the signing at Warsaw on Oct. 12, 1929, of an international convention for the unification of certain rules relating to international carriage by air, and with the provisions of that convention in view. The third chapter of the convention contains a series of important provisions relating to the liability of carriers by air, and is designed to secure that these shall not be evaded. A time-limit of 2 years is also imposed on claims for damages. F G H

It is important to observe that the signing of the convention by the parties to it did not of itself impose any restriction on freedom of contract in the matter of carriage by air. It was only as and when it became legally effective by ratification, or ratification plus legislation, that its

terms could operate to restrict the freedom of air-carriers to make such contracts as they chose with their customers. The general conditions appear, accordingly, to have been framed so as to provide (i) for cases where the traffic was governed by the convention, and (ii) for cases where the traffic was not so governed, and the carrier remained free to make his own terms. The conditions applicable to the latter case are, as might be expected, more favourable to the carrier in the matter of restriction of liability and limitation of the period for making claims. The general conditions thus differentiate certain special categories of international carriage from international carriage in general. It is as regards these special categories that the terms conforming to the Warsaw Convention are to operate, and the special categories are to include all carriage by air between the territory of one high contracting party to the convention of Warsaw and the territory of another high contracting party.

The carriage in question in the present case was between Great Britain and Belgium. Was this carriage between the territory of one high contracting party to the convention of Warsaw and the territory of another high contracting party within the meaning of the general conditions? If it was, then, under the general conditions, the more liberal terms conforming to the Convention of Warsaw were applicable to it. If it was not, then the terms less favourable to the customer were applicable.

Great Britain and Belgium were both parties to the Convention of Warsaw, which was signed by their respective representatives, but, while Great Britain had ratified it at the date of the consignment note in question, and embodied it in an Act of Parliament, Belgium had not ratified it. I recognise that in many clauses in the convention itself the expression "high contracting parties" is used to denote the countries whose representatives signed and concluded the convention, but the convention itself recognises a distinction between the signing and concluding of the convention, on the one hand, and its coming into force, on the other hand. It is not to come into force at all until 5 high contracting parties have ratified it, and thereafter it is to come into force as regards the other high contracting parties when they ratify it and as regards acceding states when they accede to it—in each case, after an interval of 90 days.

The question is whether in the general conditions the expression "high contracting parties to the Convention of Warsaw" includes any party who has signed the convention or any party as regards whom the convention has come into force. To my mind, the important question with regard to each country, from the point of view of those who were proposing to enter into a contract of air carriage, was not whether that country's representative had signed the Convention of Warsaw, but whether, as regards that country, the convention was in force. It was only as between countries both bound by the Convention of Warsaw that the carrier's freedom to make or impose his own terms was restricted. Where both countries were not so bound, the carrier could, without infringing the law,

stipulate for terms more favourable to himself than the convention allowed. In my opinion, the cardinal distinction which the general conditions have in view is the practical distinction between countries which are bound and countries which are not bound by the convention, and I therefore read the expression "high contracting party to the Convention of Warsaw" in the general conditions as meaning a party in whose case the convention is in force. I reach this conclusion with becoming diffidence, in view of the contrary opinion of the majority of your Lordships, but I am consoled by the fact that I am not alone in the view which I have formed on the difficult question involved, and that I have the support of the more fully developed arguments of my noble and learned friend LORD RUSSELL OF KILLOWEN, which I desire to adopt. The result, so far as I am concerned, is that I should be in favour of dismissing the appeal.

LORD WRIGHT: My Lords, the court has been asked to answer a number of specific questions arising on the construction of a contract of carriage of goods by air entered into between the appellants, as consignors, and the respondents, as carriers. These questions have been answered in the respondents' favour by the courts below. I am of opinion, with the greatest respect to those whose opinions are different, that the answers should be in favour of the appellants.

The contractual document which has to be construed is called an air consignment note, the body of it being in print but the particulars relevant to the specific transaction being in writing, signed by the appellants' agent, who in terms "accepts the general conditions more particularly referred to on the back of this document." On the back, it is stated as follows:

... the general conditions of carriage are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention.

The general conditions have been identified, for the purposes of this case, as being those contained in what has been called the orange booklet, which sets out an agreement concerning the contract of carriage by air, dated 1931. The document is headed International Air Traffic Association, the members of which are, it seems, the air transport undertakings (carriers). The crucial question of construction is whether this particular contract is "international carriage" within the meaning of art. 1, para. 2 (2), of the general conditions. If it is "international carriage," then the period of limitation for actions (art. 23 (1)) is 2 years, and not 6 months, which is the period specified if the carriage is not "international." The latter period would bar the appellants' claim in this action. Furthermore, if the carriage is "international," the respondents would not be entitled to avail themselves of the limit of liability of 250 francs per kilogram (art. 20, para. 2 (1)), or of the benefit of the terms which exclude or limit their liability because the consignment note

did not contain the statement required by art. 4, para. 4 (4) (b), that :

The carriage is subject to the rules relating to liability set out in the Convention of Warsaw of Oct. 12, 1929, upon which these conditions are based.

A Such an omission prevents the carrier, by reason of art. 7 (3), from relying on these terms.

It is, I think, clear that what is meant by "international carriage" in the contract must depend on what it means in the convention. The contract expressly states that what is meant is international carriage /
"within the special meaning of the said convention." It is accord-
B ingly necessary to turn to the convention to see what that special meaning is. Art. 1 (2) of the convention is in these terms (I quote throughout from the English version) :

C For the purposes of this convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two high contracting parties, or within the territory of a single high contracting party, if there is an agreed stopping-place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this convention. A carriage without such an agreed stopping-place . . . is not deemed to be international for the purposes of this convention.

D It is thus clear that the word "international" has a special meaning in the convention. That is what is referred to in the definition in the contract which I have quoted. This is confirmed by the definition contained in art. 1, para. 2 (2), of the general conditions, of

E . . . the special categories of international carriage referred to in the preceding sub-para. (1) of this paragraph, as being "international" carriage for the special purposes of the conditions.

This is clearly meant to point the contrast with any other categories of international carriage by air. The definition in the general conditions is identical in substance with that in the convention, and requires that
F the agreed places of departure and destination should be either within the territories of two high contracting parties (adding, what is not necessary in the convention itself, the words "to the Convention of Warsaw," etc.) or within the

G . . . territory of a single contracting party [omitting the word "high"] if the agreed stopping-place is within the territory subject to another Power, "even though that power is a non-contracting power."

It has been claimed that the words "high contracting party" have a different meaning in the conditions from that which they have in the convention. In my opinion, this is not the true construction. It is, I think, directly contrary to the express words I have quoted from the
H back of the consignment note—"international carriage within the special meaning of the said convention"—which expressly refer to the definition in art. 1 (2) of the convention, and is directly contrary to the definition in art. 1, para. 2 (2) of the general conditions, which, in the material passage, define the places of departure and destination as places within the territories of two "high contracting parties to the convention."

What is there meant must depend on ascertaining what are "high contracting parties" within the meaning of the convention itself. It is, I think, impossible to hold that there is a high contracting party within the meaning of the consignment note which is not a high contracting party within the meaning of the convention. It is accordingly necessary to determine what is the meaning of these words in the convention. A That must be determined by construing the convention. It is said by the appellants that the words mean any state originally a signatory to the convention, even though the state has not "ratified" it. For instance, though Belgium, the state to which this particular consignment was destined, did not "ratify" until 1936, the consignment in question being in 1935, it was, it is claimed, an original signatory, and was, therefore, a high contracting party within the meaning of the convention. B It is not material to this point that the convention contemplates another class of high contracting parties—namely, those who, though not original signatories, subsequently accede, a class which includes the United States. C On this construction, the carriage in question falls within the special categories of international carriage. Against this view, it is contended on behalf of the respondents that the words "high contracting parties to the convention" are limited in meaning to those Powers which have not merely signed the convention, but have "ratified" D it, and thus become bound to fulfil its terms, and also acceding Powers. It is conceded by the respondents that at least in many places of the convention the words "high contracting party" must be construed as meaning "signatory," but it is said that in other parts of the convention they should be construed in the narrower meaning—that is, of a Power E which has not only signed but also ratified, or acceded. Before I give my reasons for my opinion that the words are used in the convention as including signatory states, whether or not they have ratified, and also acceding states, I may observe that, on the concession made by the respondents that the words can only be construed as having the narrower F meaning in some places in the convention, it follows, in my opinion, that the appellants' contention should succeed. The court is here concerned with a contract of carriage. The respondents are claiming that, on a particular construction of the consignment note and the general conditions which it incorporates, they are entitled to limit or exclude their G liability for the loss of the goods. However, they are faced by the general principle applicable to contracts of carriage—that a carrier who wishes to limit his liability must do so by plain words. This principle is too well established to need citation of authority, but I may perhaps refer to *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.* (2), where LORD H LOREBURN, L.C., said, at p. 19 :

The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different. As LORD MACNAGHTEN said in *Elderslie S.S. Co. v. Borthwick* (1), at p. 96, "an ambiguous document is no protection."

In that case, LORD LOREBURN, L.C., was dealing with a shipowner's contract of carriage, but the same principle applies, *mutatis mutandis*, to contracts of air carriage, so far as they contain terms limiting or excluding the carrier's *prima facie* liability. *Elderslie S.S. Co. v. Borthwick* (1) is to the same effect. In particular, LORD LINDLEY emphasises the other aspect, the position of the shipper. He says, at pp. 96, 97 :

- This is a contract between two persons, one of whom, the shipowner, prepared it. I have not the slightest doubt the shipowner understood it as Mr. Carver says he did. But when I look at it from the other side, and consider whether the shipper would so understand it, I say, if I were myself a shipper, certainly I should not . . . I agree that this bill of lading did not employ plain terms and relieve the shipowner from liability in the case of unseaworthiness. I mean by "plain terms" terms sufficiently plain to the shipper for him to understand it . . .
- The principle so stated is not, in my opinion, limited to carriage by ships, or to the warranty of seaworthiness. It equally applies to a contract of carriage by air like that in question, and to the statement therein of the conditions on which the carrier's claim to exemption depends. These conditions must be stated in terms sufficiently plain for the shipper or consignor to understand. He is entitled, if they are not plain, to interpret them in the sense most favourable to him and least in favour of the carrier's exemption from liability under the contract.
- That is so whenever the exemptions are reasonably capable of both a narrower and a wider construction. It is, I think, impossible here to say that a shipper could not reasonably construe the words "high contracting parties" as including signatories to the convention. It is said that to do so would be counter to the intention of the carriers, because, for instance, art. 23 (1) (2), which provides that all other rights—other, that is, than those arising in connection with international carriage—shall be extinguished if an action is not brought within 6 months, can only have been inserted to provide for international carriage not falling within the special categories, because the convention in those cases fixes 2 years as the period. The general conditions (art. 1 (1)), however, not only deal with the special categories of international carriage, but also deal with internal carriage, and there may be cases of international carriage in which the places of departure and destination are both in territories of states which were not even signatories to the convention, so that no inference as to the carrier's intention can well be drawn from that. Again, however, the question is not limited to the question of the carrier's intention, in the same way as the question of intention may be limited in the case of unilateral instruments, like wills or settlements, where the settlor's or the testator's intention is paramount. The question is whether the limitations of liability have been brought home in what the court regards as plain terms to the shipper's or consignor's mind by the language used. It would have been easy to have stated in the general conditions that "international carriage" means carriage between countries which have either signed and also ratified the convention, or acceded to it.

To my mind, however, the construction for which the appellants contend is the true construction. The words "high contracting parties" are words of diplomacy, and are the words normally used to describe plenipotentiaries such as those who met at Warsaw. They are stated in the recital to the convention to have "concluded and signed it, being thereto duly authorised." To do so was their function, and it rested with their respective governments whether they would go further and ratify it—that is, adopt it—so as to become internationally bound to fulfil its terms, and, if necessary for that purpose, take any further steps, by legislation or otherwise, to make it part of their law. The United Kingdom ratified on Feb. 14, 1933, Belgium not till Oct. 11, 1936. However, their plenipotentiaries had signed the convention in 1929, thereby accepting its conditions as those to which they agreed. A treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, though its binding force is, as a rule, suspended till ratification is given. See OPPENHEIM ON INTERNATIONAL LAW, Part IV, Chap. 2 (V), sect. 510. There are several of the articles which are only consistent with this meaning of the words "high contracting parties." Thus, art. 36 provides that the single copy of the convention shall remain deposited in the Polish archives and one duly certified copy be sent by the Polish government to each of the high contracting parties. Art. 37 says that deposit of instruments of ratification shall be notified to each of the high contracting parties. In these articles, high contracting parties must include signatories. Art. 37 also speaks of high contracting parties as ratifying, thus clearly treating ratification as a separate and further act by a high contracting party. Art. 40 provides that any high contracting party may, at the time of signature, or of deposit of ratifications, or of accession, make a declaration that the party's acceptance of the convention does not apply to colonies or so forth. Thus, it is clear that the party may be a high contracting party as at the time of signature, whether or not the party subsequently ratifies. Ratification is treated as being a matter distinct from signing. Accession here referred to is dealt with in art. 38. Accession, it is provided, is open to any state which was not a signatory. Accession is effected by notification, which has the combined effect of signing and of ratifying. The acceding state thus becomes at one blow, not only a high contracting party, but one who has ratified. Such a state, however, is clearly within the category of high contracting parties, as shown, for instance, by art. 40, which treats as high contracting parties (i) those who have signed, (ii) those who have both signed and ratified, and (iii) those who have acceded. This seems to me to answer a difficulty which impressed the Court of Appeal. Again, the additional protocol confirms this interpretation. In so far as a different construction of "high contracting party" as used in the convention and in the general conditions is adopted in *Grein v. Imperial Airways, Ltd.* (3), I cannot, with all respect, agree with the reasoning of the Court of Appeal in that case.

Thus I construe the words of the convention. This, I think, is its plain and normal meaning. I am unable to qualify that construction by speculating on the intention of the parties who settled the general conditions of 1931. Reference was made to art. 22, para. 4, of the general conditions, which fixes the forum for bringing actions and stipulates that the national law of the court so seised of the case shall apply. Para. 4 (2) provides that actions arising out of international carriage under the convention must be brought in substantially the same forum as that stipulated by art. 28 of the convention. I cannot see why this should not apply to and include signatory states, even if they have not ratified, who may find the provisions convenient for their nationals just as much as if they had ratified. Neither in the convention nor in the general conditions is there expressed any limitation of the meaning of "high contracting parties" for the purposes of art. 28 and art. 22, respectively. I cannot attach any importance to the substitution in art. 22, para. 4 (2), of the words "contracting party to the convention" for the words "high contracting parties to the convention" in art. 28. It is merely a case of loose verbiage, which cannot control the whole tenor of the document. Accordingly both on what, in my opinion, is the clear and unambiguous construction of the words "high contracting parties" and on the considerations to be drawn from the general effect of exceptions in a contract of carriage, I am of opinion that the appellants' contention is right.

I have not thought it necessary to deal at any length with the contention that the position is changed by virtue of the Carriage by Air Act, 1932. I agree with all the members of the Court of Appeal that the Act does not affect a contract like that question. The Act was passed before ratification of the convention by Great Britain. It was passed, *inter alia*, to enable Great Britain to give statutory effect to the convention when it was ratified. It provided that, as from such a day as should be certified by order in council, the provisions of the convention should, so far as relates to carriage by air, have the force of law in the United Kingdom. It also empowered His Majesty by order in council to certify who are the high contracting parties to the convention. This, though it constitutes a statutory definition, is limited, in my opinion, to the purposes of the Act and the obligatory provisions which it contains, and it does not interfere with freedom of contract outside the defined spheres, or say who are to be or who are not to be deemed high contracting parties for contractual purposes outside the scope of the Act. It therefore affords no guidance on the construction of the contract. I do not think it necessary to say anything on the other points which have been discussed. In my opinion, the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellants); *Beaumont & Son* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

R. v. DAVID.

[COURT OF CRIMINAL APPEAL (Humphreys, Singleton and Lewis, JJ.),
February 20, 1939.]

Criminal Law—Conviction for libel—Recognisance to come up for sentence if called upon—Undertaking not to repeat libel—Breach of undertaking—Whether right to trial by jury—Crown Office Rules, 1906, rr. 115, 167. A

The appellants were convicted of criminal libel, but the court, instead of passing final judgment upon him, required him to enter into a recognisance to come up for judgment upon the conviction if called upon at any time within 2 years, and to give a written undertaking not to repeat the libel. He was subsequently charged with having broken the undertaking, and was thereupon brought before the court, which, holding that the undertaking had been broken, sentenced him to 12 months' imprisonment. He appealed against the sentence, and contended that, by reason of the proviso to the Crown Office Rules, 1906, r. 115, he was entitled to have the issue as to whether or not he had broken his recognisance tried by a jury:— B

HELD: (i) the appellants had not been brought before the court for breach of recognisance, but to receive the judgment of the court upon the conviction previously recorded against him. Rule 115, therefore, had no application to the case, and the appellants were not entitled to be tried by a jury. C

(ii) the sentence of 12 months' imprisonment was not excessive. D

EDITORIAL NOTE. The distinction between this case and that of a breach of recognisance is that here the judgment had never been passed and it still remained for the court to pass sentence on the accused. When, therefore, he was brought before the court upon the ground that the condition of his release had been broken, the court, in effect, was free to proceed with the former trial, and thereupon proceed to pass sentence upon him. It is otherwise where there is a breach of recognisance, since that breach has to be proved in the ordinary way. E

AS TO RECOGNISANCES, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 231, 232, para. 236; and FOR CASES, see DIGEST, Vol. 14, pp. 492-494, Nos. 5412-5448.]

Case referred to:

(1) *R. v. Pine* (1932), 24 Cr. App. Rep. 10; Digest Supp. F

APPEAL against sentence of 12 months' imprisonment for libel passed on Dec. 5, 1938, at the Glamorganshire Assizes held at Swansea. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

F. H. Lawton for the appellants. G

R. Sutton, K.C., and *Geraint Rees* for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: In this case, the appellant Trefor David was before this court on Jan. 30, 1939. He then applied for leave to appeal against his conviction and against the sentence which had been passed upon him on Dec. 5, 1938, at the assizes for the County of Glamorganshire held at Swansea. The ground of appeal appeared to be a point of law, and the court, without going into the merits of the case, indicated that the case should be transferred from the list of applications to the list of appeals. Accordingly, the case now comes before the court as a final appeal. The application here made to H

us by the appellant appears to us quite clearly to be an appeal against sentence. Whatever may be the form of the document issued on behalf of the appellant, he has been convicted once, and once only, and that was in Mar., 1938. The time for appealing from that conviction has long since gone by, and there has been no appeal against that conviction, and there is no appeal now. He was, however, sentenced to a term of 12 months' imprisonment on Dec. 5, and from that sentence, under the terms of the Criminal Appeal Act, there is a right of application for leave to appeal, and, in the circumstances of this case, there is right of appeal against sentence.

The facts of the case are these. The appellant was convicted of libel at the Glamorgan Assizes in Mar., 1938. He libelled the doctor, attendants, officers, councillors, clergymen, and all those in authority at the Glamorgan Mental Home, and the libels were published in the form of a leaflet charging them with permitting the most dreadful things to happen at that mental home. Amongst other things, it was alleged that those persons permitted physical violence to be used on the mental patients in that establishment. The then defendant, the present appellant, filed a plea of justification. The case was tried, and the jury, after only a few minutes of consideration, found that the justification was not proved, and convicted the then defendant. GREAVES-LORD, J., who tried the case, took a very merciful view of that case. He gave the accused person an opportunity of behaving himself in the future, and did not then send him to prison, as he might have done. He intimated to him that any repetition of those libels would most assuredly result in a sentence of imprisonment being passed. The course the judge took on that occasion—and it is desirable that it should be stated in legal terms—was this. He did not pass any final judgment on the conviction which had been recorded against the accused person. He allowed him to go free, but, before doing so, he required him to enter into a recognisance to come up for judgment upon that conviction if and when he was called upon to do so at any time within the space of 2 years. The recognisance which is before this court is in these plain terms :

I Trefor David . . . confess myself indebted to our Sovereign Lord the King in the sum of £10 to come up for judgment when called upon so to do within the next 2 years . . .

That is leaving out the words : “ the condition of the above recognisance is the only form in which such recognisance is entered into.” It is usual to find in addition the words : “ and to be of good behaviour during that time.”

In this particular case, it was pointed out to the judge by counsel for the prosecution that it was desirable that, having regard to what was known of the then defendant, he should be put on special terms, to be reduced into writing, that he must not make any similar attack on these persons. Accordingly, there was embodied in that recognisance, as one of the conditions thereof, the terms of an undertaking which in fact was

in writing, and it was then signed by the present appellant. It is an undertaking not to repeat in any manner whatsoever the allegations contained in the criminal libel, or to make any similar charges against the members of the committee of visitors, the officials or any person concerned with, or employed in, the administration or conduct of the mental hospital in question. That recognisance having been entered into, the appellant was released. On Dec. 5, 1938, he was brought, as it happened, before the same judge at the assizes at Swansea in order to receive sentence—that sentence which up to that time had never been passed in respect of the conviction which had been registered against him in March. A

The confusion of thought which has been apparent in this case may have arisen as a result of the form of notice which was given to the appellant, requiring him to come up for judgment if called upon. It is not necessary for this court to inquire, and it does not inquire, how it came about that such an elaborate form of notice was served upon him. It is quite clear, however, that no particular form of notice is required at all, in these circumstances, beyond a notice calling upon the person under recognisance to come up for judgment on a day mentioned in the notice. B C

The only Crown Office rule which has any relevance to the matter at all is r. 167, which provides as follows : D

If the defendant be not in custody and be under recognisance to appear to receive sentence the defendant and his bail may be served with a four-days' notice, that on a day named therein the court will be moved for judgment. Such service need not be personal.

This court is not deciding as a matter of law that that rule has any application to the present case. It does hold, however, that there is no other Crown Office rule which has any relevance to this matter. We have been referred to r. 166, but it is quite clear that that rule has no application to the present case, because by its terms it is confined to the case of a defendant who is not under recognisance to appear to receive sentence. We have also been referred to r. 112, and the following rules up to and including r. 115. Those rules relate to the old practice of filing in the Crown Office recognisances which have been acknowledged in certain circumstances, usually on removal of an indictment or some other proceeding into the King's Bench Division, which included recognisances to be of good behaviour, and deal with the question of what is to happen to a person whose recognisance has been entered into and the court desires to estreat that recognisance. There are various provisions for that purpose, one of which has been read to us by Mr. Lawton, who asks the court to apply it to the present case. H

Rule 115 provides as follows :

Whenever it has been made to appear to the court or a judge that a party has made default in performing the conditions of any recognisance, into which he has entered, filed in the Crown Office [this recognisance was never filed in the Crown Office] the court or a judge upon notice to the cognisor and his sureties, if any, may order such recognisance to be estreated into the exchequer [nobody applied to any court that this recognisance should be estreated] without issuing any writ of *scire facias* :

Provided that nothing herein contained shall be deemed to take away or prejudice the right of any party to have questions of fact tried by a jury, in such cases as he might before the Crown Office Rules of 1886 have so required.

It is sufficient to say that this court is quite clearly of opinion that that Crown Office rule has no sort of application to the facts of the present case.

- A It is upon that r. 115 that Mr. Lawton has submitted to this court that, upon the appearance of the defendant on Dec. 5 at the Swansea Assizes, he was entitled to have the issue as to whether or not he had broken his recognisance tried by a jury. The first observation to be made in regard to that is that, if there is any substance in regard to it,
- B it is a point which has been overlooked by generations of criminal lawyers, including those who have sat on the Bench and many criminal lawyers who have argued such matters at the bar, for, as far as this court is aware, it was not until Dec. 5, 1938, that it had ever been suggested to any court that such an issue was triable by a jury. In our view, there is
- C no foundation whatever for such a suggestion. Indeed, it is not contended that there is any foundation for such suggestion, unless r. 115 of the Crown Office Rules applies. As I have already said, in our opinion, it has no application. It is commonly said that a person is brought up for breach of recognisance before a court before which he has previously
- D been convicted, and released on recognisance. The phrase is a natural one to use, but it is an inaccurate phrase. The person in those circumstances, and the appellant in this case in these circumstances, was not brought up for a breach of recognisance. He was brought up before the court to receive the judgment of the court, upon a conviction recorded
- E against him, which up to that date had never been passed. In other words, he was brought up for sentence. He was brought up because he had been given an opportunity to be free while he behaved himself. He had misbehaved himself, and, so far from observing the condition, he had broken the undertaking.
- F There are many cases in which this court has had to consider the question of a breach of recognisance and the proper procedure to be adopted if a person is called upon to come up for judgment, and the cases are all to one effect, including *R. v. Pine* (1), to which we have been referred, and in which, incidentally, it is quite clear that no one suggested
- G from the beginning to end of the case to the judges of such experience as LORD HEWART, L.C.J., AVORY and GODDARD, JJ., that the appellant in that case had the right to be tried by a jury. The point in that case was that a person who has committed a breach of recognisance must have it proved against him, and he is entitled to be heard in his own
- H defence. That is all. In this case, it is not contended for a moment that GEEVES-LORD, J., did not hear this appellant. Indeed, he heard him at almost interminable length. His counsel called many witnesses, including the appellant himself, and the witnesses for the prosecution were cross-examined and the whole matter was tried as though it was being tried by a jury, although in fact the judge was trying the case

himself. At the close of the evidence, after hearing counsel, the judge gave judgment. He said that he was quite clear that what had been done by the appellant at a meeting on Aug. 21, 1938, was a clear breach of his undertaking, entered into solemnly in order to get punishment deferred, not to go about doing things which he had been convicted of doing. He went on to say :

The iteration of the charges which the appellant iterated was a clear breach of the undertaking, and in those circumstances the mercy which I showed in March when I dealt with the case was entirely misplaced. The only thing I can do is to impose a sentence which I hope will keep him from this sort of gossip for the future.

The court, having intimated that it is quite satisfied that the proper procedure was adopted in this case, has been asked to say that, upon the facts of this case, the sentence of 12 months' imprisonment was excessive. After going into the facts of the matter, this court would be very slow to differ from the view of the judge, who had heard all the facts and had decided that the breach of recognisance had been proved. The court has been referred to, and has considered, the evidence before GREAVES-LORD, J., and entirely agrees with him that what was proved was a clear breach of the recognisance, whether it is regarded as a recognisance to be of good behaviour or as one to keep and observe certain specific undertakings. In our view, the judge was perfectly justified and perfectly right in taking the view he did. This application, which is an appeal against sentence of 12 months' imprisonment, has no foundation at all, and the appeal is dismissed. Since, however, the case has been transferred, although it would not be right to say that leave to appeal has been granted—it was transferred from the application list to the final list on Jan. 30, 1939, and that has necessarily caused some delay—the sentence in this case may run from Jan. 30, 1939.

Solicitors: *Thompson & Davis* (for the appellant); *A. C. Walter*, Cardiff (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

JENKINS v. SHELLEY.

[KING'S BENCH DIVISION (Hallett, J.), February 22, 28, 1939.]

Royal Forces—Navy—Discipline—Summary jurisdiction of captain—Naval officer disobeying orders—"Wilful disobedience"—"Highly insubordinate conduct"—Meaning of terms—Naval Discipline Act, ss. 17, 56 (2)—King's Regulations and Admiralty Instructions, arts. 540, 552.

The plaintiff, a chief petty officer in the Navy, refused to obey certain orders, and was thereupon summarily sentenced by the captain of the ship to 42 days' detention. The charge sheet preferred against him merely contained the words "wilful disobedience of orders," and it was thereupon contended by the plaintiff that, unless the charge was one of "highly insubordinate conduct," as provided by the King's Regulations and Admiralty Instructions, art. 552, the captain had no jurisdic-

tion to deal summarily with the plaintiff's offence, and that, therefore, the plaintiff's detention amounted to false imprisonment:—

HELD: wilful disobedience is a kind of insubordination, and, upon the proper construction of the regulations, the captain had jurisdiction to sentence the plaintiff summarily.

[EDITORIAL NOTE.] Offences under the naval penal code can be dealt with by A courts-martial or summarily, and the present case is concerned with the limits of the summary jurisdiction of the commanding officer. The difficulty is that the regulations refer to "highly insubordinate conduct" as an offence punishable under the Naval Discipline Act, but that Act does not in terms refer to that offence.

AS TO ADMINISTRATION OF NAVAL PENAL CODE, see HALSBURY, Hailsham Edn., Vol. 28, pp. 551, 552, para. 1145; and FOR CASES, see DIGEST, Vol. 39, B p. 318, Nos. 21-26.]

Case referred to:

(1) *Heddon v. Evans* (1919), 35 T.L.R. 642; 39 Digest 331, 158.

ACTION for damages for false imprisonment. In Jan., 1938, the plaintiff, C a chief petty officer in the Navy, when ordered to resume work, refused to do so, and, without using insulting language, accompanied his refusal with words to the effect that "he was not going to do any more work for the Admiralty." As a result of that occurrence, he was charged with "wilfully disobeying the lawful command of his superior officer," and D was subsequently sentenced to 42 days' detention, the punishment warrant being signed by the captain of the ship and the Commander-in-Chief. It being undisputed that this court had jurisdiction to deal with the plaintiff's claim for damages, the only question for decision was whether or not the defendants—the captain and the Commander-in-Chief E —had jurisdiction to inflict the sentence. This depended on the correct interpretation of the King's Regulations and Admiralty Instructions, and, in particular, of arts. 540 and 552 thereof. Art. 540 contains an index of certain offences and punishments suggested therefor, and art. 552 provides as follows:

F Chief petty officers . . . are not to be sentenced summarily . . . except for desertion; but those who cannot be disrated [the plaintiff belonged to that category] may be sentenced summarily . . . for . . . highly insubordinate conduct.

No oral evidence was adduced on either side.

G *Hon. Sir Stafford Cripps, K.C., Peter Pain and Anthony Cripps* for the plaintiff.

The Attorney-General (Sir Donald Somervell, K.C.) and Hon. H. L. Parker for the defendants.

Cripps, K.C.: The facts are not in dispute, nor is it disputed that this court has jurisdiction to decide this case. [Counsel referred to H *Heddon v. Evans* (1).] The plaintiff is charged with "wilful disobedience," and not with "highly insubordinate conduct." The court can only look to the charge-sheet and art. 552, and, unless there is something more than wilful disobedience, art. 552 does not apply. Consequently, the defendants had no jurisdiction to deal with the offence summarily. "Wilful disobedience" and "highly insubordinate con-

duct" are two entirely different things. The former is of a passive nature, whereas the latter is not.

The Attorney-General : The plaintiff's argument would result in depriving the captain of jurisdiction in all cases of wilful disobedience. In fact, there is nothing to suggest that "wilful disobedience does not include highly insubordinate conduct." If anything has been omitted from the warrant, it is simply an additional sentence to the effect that the plaintiff was "guilty of highly insubordinate conduct in that he wilfully disobeyed orders." That, however, can be no more than an error of procedure, which does not affect jurisdiction. A

HALLETT, J. : In this case, the plaintiff, Eric John Arnold Jenkins, was in Jan., 1938, an engine-room artificer, 4th Class, in His Majesty's Navy, serving aboard H.M.S. Curacoa in Portsmouth Harbour. By a letter dated Dec. 12, 1938, it was admitted on behalf of the defendants, although originally traversed in their defence, that the plaintiff had a rating as chief petty officer, but, on the other hand, at the trial, it was admitted on behalf of the plaintiff that he was a chief petty officer who could not be disrated. The relevance of these two admissions will appear when I come to deal with the King's Regulations and Admiralty Instructions for the Government of His Majesty's Naval Service, art. 552, upon which this case mainly turns. The first defendant was at all material times a captain in His Majesty's Navy commanding H.M.S. Curacoa, and the second defendant was at all material times the Commander-in-Chief of His Majesty's ships and vessels at Portsmouth. One, Reginald Lewis Mauger, chief engine-room artificer, 2nd Class, was, at all material times, having regard to the definition contained in the Naval Discipline Act, 1866, s. 86, the superior officer of the plaintiff. C D E

On Jan. 19, 1938, an incident, whereof particulars are set out in the letter of Dec. 12, 1938, is alleged by the defendants to have occurred aboard H.M.S. Curacoa, and counsel for the plaintiff conceded that those particulars might be accepted by me as sufficiently accurate for the purposes of this action. By reason of that incident, the plaintiff was charged on Jan. 20, 1938, before the first defendant, as the officer in command of the ship to which the plaintiff belonged, with an offence which was specified on a form S 241 (hereinafter called the charge sheet) as follows : F G

... did wilfully disobey the lawful command of Reginald Lewis Mauger, Chief Engine-Room Artificer, 2nd Class, O.No.P/M 22013 his superior officer when ordered to "turn to" at 08.15.]

Thereupon the first defendant, having investigated the matter, transmitted to the second defendant a form S 271 (hereinafter called the punishment warrant) which recited on p. 1 that the plaintiff had been charged with an offence specified in exactly the same terms as those used on the charge sheet, and submitted on p. 4 that the offence might be dealt with summarily, and that a sentence of 42 days' detention in addition to deprivation of one good conduct badge was considered H

suitable. On the same day, this recommendation was approved in writing by the second defendant on the appropriate part of the form, and on Jan. 22, 1938, the first defendant made further entries on the form adjudging that the plaintiff was to be kept in detention in Portsmouth naval detention quarters for 42 days, and to be deprived of one good conduct badge, and certifying that, before awarding the foregoing punishment, he had duly investigated the matter, and that he considered the charge against the plaintiff to be substantiated.

A Counsel for the defendants intimated to me that he was prepared to call the first defendant to give evidence that, before arriving at the decision recorded on the punishment warrant, he had addressed his mind to the question whether the plaintiff was guilty of highly insubordinate conduct, and had come to the conclusion that the plaintiff was guilty of such conduct, but counsel for the plaintiff, whilst submitting that such evidence could be of no possible relevance, intimated to me that, without the first defendant being actually called, he was prepared to treat such evidence as having been given and not challenged. I attach no importance to the conduct sheet, which was also put in evidence before me, but, in order to complete my survey of the documentary evidence, I may mention that the offence in question was specified thereon in the same terms as those on forms S. 241 and S. 271. No oral evidence was adduced on either side. As a result of the respective actions of the defendants which appear from the punishment warrant, the plaintiff was in fact kept in detention in Portsmouth naval detention quarters for 36 days, 6 days of his sentence being remitted.

E For the plaintiff, it was contended that the first defendant had no jurisdiction, in the circumstances of this case, to sentence him summarily on the punishment warrant to detention, as had admittedly been done, and that, therefore, the detention of the plaintiff amounted to a false imprisonment in point of law, for which both defendants were responsible, and in respect of which both were liable to pay to the plaintiff such damages as I might think fit to award.

G For the defendants, it was contended in para. 4 of their defence that the plaintiff's claim did not fall within the jurisdiction of this court, but during the course of the hearing it was admitted by their counsel that, having regard to the decision in *Heddon v. Evans* (1), it was not open to me to decide this point in their favour, and, accordingly, whilst keeping the point open for argument in a higher court, he did not address any argument to me thereon.

H The sole questions which I have been asked, and think it necessary to consider, are, first, whether the first defendant had the necessary jurisdiction in point of law to sentence the plaintiff summarily to detention, as he did, and, secondly, what damages ought to be awarded if the first defendant had no such jurisdiction. The Naval Discipline Act, s. 56 (2), provides as follows :

Any offence not capital which is triable under this Act, and (except in the cases

by this Act expressly provided for) is not committed by an officer, may, under such regulations as the Admiralty from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time either of the commission or of the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude or to award imprisonment or detention for more than 3 months.

The general power of summary trial and punishment in respect of offences triable under the Act which is thus conferred on the officer in command of the ship to which the offender belongs is, therefore, expressly limited by the section only in three particulars—namely, (i) as regards the nature of the offence, it must not be capital, (ii) as regards the nature of the offender, he must, except in certain cases, not be an officer, which expression includes, by sect. 86, a subordinate officer, and (iii) as regards the nature of the punishment awarded, it must not be penal servitude or imprisonment or detention for more than 3 months. None of these limitations is applicable in the present case. I think that the words “under such regulations as the Admiralty from time to time issue” merely regulate procedure, and do not further limit the jurisdiction.

It was conceded, however, on behalf of the defendants, that, since the King's Regulations and Admiralty Instructions are, to quote the order enjoining their observance, “established by His Majesty's order in council,” any further limitation of the jurisdiction of the first defendant which appears therefrom can be relied upon by the plaintiff, and does not merely expose the defendants to disciplinary action for disregarding such limitation.

Art. 551 of the King's Regulations lays down a general power of summary trial and punishment in respect of offences triable under the Naval Discipline Act, which power is by the article limited in the same three particulars as is the power conferred by sect. 56 (2) of the Act, but is also limited by reference to the exceptions specified in art. 552. Art. 552 lays down that (amongst others) chief petty officers, of whom the plaintiff was one, are not to be sentenced summarily to imprisonment or detention except for desertion, but that those who cannot be disrated, as shown in Appendix XVII, part I, of whom the plaintiff was one, may be sentenced summarily to imprisonment or detention for the offences thereafter specified only. There follows a list of offences under letters (a) to (i), of which (a) is “mutiny or highly insubordinate conduct.” It results that art. 551 clearly conferred no jurisdiction to sentence the plaintiff summarily to detention, and that, according to art. 552, he was not to be sentenced summarily to detention except for one of the offences specified under letters (a) to (i).

It is not suggested that the plaintiff was in fact sentenced for mutiny, or for any of the offences specified under letters (b) to (i) inclusive, and the short point for my decision, therefore, becomes whether he was sentenced for “highly insubordinate conduct.”

His counsel points to the terms in which the plaintiff's offence was specified on both the charge sheet and the punishment warrant, and contends that it appears from those terms that the plaintiff was neither

charged with, nor adjudged guilty of, nor sentenced for, "highly insubordinate conduct." Counsel contends, and I agree with him, that whether the plaintiff could have been so charged, adjudged and sentenced, having regard to the admitted particulars of his conduct, is wholly immaterial if he was not in fact so charged, adjudged, and, more particularly, sentenced. He further contends that whether the first defendant considered the plaintiff to be guilty of highly insubordinate conduct is equally irrelevant, and I agree that this is so if, but only if, the defendants are precluded by the documents from establishing that this was the offence for which the plaintiff was in fact sentenced.

The first difficulty in the case is that, whilst art. 552, when read in conjunction with art. 551, which refers to it, clearly contemplates that highly insubordinate conduct is an offence triable under the Naval Discipline Act, the Act itself does not refer in terms to any such offence. I may add that the inclusion of "insubordination" as the second offence in section (j) of Table I under art. 540, to which I shall have further to refer, also seems to contemplate that insubordination is an offence triable under the Act. In these circumstances, counsel for the plaintiff does not dispute that highly insubordinate conduct is an offence triable under the Act, and concedes that it is an offence covered by sect. 17 of the Act, since it is common ground that there is no other section which can cover it. That section creates three offences—namely, (i) wilfully disobeying any lawful command of his superior officer, (ii) using threatening or insulting language to his superior officer, and (iii) behaving with contempt to his superior officer. For each of those offences a punishment of detention is clearly authorised by the section, having regard to the terms of the section, coupled with sect. 55. The first of those offences was the offence charged in the present case, according to the charge sheet and punishment warrant, and, not only would a charge of highly insubordinate conduct in those terms have been a charge of an offence not mentioned in the Act, but also the insertion of such a charge on the punishment warrant would have failed to comply with the requirements of art. 538, which prescribes that, when punishments are ordered by warrant, as in the present case, the charge as shown under the heading "Particulars of offence" on p. 1 should follow as closely as possible the wording of the appropriate section of the Naval Discipline Act.

Accordingly, counsel for the defendants contends that conduct rendering the offender guilty of any one of the three offences created by sect. 17 may amount to highly insubordinate conduct, and that the question whether it has been of the gravity described by those words is a question for determination by the officer trying the offender, and not by this court. He points to the fact that the word "Insubordination" appears as a heading to both sects. 17 and 18, and I may add that in sect. 46 there is a reference to this heading.

As to the effect that such a heading may have, he refers me to MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 46, where it is stated

that such headings are regarded in the same light as preambles, and he concedes that assistance can only be derived from such headings in case of ambiguity. However, he contends, as I understand, and, notwithstanding the contention of the plaintiff's counsel to the contrary, I agree, that this is a case where I can legitimately derive some assistance from the heading. The plaintiff's counsel contends, on the other hand, that wilfully disobeying a lawful command of a superior officer does not and cannot amount to highly insubordinate conduct, and, in reply to my question as to what is the difference, according to the ordinary use of language, between such disobedience and insubordination, he submits that wilful disobedience is something merely passive, whereas insubordination is something in the nature of active defiance. He concedes, as I understand, that the second or third offences created by sect. 17 might amount to highly insubordinate conduct, but denies that the first offence so created can amount to it. After careful consideration, I am unable to take this view. I think that wilful disobedience to a lawful command of a superior officer would commonly and correctly be described as a kind of insubordination, although not the only kind, and I think that the heading to which I have referred tends to support the view, which I have formed independently of the heading, that such disobedience is to be so regarded for the purposes of the Act.

Counsel for the plaintiff suggests that highly insubordinate conduct is the equivalent of gross insubordination, and I agree, but the adjective seems to me to relate merely to the quality of the insubordination, and not to render highly insubordinate conduct a different offence from that of insubordinate conduct, or a different offence from that of wilful disobedience, if insubordinate conduct is not a different offence from that of wilful disobedience. I do not understand it to be disputed that the quality, as distinct from the nature, of the offence committed is a matter for consideration by, and only by, the person or persons entrusted with the duty of deciding how far the offender ought to suffer or escape the maximum punishment which can lawfully be imposed for that offence.

Counsel for the plaintiff has further urged that the officer in command of the ship cannot be the judge of his own jurisdiction, but I think that it is clearly for such officer to decide whether the person charged with wilful disobedience is guilty of that offence, and, if so, whether the quality of his offence is, in all the circumstances, sufficiently serious to bring it within the description "highly insubordinate conduct." It has been strongly contended, however, on behalf of the plaintiff, that the contents of Table I under art. 540 conclusively preclude me from regarding wilful disobedience as a kind of insubordination which may amount to highly insubordinate conduct, and I agree that considerable difficulty is occasioned by the subdivisions of offences which are to be found in that table. The expression "highly insubordinate conduct" does not appear in the table at all, but it is pointed out that "Disobedience" is the heading to sect. (d) of that table, and that "wilful disobedience of

orders " appears as the first offence mentioned in that section, whereas " Insubordination and disrespect " is the heading of sect. (j) of that table, and " insubordination " is the second offence mentioned in that section.

It is therefore contended that the table shows that wilful disobedience is to be regarded as a different offence from that of insubordination, and
A not merely as a possible kind of insubordination. This argument is reinforced by pointing out that in sect. (j) mutiny and insubordination appear as the first and second offences, and are thus in a sense coupled, just as they are in sect. (a) under art. 552, and it is sought to deduce from this circumstance that, for the purposes of art. 552, wilful disobedience
B should be regarded as falling within a category of offences less serious than that of highly insubordinate conduct, and, therefore, within a different category. It is conceded that this argument would have been stronger if a more severe maximum punishment—for example, punishment No. 3 (imprisonment)—were suggested for insubordination,
C but I agree that the fact that the same maximum punishment is suggested for insubordination and for wilful disobedience of orders may be a mere coincidence, and does not carry the matter any further.

I have also come to the conclusion that the note to the second offence in sect. (d) does not throw any real light upon the question whether or
D not any one of the offences specified under art. 552 can come under more than one of the descriptions contained in Table I. For the defendants, it is pointed out that Table I merely contains suggestions as to normal maximum summary punishments, and that it is expressed not to be exhaustive as regards offences. In my opinion, that table can neither
E create fresh offences, nor subdivide, save as regards the suggested normal maximum summary punishments, existing offences, nor affect by such creation or subdivision the permissible mode of trying offences. The only effect which it can have, in my opinion, upon the application of
F art. 552 is that, whereas, for example, by virtue of the combined effect of sect. 56 (2) of the Act and art. 552, if they had stood alone, the plaintiff could have been sentenced for highly insubordinate conduct to a summary punishment as severe as 3 months' imprisonment—that is, punishment No. 3 for 3 months—by virtue of Table I and the first part of the second sentence in note (i) at the head of that table, the normal maximum
G summary punishment to which he exposed himself by committing that offence was further limited to 3 months' detention—that is, punishment No. 4 for 3 months.

I think that art. 540 deals, and is intended to deal, only with limitation of punishments, and does not deal, and is not intended to deal, and ought
H not to be utilised so as to have the effect of dealing, with jurisdiction to try offences summarily. For these reasons, I have come to the conclusion that, when the plaintiff was sentenced summarily to detention by the first defendant on the charge specified on the charge sheet and the punishment warrant, he was not so sentenced without jurisdiction, having regard to the authority enjoyed by that defendant under the relevant

provisions of the Naval Discipline Act and the King's Regulations, and that the plaintiff's claim fails accordingly. In these circumstances, the question as to what amount of damages ought to be awarded to him does not arise for my decision.

Where the assessment of damages involves an investigation which the trial judge has already conducted, it is often desirable for him, although giving judgment against the plaintiff upon the question of liability, to state the amount of damages which he would have awarded if he had decided differently upon that question, and thus save unnecessary trouble, delay and expense in the event of the plaintiff succeeding upon the issue of liability in a higher court. In the present case, however, I am in no better position to assess damages than that of a higher court, and I therefore content myself with saying that no suggestion was made before me on behalf of the plaintiff that the defendants were guilty of anything more than a *bona fide* misapprehension as to the extent of the powers conferred on the first defendant by provisions which, as sufficiently appears from this judgment, are, in my opinion, not very easy to construe and apply. For these reasons, there will be judgment for the defendants, with costs.

Judgment for defendants with costs.

Solicitors: Gower, Pollard, Thorowgood & Tabor (for the plaintiff); Treasury Solicitor (for the defendants).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

NAISMITH v. LONDON FILM PRODUCTIONS, LTD. E

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), February 23, 24, 1939.]

Master and Servant—Liability of master at common law—Safety of employee—Dangerous employment—Duty of master to insure that danger is minimised. Practice—Jury—Communication from jury—Desirability of recording on judge's note or shorthand note. F

The plaintiff was employed as a crowd extra in a film in course of production at the defendants' studios. She was acting with a large number of others, and was required to be covered with a highly inflammable material, which was wound round the legs and over the shoes. While waiting for a scene to be photographed, she noticed that her foot was on fire, and she was immediately enveloped in a sheet of flame, with the result that she suffered serious injuries. The jury were directed that the obligation which the defendants owed to the plaintiff was that owed to an invitee:— G

HELD: the direction to the jury was wrong. The duty owed by the defendants to the plaintiff was that owed by an employer to an employee, and was a duty to provide proper equipment, and to take whatever steps were reasonable and proper to ensure that any danger to the plaintiff should be minimised as far as possible. H

Where the jury send in a communication, its terms should be put on the record. If the judge is keeping a note, it should be on the judge's note. If there is a shorthand note, it should, if possible, be recorded on that note.

[EDITORIAL NOTE. The standard of duty owed by an employer to an employee was recently considered in the House of Lords in *Wilsons & Clyde Coal Co., Ltd. v. English* (2). It is not the same as the duty owed by an invitor to an invitee. The further point in the case, as to the placing on record of a communication from the jury, should be noted as a point of practice.

A As to MASTER'S DUTY TOWARDS A SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-191, paras. 313-321; and FOR CASES, see DIGEST, Vol. 34, pp. 194-199, Nos. 1580-1626.]

Cases referred to :

(1) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, 208 ; 35 L.J.C.P. 184 ; 14 L.T. 484 ; *affd.* (1867), L.R. 2 C.P. 311.

B (2) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57 ; [1937] 3 All E.R. 628 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406.

C APPEAL by the plaintiff from verdict and judgment at a trial before LORD HEWART, L.C.J., and a special jury on July 20, 1938, asking for judgment or a new trial. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. The appeal is only reported as to the nature and extent of the obligation owed to the plaintiff by the defendants, her employers.

Eric Sachs, K.C., and *F. Ashe Lincoln* for the appellant.

J. W. Morris, K.C., and *T. F. Davis* for the respondents.

D SIR WILFRID GREENE, M.R. : In this appeal, the plaintiff asks for a new trial of an action which she brought against London Film Productions, Ltd., claiming damages for personal injuries in circumstances which I will shortly state. In July, 1935, the plaintiff, who is a film artiste, was engaged by the defendants to act as what is known

E technically as a crowd extra in a film entitled THE SHAPE OF THINGS TO COME. That film, at the time, was in course of production by the defendants at their studios at Denham, and on July 21 the plaintiff, with a large number of others, amounting to some 400 members of the

F crowd, had served out to her material which she was to put over her dress. What I am saying now is common ground. That material, which is known as scrim, is like a very loose-mesh sacking such as is used by

G plasterers. They were to put it on so as to conceal entirely the ordinary clothes that they were wearing. They had to wind it round their legs and over their boots or shoes, with the consequence that, as they walked

H about, they would be walking on this material. The plaintiff, while waiting with some others for the camera to take a shot in which she would be included, noticed that her foot was on fire, and no sooner had she noticed it than she was enveloped in a sheet of flame. What happened was that the flame, which began at her feet, swept up with very great

H rapidity and consumed the whole of this scrim which she was wearing. It was only by good fortune that a much greater catastrophe did not occur, but the plaintiff suffered very serious burns.

Three suggestions were made in the course of the case as to the cause of the fire, (i) that it was caused by the plaintiff herself dropping a match or a cigarette-end on her foot or on the ground, (ii) that it was caused

by somebody else's match or cigarette-end, and (iii) that it was caused by some generation of fire due to reflectors, or something that might operate on the very dry grass. That latter point really dropped out of the case. On several points of vital importance there was a direct conflict of evidence. I may mention two. One was as to whether the plaintiff herself at the time in question was smoking, and the other was as to whether there was any prohibition of smoking, either generally in the place where the film was being actually produced or specially with regard to the particular spot where the plaintiff was at the time. A

The complaint that is made is as to misdirection in the summing up of LORD HEWART, L.C.J., to the special jury. The case is obviously one of some complication on the facts, and the precise operation of the law of negligence on those facts is one that requires careful thought. It was eminently a case where the jury should have received instruction as to the various points in regard to which they would have to consider whether or not the defendants had fulfilled the duty imposed upon them by law. Unfortunately, LORD HEWART, L.C.J., began his summing up with a statement as to the relevant principles of negligence which I cannot help thinking really coloured, as Mr. Sachs submitted, the whole of his summing up. That statement was to the effect that the obligation of the defendants in this case was the obligation owed towards an invitee under the familiar principle laid down in *Indermaur v. Dames* (1), the case that is usually referred to on that subject. In point of fact, the standard of duty was a different one, because it was the standard of duty owed by an employer towards an employee in reference to the place in which that employee is to work and the materials which that employee is to use in connection with his work. The law on this point has recently been laid down by the House of Lords in the case of *Wilsons & Clyde Coal Co., Ltd. v. English* (2), and for present purposes I can take the very concise statement of LORD MAUGHAM, at p. 88 ([1937] 3 All E.R. at p. 646): B C D E

The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result. F

The obligation of the defendants, therefore, as a matter of law, was to provide proper equipment for their employees: That does not mean, of course, that they were not entitled to supply equipment which was in fact dangerous, but, if they supplied equipment which was in fact dangerous, that would impose upon them, as a matter of law, the further duty to take whatever steps were reasonable and proper to ensure that that danger should be minimised so far as possible. The sort of duty which lay upon them would obviously raise questions in a case like the present as to whether or not there ought to have been given to the people to whom this material was served out some special warning as to its peculiarly inflammable nature, particularly in view of the fact that smoking was admittedly allowed over the whole of this area, if not to everybody, at least to some. This and other matters as to the precautions which ought to have been taken were matters for the jury to consider. G H

- MACKINNON, L.J. : I agree. In the first place, I think that there was material misdirection of the jury, and that there was no proper direction to them as to the standard of care and duty owed by the defendants to the plaintiff. That standard of care was put in the summing up as merely that of the owners of premises to an invitee on to those premises, and the
- A well-known passage in *Indermaur v. Dames* (1) was quoted. That might have been a proper direction if the plaintiff had come upon these premises as an invitee wearing a dress of her own choice and her own provision. The fact was that the plaintiff was in this place as an employee of the defendants, wearing material with which they had directed her to clothe
- B herself. The duty owed by the defendants to the plaintiff should have been analysed, in the direction to the jury, as that of an employer to an employee, the employer providing the apparatus and equipment for the employment, including, in this case, a reference to the nature and safety of the garments that the employee was to wear. Such standard of duty is explained by
- C *Wilsons & Clyde Coal Co., Ltd. v. English* (2), to which SIR WILFRID GREENE, M.R., has referred. The jury sent back a communication to LORD HEWART, L.C.J., which resulted in that incident which is recorded in the shorthand note. Unfortunately, there is no record in the shorthand note, or any other note, of what the terms of that communication were.
- D The recollection of one of the counsel who was there is that the terms of the communication were to this effect : " We have come to a conclusion as to what the cause of the fire was." Having regard, as I say, to the words of this summing up—asking if this fire was due to the girl herself smoking—I suspect that the jury by that general intimation meant : " We
- E think that she was smoking, and that she caused the fire herself." Assuming counsel is right in his recollection that the communication of the jury was, " We have come to a conclusion as to what the cause of the fire was," the jury then received only this further assistance :

- F Are you satisfied that there was in the circumstances, which have been described to you, negligence on the part of the defendants, and are you satisfied that, if there was negligence on the part of the defendants, that negligence was the cause of the injuries which the plaintiff has sustained ?

- That, I think, following upon the summing up, repeated by implication to them what I say is my conclusion as to the general meaning of the
- G whole summing up—namely, " If you are satisfied that the plaintiff was smoking, and so set fire to herself, find for the defendants." That being so left to them, I think that it was not an adequate presentation to the jury of the problem which they had to solve. The result is, I agree, that there must be a new trial of this case.

H

GODDARD, L.J. : I agree. In the first place, the standard of duty was not correctly stated to the jury, though it is only fair to point out that *Wilsons & Clyde Coal Co., Ltd. v. English* (2), which has done so much to clarify the law on that point, was not cited to LORD HEWART, L.C.J. The relationship of the parties was not that of invitor

and invitee, but that of employer and employee, and it follows that the jury should have been directed that the defendants' duty was not merely to warn against unusual dangers known to them, and not to the plaintiff, but also to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit.

SIR WILFRID GREENE, M.R. : I would like to add one matter on the point to which MACKINNON, L.J., referred, and that is with regard to the communication from the jury. In a case where the jury send in a communication, the terms of it should be put on record. If the judge is keeping a note, it should be on the judge's note. If there is a shorthand note which takes the place of his note, the communication should be announced, if the judge thinks it right to do so, having regard to the nature of it, after the verdict has been returned, in order that it may be recorded on the note.

New trial granted.

Solicitors : *M. Freeman & Co.* (for the appellant) ; *C. Howe Browne* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

GRAY v. JONES.

[KING'S BENCH DIVISION (Atkinson, J.), **February 3, 6, 1939.**]

Libel and Slander—Slander—Words actionable per se—Words imputing a criminal offence—"You have a conviction"—Words not putting defamed person in jeopardy of prosecution—Payment in of precise sum awarded as damages—Costs.

In an action for slander, it was proved that the defendant said of the plaintiff : " You are a convicted person. I will not have you here. You have a conviction." It was contended that these words were not actionable without proof of special damage. The defendant had paid into court the sum of £25, and the jury by their verdict awarded that sum as damages :—

HELD : (i) these words were actionable without proof of special damage. The basis of such an action is not that the words put the person defamed in jeopardy of a criminal prosecution, but that they cause other people to shun that person and to exclude him from society.

(ii) upon these words, the jury were entitled to find that the plaintiff was alleged to have been convicted of an offence for which she might be sent to prison.

(iii) there having been no evidence specially directed to the question of quantum, the order as to costs should be that the plaintiff recover his general costs of the action down to the date of payment in and the costs incurred after that date on the issue of liability.

[**EDITORIAL NOTE.** The argument in the present case is that a statement that a person has been tried and convicted does not put him in jeopardy of a criminal prosecution, since, according to the statement itself, he has already been tried for the offence. Therefore, assuming the reason for such words being actionable without proof of special damage to be that the person is so put in jeopardy, such words relating to a past conviction cannot be actionable without such proof. The

question thus arises as to the true basis upon which such words are so actionable. Upon a review of the authorities, this is found to be the social ostracism to which the plaintiff is liable to be subjected—that is, that the person defamed is held up to hatred, ridicule and contempt.

AS TO WORDS IMPUTING A CRIMINAL OFFENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 417, 418, paras. 503, 504; and FOR CASES, see DIGEST, Vol. 32 pp. 47-51, Nos. 528-634.]

Cases referred to :

- (1) *Fowler v. Dowdney* (1838), 2 Mood. & R. 119; 32 Digest 50, 596.
- (2) *Gainford v. Tuke* (1619), Cro. Jac. 536; 32 Digest 58, 831.
- (3) *Boston v. Takam* (1621), Cro. Jac. 623; 32 Digest 56, 774.
- (4) *Heming v. Power* (1842), 10 M. & W. 564; 32 Digest 48, 561; 11 L.J.Ex. 323.
- (5) *Carlslake v. Mapledoram* (1788), 2 Term Rep. 473; 32 Digest 59, 858.

ACTION for damages for alleged slander. The facts are fully set out in the judgment.

P. L. E. Rawlins for the plaintiff.

Geoffrey Howard for the defendant.

ATKINSON, J. : In this case, the plaintiff is suing for slander. The alleged slander was that the defendant had said of the plaintiff :

You are a convicted person. I will not have you here. You have a conviction.

- At the close of the case for the plaintiff, it was submitted that these words were not capable of being actionable without proof of special damage. The point was also submitted, and has since been argued, that to say of somebody that she has been convicted of a crime for which she could be corporally punished is not actionable without proof of special damage. Those points were reserved, and the case went to the jury. Right from the beginning, the innuendo opened was that these words did imply that the plaintiff had been guilty of a criminal offence for which she could be sent to prison, and no objection was taken to that opening. It was never pointed out by counsel for the defendant that the innuendo alleged in the statement of claim was merely that the plaintiff had been found guilty of a criminal offence. If the point had been taken, the plaintiff was in a position to point to a letter of Dec. 12, 1938, in which her solicitors notified the solicitors for the defence that it was the plaintiff's intention at the trial of the action to contend that the words complained of meant that she had been convicted of an offence punishable corporally, and the fact that that letter was acknowledged without any objection being raised. The reason for that being done, I am told, was the footnote in FRASER ON LIBEL AND SLANDER, p. 31, in which it is said that in such a case at the present day it would be wiser for the pleader to add to the innuendo the words : " which are punishable corporally." I do not know whether or not that is necessary—I should have thought not—but I am quite sure that, if any point of that sort is going to be relied upon, objection ought to be taken early in the case, when the pleadings can be amended, and when they certainly would have been amended here in view of that letter. If the point had been taken at all, I certainly

would have given leave to amend. I am not going to hold that amendment was necessary, but, as I should have given leave to amend, if any question had been raised, I do not think that that point can be relied on now.

Then one comes to a very interesting point—a point raised in *GATLEY ON LIBEL AND SLANDER*—that these words, even if they do impute a crime for which the plaintiff has been convicted, are not actionable without proof of special damage, and I have been referred to *GATLEY ON LIBEL AND SLANDER*, 3rd Edn., p. 51, where this point is discussed :

There is some conflict of authority as to whether the ground of words being actionable *per se* is the putting the plaintiff in jeopardy of a criminal prosecution or degrading him in the eyes of his fellow-men.

The argument for the defendant is that the true view is that the reason why words imputing a crime are actionable is that the plaintiff is put in jeopardy of a criminal prosecution, and, therefore, if the words merely imply that the plaintiff has been guilty of a criminal offence, and has been convicted, and it is a thing of the past, then it is not actionable without proof of special damage, because the plaintiff is not put in jeopardy. That raises the question as to the real basis of the action. What is the real ground upon which a plaintiff may bring an action for such defamation without proof of special damage? Is it because the misconduct alleged is of so serious a character that the law visits it with punishment, and is therefore so likely to cause other people to shun the person defamed, and to exclude him from society, that damage is presumed? Or is the basis the fact that he is put in jeopardy? In my opinion, the former view is the sound one.

In *Fowler v. Dowdney* (1), the very point was raised and decided. The slander there was: "He is a returned convict." There was an allegation of special damage, but the proof of special damage failed, and then the argument was advanced that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment. LORD DENMAN, C.J., said, at p. 120 :

My opinion is, that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported: that is, I think, the plain meaning of the words, as set out in the declaration; they import, to be sure, that the punishment has been suffered—but still the obloquy remains.

There is a very interesting note to that case, at pp. 120, 121, in which it is said :

The test here applied to ascertain whether the words were actionable seems to be, whether they impute a species of misconduct which, in general, subjects a person to criminal prosecution in the common law courts. . . . And the principle of that test is, not that the imputation of such a species of misconduct places the person slandered in a situation of actual danger, but that an aggravated degree of obloquy is supposed to attach to such misconduct as the law visits with punishment. Accordingly, we find that in ancient times an action for slander was holden to be maintainable for words imputing that the plaintiff had committed a criminal offence; and no objection was raised on the ground that the speaker went on (as in the principal case) to allege that the plaintiff had already suffered the punishment inflicted by law on such offenders.

Then *Gainford v. Tuke* (2) is referred to, and the note continues as follows:

The same point was raised in *Boston v. Tatam* (3). The words spoken were that the plaintiff "was a thief, and had stolen the defendant's gold." After not guilty pleaded, and a verdict for the plaintiff, it was moved for the defendant, in arrest of judgment, that as no time was alleged when the theft was committed, it might

A be it was in former times, since which divers general pardons had been, so as there cannot any loss happen to him (the plaintiff). The court overruled the objection, saying "it was a great slander to be once a thief, for, although a pardon may discharge him of the punishment, yet the scandal of the offence remains . . ."

B That seems good authority—up to that date, at any rate—for saying that the real basis for such a slander being actionable is because of the obloquy which attaches to anybody who has been guilty of a crime of that kind. The only doubt that has ever been thrown upon that, so far as cases which have been cited to me indicate, is *Heming v. Power* (4). That was a very peculiar case. There the plaintiffs were a man and his wife,

C and the slander complained of was one in which it was said that the wife was already married to another man—a man who in fact was proved to be her brother—implying, therefore, that the marriage to the plaintiff husband must have been a bigamous one. The case had been tried, and the plaintiffs had succeeded, but had been awarded only a farthing damages, and leave was reserved to the defendant to move to enter a non-suit.

D No point, of course, could be raised there, and no question was raised on the point which I have to decide, because, if it meant anything, it meant that they had been guilty of bigamy, and might be prosecuted at any time. The point of distinction was never raised and never argued, and no cases on the point were cited. However, PARKE, B., did say, at p. 569 :

E

According to the averment in the declaration, it is a charge of felony, for the defendant does not admit she was the sister of Alleyne; on the contrary, his statement is, that Mrs. Heming, who is now married to the plaintiff, instead of being sister to Alleyne, was his wife; if so, she was guilty of the offence of bigamy in intermarrying with the plaintiff. The ground of the matter being actionable is that a charge is made, which, if it were true, would endanger the plaintiff in point of law.

Of course, that is perfectly true of that case. The ground of the matter being actionable there was that, if it were true, the plaintiff would be endangered in point of law. PARKE, B., continued, at p. 569 :

Here, if it were true, the plaintiff would be in danger of a prosecution for bigamy, and therefore the matter said to have been uttered is actionable.

Then, at pp. 569, 570, there are words which are relied upon :

The reason why the action lies is, that those persons who heard the slander might infer that the plaintiff had been guilty of a felony, and might make a charge founded upon it; but if at the time the words are uttered, there are circumstances which clearly show the words are not used in the sense of imputing a felony, then the charge falls to the ground, and no action will lie.

Everything that is said there is perfectly true of that particular case, and I think that PARKE, B., was saying : "Here you have words which, if believed, would suggest that the plaintiffs were guilty of a felony,

and might be charged with it, and therefore they are actionable.”
ALDERSON, B., I think, added more. He said, at p. 570 :

. . . the words, to be actionable, must impute a criminal offence ; that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offence.

He does not say : “ would be guilty of a criminal offence, and therefore would be put in jeopardy, or be in danger of prosecution.” He is merely saying that they are words which must impute that the plaintiff has been guilty of a criminal offence. They must impute a criminal offence, whether they are speaking of the past or of the present. If one says of a person that he has been convicted of some offence, one is making, I should have thought, a much more emphatic charge of a criminal offence than if one is merely saying : “ You have committed an offence, but you have not yet been convicted of it.” It seems to me that it is quite impossible to regard that case as overruling a well-recognised rule of law with regard to slander, and it is noticeable that in *GATLEY ON LIBEL AND SLANDER*, 3rd Edn., p. 51, there is a series of early references which, the editors agree, support the view which I am taking.

I would like to point out that it is quite clear that words imputing a contagious disease are actionable without proof of special damage. The basis of that rule is laid down in *Carslake v. Mapledoram* (5), and is quoted in *FRASER ON LIBEL AND SLANDER*, 7th Edn., p. 32 :

Charging another with having had a contagious disorder is not actionable, for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails ; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society.

In other words, the social ostracism is the basis of that action, and it seems to me that it is the basis of the action with which we are dealing here.

The other point is that the innuendo must be that the plaintiff has committed a crime for which she might be sent, or has been sent, to prison—a crime of such a nature that the law does punish by imprisonment—and it has been repeatedly held, and it is now beyond discussion, that, if words merely impute an offence for which the offender can only be fined, then the slander is not actionable without proof of special damage. The point was raised here that these words were not capable of being construed as imputing a crime for which the plaintiff has been, or could have been, sent to prison. Of course, it is for the judge to rule whether or not words are capable of a defamatory meaning, and it is for the jury to say whether, in the particular case, they could reasonably be so understood. In my view, in all the circumstances of the case, the words were capable of the necessary defamatory meaning. One has to consider all the circumstances of the case, as, for example, who the plaintiff was—a woman apparently quite respectable, carrying on business in a florist's shop. I say that because she was not a woman, for instance, who owned a motor car, but a woman of humble circumstances—obviously, one would think, a woman who would be very unlikely ever to have been

drunk and disorderly, or anything of that kind. She was a most respectable-looking woman. Moreover, one has to remember that these words were spoken by a man who had been her landlord for 4 or 5 years. He is saying :

You are a convicted person. I will not have you here. You have a conviction.

A Alternatively, as Mr. Aldridge put it :

You have been convicted. You are a convicted person. I do not want you here.

In other words, the argument was that those words certainly imported something which made it unsuitable to have the woman as a tenant, and which made this man—whose tenant she had been for 5 years—want to turn her out. Part and parcel of the discussion was that she had had notice to go, and she had said : “ I am not going until I am turned out. It is very unjust. It is my livelihood, carrying on this business here,” and so on. All this was carried on in a loud voice, so that others could hear it, and as part of a discussion of that sort. The landlord was really justifying his turning her out by saying : “ You are a convicted person. I am not going to have you here.”

It is agreed that the test is how a reasonable man would interpret those words, if he heard them. Mr. Aldridge was not asked what precise meaning he attached to them. I think that the real test is whether or not reasonable people could reasonably take those words to mean that the plaintiff had done something for which she could have been put in prison. I think that it is for the jury to say. After all, they are twelve reasonable people, and they heard the case, and heard the words, and, after the point was very clearly put to them, they took the view that that is how they would have understood the words, and how reasonable people would understand them. If that is wrong, I am afraid I have no power to put that right. Their verdict must be accepted, and the plaintiff is entitled to the £25 awarded to her.

F Then comes the question of costs. It turns out that the defendant had paid £25 into court. I take as my guide here what is laid down both in THE ANNUAL PRACTICE, 1939, and in GATLEY ON LIBEL AND SLANDER, 3rd Edn., p. 51, as the order to make. In THE ANNUAL PRACTICE, 1939, it is said, at p. 406 :

G If defendant in an action for unliquidated damages denies liability but pays money into court, and plaintiff proceeds with action there are two distinct issues raised, namely, (a) whether the defendant is under *any* liability to the plaintiff, and (b) whether the sum paid in is sufficient to cover the liability, if any. If the plaintiff succeeds in recovering from the defendant an amount which carries costs, even though it is less than the sum paid into court, he succeeds on the first of those issues, and is entitled to the whole costs of the action down to payment in, and the subsequent costs of the issue on which he has succeeded.

H In GATLEY ON LIBEL AND SLANDER, 3rd Edn., p. 761, the same thing is said :

If the money was paid in with a denial of liability and the action goes to trial, two distinct issues arise : (1) whether the defendant is under any liability to the plaintiff ; (2) whether the sum in court is sufficient to satisfy such liability.

If the plaintiff succeeds on the first of these issues, he is *prima facie* entitled to his costs of action down to the date of payment in and his subsequent costs on the issue of liability . . .

The difficulty here is that really there were no costs incurred other than the costs of the issue of liability. It is not a case in which any special damage is alleged, and where heavy costs, attributable solely to the issue of quantum, have been incurred. The taxing masters know more about these things than I do, but I cannot quite see how the plaintiff's costs could be said to have been increased, because there was inevitably the question of quantum to be dealt with by the jury, and the same witnesses would be called. There was, and could be, no evidence directed to quantum of damage, and it seems to me that here the costs of the issue of liability are the same as the general costs of the action. However, I may be wrong about that. I must leave that to the taxing master. I am going to give judgment here for £25, with the general costs down to the date of payment in, and the costs of the issue of liability incurred since that date. In addition to that, I say, because it may be of help to the taxing master, that, so far as I can see, the costs of that issue were not increased in any way by the issue of quantum, and, as I cannot see that there have been any costs incurred by the defendant over and above the costs of this issue of liability, I am going to leave it there, and not make any order awarding the defendant any costs. I think that that is the fair order to make, considering, as I have to do, that just the precise figure has been paid into court. It is not a case in which anyone can say that the plaintiff was unreasonable in not accepting that sum, if, naturally, she thinks she is entitled to more. In a case where much more has been paid in than a jury have given, I think that that is very often a case for saying that the plaintiff has been very unreasonable in not taking out the money. In this case, if the jury had awarded 25 guineas, instead of £25, this question would not have arisen. If I could see that the defendant has been put to any extra costs whatever in respect of that, I would give him the costs of that issue, but I cannot see that there are any. Therefore, I am going to give judgment for the plaintiff, with the general costs down to the date of payment in, and the costs of the issue of liability incurred since that date, and there will be an order for payment out to the plaintiff of the sum in court.

Solicitors : *Woodroffes & Gibbs* (for the plaintiff) ; *Windsor & Brown* (for the defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

TOWNSEND v. BISHOP.

[KING'S BENCH DIVISION (Lewis, J.), **February 14, 15, 1939.**]*Estoppel—Res judicata—Actions founded upon same negligent acts—Second action by agent of plaintiff in former action—Son driving father's motor car.*

A The plaintiff, who was the driver of a motor car belonging to his father, claimed damages for personal injuries sustained by reason of a collision between that car and a motor lorry. The claim was based on the negligent driving of the lorry, and the defence was one of contributory negligence. The father had claimed damages in a previous action against the present defendant for damage to the motor car, and that action was founded on the same alleged negligence of the defendant, and the defence relied upon was a plea of contributory negligence in the same terms as those in the present action. That action was duly tried and judgment given. It was contended that the doctrine of *res judicata* applied in this action as, in driving the car, the son was acting as his father's agent:—

B
C HELD: as the present action was not one between the same parties as those in the earlier action, the plea of estoppel failed, although the negligence and contributory negligence pleaded in each action were the same.

D [EDITORIAL NOTE. The contention in the present case is that the son was the father's agent, and that, therefore, they were in law one person, the principal being liable for the negligent acts of the agent. For this reason, it was said that the two actions were really between the same parties, and that, therefore, the doctrine of *res judicata* applied, as the question of fact at issue had already been adjudicated upon between the parties. This argument is, however, rejected, and, the action being between different parties, although the same facts had to be adjudicated upon, there was no estoppel.

E AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 412-414, paras. 467-469; and FOR CASES, see DIGEST, Vol. 21, pp. 205-211, Nos. 472-506.]

Cases referred to:

- (1) *Marginson v. Blackburn Borough Council*, [1939] 1 All E.R. 273; Digest Supp.
(2) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 36 Digest 122, 810; 53 L.J.Q.B. 476; 51 L.T. 529.

F ACTION for damages for personal injuries. Trial of preliminary point, which raised the question whether the plaintiff was estopped by reason of the fact that the same facts had been the subject of a previous action between the plaintiff's father and the defendant. The facts are fully
G set out in the judgment.

F. Ashe Lincoln for the plaintiff.

R. Armstrong-Jones for the defendant.

H LEWIS, J.: In this case, I have to decide a plea which is put on the pleadings, and which I have been asked to decide as a preliminary point. There has been no order made that it should be treated as a preliminary point, but the parties consented, and, indeed, asked me to try it as a preliminary point before the action is heard by the jury. The preliminary point is this. It is alleged that on Mar. 17, 1937, there was a collision between a motor car and a motor lorry somewhere in

Ladbroke Grove. In this action, the plaintiff, who is Leslie Louis Thomas Townsend, says that he was driving the motor car, and that, owing to the negligence of the defendant, Joseph Bishop, his servant or agent, there was a collision, with the result that the plaintiff, the son, sustained head injuries, cuts on the left side of his face, and so on. He claims as special damage hospital fees, doctor's fees, and loss of share of the profits of his business whilst he was incapacitated, and he claims, of course, damages for his injuries. The defendant, Joseph Bishop, says that neither he nor his servant was negligent, and either that the accident and the damage were caused solely, or that they were contributed to, by the negligence of the son. The son was in fact the driver of the car, and the car belonged to his father. A B

On July 6, 1937, an action was started in the High Court by the father, Walter John Townsend, against the present defendant, claiming damages against the present defendant on a specially indorsed writ, which read as follows : C

The plaintiff's claim against the defendant is for damages arising out of the negligence of the defendant, his servant or agent. The plaintiff at all material times employed his son, Leslie Townsend [the present plaintiff] in connection with his business, and as a result of the said negligence of the defendant, his servant or agent, the said son was injured, whereby the plaintiff was deprived of his services, wherefore the plaintiff also claims damages in respect thereof. D

Of the damages in that action, particulars were given as follows : Total loss of the car, £30, less a certain amount for salvage, and so on, and sale of wreckage. The two principal items were the loss of the car and the loss of his (the father's) profits from the date of the accident. In that action, of course, no damages were claimed by the father in respect of the injury to the son, nor, of course, was there any claim in that action for the loss of profits of the son for his share of the loss of profits. The claim was brought by the father, who claimed simply for the loss of his car and the loss of his profits from the date of the accident. That action was remitted to the county court, I am told, because the plaintiff in that action, Walter John Townsend, was unable to show that he had means. F The case was tried before His Honour JUDGE WOODCOCK on Nov. 10, 1937, and at the time it was remitted pleadings had been delivered. The statement of claim was indorsed on the writ, to which I have already referred. The defence was that the defendant denied that he or his servant was guilty of the alleged, or of any, negligence, and there was a plea that the accident was caused solely through the plaintiff's negligence, or the negligence of the plaintiff, his servant or agent, or that the negligence of the plaintiff, his servant or agent, was a contributory cause. Then certain particulars of the negligence are there set out. G H

That action came on before His Honour JUDGE WOODCOCK at the Marylebone County Court, and, after hearing it, the judge gave his decision. I have here a copy of the certificate of the judgment, which was to the effect that judgment was entered for the defendant, and an order for costs—£48 19s. 6d.—was made against the plaintiff, Walter

John Townsend, the plaintiff in that action. I am told, as a matter of fact, that not a penny of those costs has been paid. In the county court, the judge gave reasons for his judgment, and of those reasons a shorthand note taken by the solicitor at the time has been transcribed, and has been put in, and is not challenged. In the course of his remarks when he gave judgment, there being before him a plea of negligence and a plea of contributory negligence—that is to say, negligence alleged on both sides—the county court judge, having dealt with the facts and the evidence that had been called before him, and having stated whose evidence he accepted, said this :

A B It would be most dangerous to say that the plaintiff had made out his case. I am satisfied that he did a dangerous thing, and was negligent. The defendant was not negligent.

Of course, it is quite true that in the usual course he used that language, saying that the plaintiff did a dangerous thing and was negligent, but in fact it is admitted that, at the time of the accident, the person who was driving the little car and who was negligent was not the plaintiff in that action, Walter John Townsend, but the present plaintiff in this action, his son, who in fact was driving the car, and through whose negligence, and solely through whose negligence, the county court judge has found the accident was due.

D Those facts which I have stated are pleaded in this action, though not at the length, of course, with which I have dealt with them, but the fact is pleaded that the former action brought by the father was dismissed, and judgment was given in favour of the defendant, on the ground that the only person who was negligent in the matter at all was the present plaintiff, the son. It is said that, that being so, the doctrine of *res judicata*, applies to this case, and that I ought to say in law that the present plaintiff is estopped from bringing his action. I do not think that it is an easy point, and it is a point for which I am told by both counsel they have been unable to find any precedent. It is said by Mr. Ashe Lincoln that no such case has ever been reported, because it is not *res judicata*, and that nobody has been so rash as to raise a point such as this until Mr. Armstrong-Jones, with great boldness, raised it. I think that it is an extremely difficult point, and, of course, the way in which it is put by Mr. Armstrong-Jones is this.

G It is conceded, as it must be conceded, that the general rule of *res judicata* is this—the *res* has not been previously adjudicated upon unless the matter is the same and it is a decision between the same parties suing in the same right. The case which was decided the other day in the Court of Appeal—*Marginson v. Blackburn Borough Council* (1)—which was an appeal from a decision of mine given on circuit, is an example of that definition which I ventured to give. In that case, there had been a decision between the parties, Mr. Marginson on the one hand and the Blackburn Borough Council on the other, when Mr. Marginson was being sued in his personal capacity. Mr. Marginson was not entitled in his personal capacity to bring another action for damages for the personal

injuries he had sustained in that accident. On the other hand, however, in so far as he was bringing against the Blackburn Borough Council an action arising out of the same identical accident, and so far as he was bringing an action in another capacity—namely, in his capacity as administrator, and on behalf also of his daughter, who was alleged to have been dependent upon his wife killed in the accident—the Court of Appeal said, A
 “Yes, you can do that,” the reason, as I understand it, being that, when he was suing in that capacity, no matter had been decided between him and the Blackburn Borough Council. Of course, that case is a long way from this case, because, as I ventured to point out, in that case there was one gentleman, Mr. Marginson, who, for the purposes of the litigation, B
 was in law two people. He was Mr. Marginson, and he was the administrator. In the case now before me, what is being said is this, and it is an attractive argument: “True, there are two people called Townsend. One is the father and the other is the son. The father brought an action against the defendant, who is the same in both cases, and it was essential C
 for the success of that action that Mr. Walter John Townsend should satisfy the court that the defendant was guilty of negligence, and that his servant, the present plaintiff, who was driving his (the then plaintiff’s) car, was guilty of no negligence at all.” That is said with perfect truth and accuracy. The court below has found that the defendant was not D
 guilty of negligence, and that the present plaintiff was guilty of negligence, and that the accident was solely the result of the negligence of the present plaintiff. It is said that the present plaintiff was the agent of the plaintiff Walter John Townsend, and that they are one person in law, because Mr. Walter John Townsend is answerable for the negligence of his E
 servant. It was because of that doctrine that the county court judge found that the plaintiff in the action before him, as he put it in terms, did a dangerous thing, and was negligent. That is to say, the act of his son, the agent, was his act. Mr. Armstrong Jones says that, if that is so, in law, in the circumstances of this particular case, these two people, F
 father and son, must be looked upon as one individual. Therefore, he says, the decision given by the county court judge was a decision between the same parties—namely, the Townsends, who are one, and Mr. Bishop, the defendant. That is a most attractive argument, but I do not think that I can accept it. (It seems to me that the person who was really G
 responsible, and solely responsible, on the finding of the county court judge, for this accident was the present plaintiff, and it would seem to me to be curious (to say the least of it) that a person who has been found guilty of negligence in one court of competent jurisdiction, thereby causing damage to other people, should be allowed to come forward in another H
 court of competent jurisdiction and ask the court to decide that matter all over again.) It seems to be a very curious state of affairs, but, as I understand it, and particularly as I read the cases to which I have been referred, and, amongst others, *Brunsdon v. Humphrey* (2), it seems to me that there is no warrant for this proposition—namely, that, because the

plaintiff in the present action has been found guilty of negligence in an action to which he was not a party in fact, and because, in the action in which his negligence was proved to the satisfaction of the court, he was in fact the agent of the then plaintiff, that entitles the defendant in the present action to say that this matter has been litigated already. He cannot in my view properly say what he must say in order to succeed in this plea of estoppel—namely, that the matter now in issue is the same as that which was litigated in the county court, and that that was a decision in litigation between the same parties. Though it seems a curious state of affairs, I think that I must rule against this preliminary point, and say that, in my view, the facts stated on the pleadings and the facts which have been admitted here, quite frankly and properly admitted, of course, in the absence of the jury, do not amount in law to estoppel.

Solicitors: *Beach & Beach* (for the plaintiff); *Stanley & Co.* (for the defendant).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

HALL BROTHERS S.S. CO., LTD. v. YOUNG. THE TRIDENT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), **February 27, 28, March 1, 1939.**]

Insurance—Marine insurance—Collision clause—Sum payable by way of damages—Indemnity to French pilot-boat.

The plaintiffs, the owners of the Trident, sued the defendant as one of the underwriters of a Lloyd's policy of marine insurance for the due proportion of a sum which they had had to pay in consequence of legal proceedings in France. In those proceedings the plaintiffs were sued by the pilotage authority of Dunkirk for damage done to a pilot-boat engaged by the Trident. The damage was due to a collision between the two vessels, which it was agreed was in no way due to any negligence on the part of the Trident. The plaintiffs counterclaimed in those proceedings for damage done to the Trident, but this counterclaim was dismissed. The evidence of French lawyers showed that the claim of the pilotage authority was in the nature of an indemnity, and could be answered only by showing gross negligence on the part of the pilot-boat, and the claim was not, therefore, of a delictual or quasi-delictual character. The collision clause of the policy provided that the insurers should pay three-fourths of any sum paid by way of damages in respect of a collision:—

HELD: the sum paid in consequence of the action in the French courts was not paid by way of damages, and, therefore, was not recoverable under the policy.

Per SIR WILFRID GREENE, M.R.: "Damages," to an English lawyer, imports the idea that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or by legislation.

Judgment of GODDARD, J. ([1938] 3 All E.R. 234) affirmed.

[EDITORIAL NOTE.] Though there is much upon which this case may be distinguished upon the facts from the case of *Furness Withy & Co., Ltd. v.*

Duder (3), it would seem that the same legal principles are applicable, and that the court was in fact bound by that decision. The words "by way of damages" in the usual collision clause presuppose a claim in tort, and are not applicable to a claim of a contractual or a *quasi*-contractual nature.

AS TO COLLISION CLAUSE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 310-313, paras. 435-437; and FOR CASES, see DIGEST, Vol. 29, pp. 212-215, Nos. 1697-1716.]

Cases referred to :

- (1) *The North Britain*, [1894] P. 77; 29 Digest 214, 1712; *sub nom. The North Britain, Roberts & Sons v. Ocean Marine Insurance Co.*, 63 L.J.P. 33; 70 L.T. 210.
- (2) *Tatham, Bromage & Co. v. Burr, The Engineer*, [1898] A.C. 382; 29 Digest 215, 1713; 67 L.J.P. 61; 78 L.T. 473.
- (3) *Furness Withy & Co., Ltd. v. Duder*, [1936] 2 K.B. 461; [1936] 2 All E.R. 119; Digest Supp.; 105 L.J.K.B. 473; 154 L.T. 663.
- (4) *Ionides v. Universal Marine Insurance Co.* (1863), 14 C.B.N.S. 259; 29 Digest 229, 1854; 32 L.J.C.P. 170; 8 L.T. 705.
- (5) *Inman S.S. Co. v. Bischoff* (1882), 7 App. Cas. 670; 29 Digest 210, 1684; 52 L.J.Q.B. 169; 47 L.T. 581.
- (6) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 29 Digest 105, 706; 97 L.J.P. 8; 138 L.T. 403.
- (7) *Baker v. Adam* (1910), 102 L.T. 248; 29 Digest 76, 356.
- (8) *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; 41 Digest 974, 8643; 47 L.J.Q.B. 193; 37 L.T. 543; *affg.* (1876), 1 Q.B.D. 546; *reusg.* (1873), 29 L.T. 530.
- (9) *M'Cowan v. Baine & Johnston, The Niobe*, [1891] A.C. 401; 29 Digest 213, 1702; 65 L.T. 502; *previous proceedings* (1888), 13 P.D. 55.
- (10) *De Vaux v. Salvador* (1836), 4 Ad. & El. 420; 29 Digest 212, 1695; 5 L.J.K.B. 134.
- (11) *Xenos v. Fox* (1869), L.R. 4 C.P. 665; 29 Digest 214, 1710; 38 L.J.C.P. 351.
- (12) *Taylor v. Dewar* (1864), 5 B. & S. 58; 29 Digest 214, 1709; 33 L.J.Q.B. 141; 10 L.T. 267.
- (13) *Marine Transit Corp'n. v. North Western Fire Marine* (1933), 67 Federal Reports (2nd Series), 544.
- (14) *Adelaide S.S. Co. v. A.-G.*, [1926] A.C. 172; 29 Digest 212, 1701; 95 L.J.K.B. 213; 134 L.T. 258.

APPEAL by the plaintiffs from a judgment of GODDARD, J., dated June 1, 1938, and reported [1938] 3 All E.R. 234. The appellants were the owners of the ship in question, the *Trident*, and the respondent was a Lloyd's underwriter. The circumstances of the claim were that the respondent and others had insured the owners of the *Trident* under a marine insurance policy which contained a running-down clause. The owners claimed from the insurers, under this clause, a sum of money which they had been compelled to pay to the Dunkirk pilotage authority by reason of damage suffered by the *Veteran*, one of the pilot authority's vessels, through a collision between the *Trident* and the *Veteran*. There was no negligence on the part of those navigating the *Trident*, negligence not being necessary to establish liability under French law. The point for decision was whether or not the underwriters, who would no doubt have been liable for the damage if those on board the *Trident* had been negligent, could escape liability when those on board the *Trident* had not

been negligent, but the damage fell to be paid by reason of French law. The Dunkirk pilotage authorities claimed to recover the cost of the repairs to the Veteran. The case went as high as the Cour de Cassation, the supreme appellate tribunal in France, and that court decided that the owners of the Veteran were entitled to recover the cost of the repairs to their vessel. A counterclaim by the plaintiffs for damages suffered by the Trident was dismissed.

Sir Robert Aske, K.C., and W. L. McNair for the appellants.

H. U. Willink, K.C., and Cyril Miller for the respondent.

Aske, K.C.: Although a claim upon a marine insurance policy is a claim upon a contract for an indemnity, the action which the assured brings against the underwriters is one for damages. In all cases there is an obligation to keep clear of other vessels or to pay the loss suffered by a vessel which is damaged. Every claim must be an obligation which is imposed either by contract, by common law, or by statute. The collision clause consists of two parts—namely, the obligation and the proviso. The matters which are excepted by the proviso form a very valuable guide as to what matters were intended to be dealt with in the main part of the clause. Excepted out of the obligation imposed by the main part of the clause are the expenses of the removal of obstructions under statutory powers, damages for injuries to harbours, piers and similar structures, and—most significant of all—sums which the assured may have to pay in respect of the cargo and engagements of the insured vessel, or for loss of life or personal injury. These are matters of contract. Unless the clause applies to matters of contract, there can be no possible object in including these exceptions. This matter does not arise out of contract, and, therefore, the claim for damages cannot be supported on that ground. The assured is limited to loss or damages to any other ship for which he may become liable in consequence of a collision. That is what the plaintiffs are asking for in this case. If a liability is imposed by the law of a foreign country, and the shipowner has to pay, the amount which he pays is damages. In the clause in question, there is neither the word “accident” nor the word “negligent.” If the clause is to be limited to cases in which the ship had been guilty of some tort, it would have said so. Instead of that, the clause uses a generic expression and then excludes certain matters. *GODDARD, J.*, referred to *Furness Withy & Co., Ltd. v. Duder* (3). In that case, a special contract made between the ship and the tug made the ship liable to pay for damage which the tug itself had caused. It is not necessary, for present purposes, to attack that decision, as the shipowners had brought the liability upon themselves by a contract. Even if matters *ex contractu* are excluded, it does not follow that statutory obligations are similarly excluded. The statutory obligation arises directly from delict or tort, and the remedy would be in tort on the statute. All matters arising from tort or from statutory obligation are within the intent and import of this clause. Having regard to the clause itself, the words should be construed in a broad

sense. By a rule of construction, an owner of a ship which had become liable to pay damages could not recover under the policy. Therefore, the running-down clause was provided, and this was intended to cover—and, on a reasonably generous construction, it does cover—the assured against the liabilities to which he becomes subject by reason of loss or damage caused to another vessel. It would be a strange construction of this policy to say that the shipowner can recover under the collision clause when there has been negligence, and yet, if he has not been negligent at all, and has to pay money in consequence of a collision, he cannot recover. That is not a reasonable business construction, and, therefore, the appeal should succeed. [Counsel referred to *Great Western Ry. Co. v. Mostyn (Owners)*, *The Mostyn* (6), *Baker v. Adam* (7), *River Wear Comrs. v. Adamson* (8), *M'Cowan v. Baine & Johnston*, *The Niobe* (9), *De Vaux v. Salvador* (10), *Xenos v. Fox* (11), *The North Britain* (1), *Taylor v. Dewar* (12), *Marine Transit Corp. v. North Western Fire Marine* (13) and *Tatham, Bromage & Co. v. Burr*, *The Engineer* (2).]

McNair : The court is being asked to construe a document of universal application, and I desire to call attention to the way in which this particular clause came into existence. *De Vaux v. Salvador* (10) showed that marine insurance was defective, in that it did not cover the shipowner in respect of all the liabilities to which the vessel might be exposed. As a result of the decision in that case, a clause was made up to cover cases in which damages should be payable by reason of one ship coming into collision with another. The qualification “by way of damages” can be given full scope in this clause if it is limited to excluding the liability to which LORD DENMAN, C.J., referred at the end of his judgment. That is a form of liability which underwriters are not prepared to undertake, but they are prepared to undertake the ordinary liability which results from collision. The present clause is an attempt to satisfy all the liabilities which a ship may incur anywhere in the world, whether in contract or in tort. This clause is to be applied to recover losses arising under all systems of jurisprudence, and it is an erroneous view that all systems impose a liability which involves the same elements of liability. The word “damages” in the collision clause ought to be given a wider meaning than damages in the strict legal sense, by reason of the proviso. The proviso excludes sums which the assured may be liable to pay for the removal of obstructions. That liability arises under the Harbours, Docks and Piers Clauses Act, 1847, s. 74, and it is a liability which arises independently of negligence. Collision itself is never a cause of collisional liability. The liability is caused, not by the collision, but by negligence. In the usual case of collision, the liability arises under a system of law by which negligence is essential to establish liability. It is the negligence which creates the liability, and not the collision : *Adelaide S.S. Co. v. A.-G.* (14). In English law, negligence is essential to create liability. It was not so under the laws of Oleron, and it is not so under French law. It is beside the point to say that there might be

- liability without a collision. It may be that, under French law, there may be liability without collision. When a liability is created by collision, however, the underwriters are involved in liability under the clause. The collision is a *sine qua non* of the underwriters' liability under the clause, but it need not be the cause of the creation of the liability of the
- A ship. In the context in which it is used in this clause, "damages" would include workmen's compensation. In this case, the parties have provided a dictionary with which to construe the word. In the present case, it is plain that the pilotage authority recovered by way of damages. The claim in the writ in the French proceedings was a claim for damages.
- B It was not a claim for failure to pay a sum due under the French law of Mar., 1928. Throughout the proceedings, it was kept as a claim for damages. The court should not reject the claim under this clause because it is not in accordance with English law. The claim is for damages, and it arises from a collision in the sense in which the word is used in this
- C clause. The intention of the clause can be carried out by deciding that the underwriters undertook to indemnify the assured against all liabilities arising out of collision, except so far as the underwriters have excepted themselves. [Counsel referred to *The North Britain* (1) and *Tatham, Bromage & Co. v. Burr, The Engineer* (2).]
- D Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R. : The question raised by this appeal turns upon the construction of the common form running-down clause in a policy of marine insurance, as applied to the particular circumstances

E of the case. It therefore becomes necessary to consider, first of all, the actual language used in the clause, and then to consider the nature of the subject-matter to which it is said that the clause applies. The obligation undertaken by the underwriters is as follows :

F If the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision . . .

That is the event upon which the underwriters' liability arises. It is to be noticed that it is not a liability to make any payment to any

G other persons in respect of the collision, but a liability to pay "by way of damages." Accordingly, the clause does not extend to every pecuniary liability arising in respect of the collision, but only to such liabilities as arise by way of damages. The word "damages" is one which, to an English lawyer, conveys a sufficiently precise meaning. This document

H is an English contract, which falls to be construed according to English law. That does not, of course, mean that, in its application to liabilities arising under foreign law (an application which the parties, of course, clearly contemplated as possible), the operation of the clause is to be excluded merely because some liability arising under foreign law as a result of a collision does not precisely coincide with the liability which is

recognised in the courts of this country. Nevertheless, it is necessary, in my opinion, in construing a document of this kind, to give to the word "damages" its ordinary meaning in English law. "Damages," to an English lawyer, imports the idea that the sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, A
by the general law, or by legislation.

The measure of the duty, of course, will depend upon the particular law. A statute may impose an absolute obligation not to do certain things, and, as the result of that, the person injured by the doing of such a thing may have a right to damages. That is a question of the measure B
of the duty. An example which was referred to in the course of the discussion is to be found in the Air Navigation Act, 1920, s. 9 (1), under which damages are recoverable from the owner of aircraft who causes damage, irrespective of negligence or intention. It is a standard of duty not to do certain things imposed by that statute. Looking at it from C
another point of view, there are certain classes of liability to make pecuniary payments which clearly fall outside the word "damages." For instance, compensation paid under the Lands Clauses Act, or a matter of that kind, is certainly not damages. Workmen's compensation payments are certainly not damages in the ordinary sense of the word, and, D
in spite of Mr. McNair's argument to the contrary, I find it quite impossible to suppose that workmen's compensation payments are included in the word "damages" in this clause. The foundation of that clause of liability is something entirely different from the foundation of the liability which gives rise to a claim for damages. E

Proceeding with the clause, it is to be noticed that in the last branch of the clause there occur the words: "but when both vessels are to blame." Those words seem to me to throw light upon the construction of the earlier part of the clause, and to confirm what I have been saying about it. The words "but when both vessels are to blame" import the F
idea that what the clause is dealing with is a case where the vessel insured is to blame—that is to say, has been guilty of some breach of duty (normally, the duty to take care)—and the last part of the clause makes a special provision for the case where the other vessel also is to blame.

Then comes the proviso, and an argument was based upon it to this G
effect. It was said that the proviso, upon its true construction, covers matters which would not fall within the word "damages" in its ordinary meaning—matters such as liability, under the Harbours, Docks and Piers Clauses Act, 1847, s. 74, to pay for removal of obstructions under statutory powers, or to pay for injury to wharves, piers and so forth. The argu- H
ment is of this nature. It is said that, because the proviso extends to cover cases of statutory liability, imposed without reference to any breach of duty at all, therefore the word "damages" in the main part of the clause must be given a very wide and loose meaning. I cannot give that force to the proviso. The two cases that were relied upon on

this part of the argument were *The North Britain* (1) and *Tatham, Bromage & Co. v. Burr, The Engineer* (2), a later case in the House of Lords in which the same point arose. In *The North Britain* (1), the claim against the underwriters was truly a claim for damages, because it was a claim by the owners of the *North Britain*, the vessel insured, to
A be re-imbursed by the underwriters the sum which they had been compelled to pay to the owners of the other vessel who had incurred the statutory liability to pay for the removal of their vessel as an obstruction. The liability of the *North Britain* was a liability to pay to the owners of the other vessel its share of that particular head of damage suffered by
B them in consequence of the negligence of the *North Britain*. It was argued in that case that the proviso extends only to cases where the liability to make a payment for removal of obstructions under statutory powers arises apart altogether from a liability to pay damages, and that, as in that case the liability was a liability to pay damages the measure
C of which was the amount which the other vessel had to pay for removal of the obstruction, the proviso did not cover it, and it fell to be governed by the main clause. It will be seen, therefore, that the point in that case is very far removed from anything which we have to consider here. It is argued, however, that in that case it was said that the clause extends,
D not merely to payments for removal of obstructions, which are payments by way of damages, but also to payments for removal where no question of damages arises. It seems to me that the observations in that case are, if anything, against the contention of the appellants. LINDLEY, L.J., for instance, in the Court of Appeal, at p. 84, agrees with the view
E expressed by GORELL BARNES, J., that the proviso is not an exception, and that it is put in by way of precaution. LINDLEY, L.J., says that he regards that as a warning that one is not to read the clause so as to include the consequences mentioned, and then he says, at p. 84 :

F The true meaning of the proviso is that "this clause shall in no case extend to any sum which the assured shall have to pay for removal of obstruction consequent on such collision." I know the clause itself says in terms "shall pay by way of damages"; but I do not think the construction which I am adopting involves the insertion of any words at all. It is, "in no case shall extend to any sum the assured shall become liable to pay"—that is, pay in respect of any ship by way of damages or otherwise."

G Therefore, LINDLEY, L.J., is reading the proviso as extending, not merely to cases where payment falls to be made by way of damages, but also to cases where it falls to be made not by way of damages. That is in agreement with what he has just said—namely, that he is regarding the proviso, in so far as it goes beyond the subject-matter of the main clause,
H as something put in *ex abundanti cautela*. DAVEY, L.J., in his judgment also appears to take the same view—that the proviso is to that extent put in *ex abundanti cautela*—and, indeed, to find a proviso inserted in such a context for such a purpose is a thing of common occurrence.

The case of *The Engineer* (2) is one to which I do not think I need refer except to say that the House of Lords there approved the observations

of DAVEY, L.J. I find myself quite unable to find in this proviso any words sufficient to give to the word "damages" the extended and inaccurate signification which the appellants would have us give to it. The difficulties into which the appellants get in trying to construe the word on some such basis as that is illustrated by the fact that they feel constrained to include within the word workmen's compensation pay- A
ments—which are not damages at all—but to exclude such things as penalties. On what principle that distinction can be drawn I am quite unable to appreciate. Therefore, taking the matter of the construction of this clause, the conclusion to which I have come is that the payments "by way of damages" to which it refers are payments the obligation to B
make which arises from a fault of some kind on the part of the ship insured. That is in accordance with a decision of BRANSON, J., in *Furness Withy & Co., Ltd. v. Duder* (3). That was a case where the obligation to make a payment arose, not by reason of a local law, C
but by reason of a special contract into which the owners of the vessel had entered with the Admiralty, who provided the only tugs which were available at the spot. It was under that contract that the payments fell to be made. In that case, BRANSON, J., had to deal, therefore, with a point on all fours with the present point, save for the fact that the obligation arose, not by legislation, but by contract. He construed the D
clause in this way. He said, at pp. 467, 468 ([1936] 2 All E.R. at p. 121):

... I think the clause means that where in consequence of a collision there arises a legal liability upon the shipowners to pay a sum which can properly be described as damages for a tort, then the underwriters will indemnify them. The expression "become liable to pay . . . by way of damages" indicates, to my mind, a liability E
which arises as a matter of tort, and not as a matter of contract.

As I said earlier in this judgment, the word "tort," in regard to a document intended to apply to foreign countries under foreign jurisdiction, must not necessarily be read in the precise technical sense of English law. It would not be necessary to find that the act should necessarily be F
tortious by English law, but it must be at any rate of that character.

I now come to examine the nature of the payment in this case. The first thing to be observed about it is that the liability to make the payment falls upon the vessel without any regard to the question whether or not it has been guilty of any fault or breach of duty. The obligation G
which arises is the obligation to make good the damage suffered by the pilot-vessel in the circumstances stated, whether or not there is a collision, whether or not the vessel insured is to blame, whether or not the pilot himself is negligent, provided that his negligence is not the type of negligence described as *faute lourde*. It has nothing in the world to do H
with any duty on the vessel itself, but is a provision under which the vessel is compelled to bear a particular charge, irrespective of any question of duty imposed upon it. In the present case, the liability would have arisen equally if the pilot-vessel, without touching the Trident, had been swamped by a sea owing to the failure of its steering-gear. It so happened

that that failure led, not to the pilot-boat being swamped, but to its colliding with the Trident. However, the liability would have been precisely the same in either case. Looking at the terms of the French law—without doing what the judge found it unnecessary to do and I find it unnecessary to do, namely, to express any concluded opinion as

- A to the true category into which this class of payment ought to be put—one thing which is, to my mind, quite clear is that it cannot be put into the category of the “damages” within the meaning of this clause. It is based on an entirely different conception of the liability which arises under it, and is not a liability to avoid collision, and not an obligation to
- B navigate carefully, or to do acts of that kind. It is merely a liability to make a payment of that particular character. It has no reference whatsoever to any act or default on the part of the vessel insured.

- That is the conclusion to which I should have come upon an examination of the language of the French law itself. However, evidence was
- C called before the judge, and was given by two distinguished French lawyers, one of whom, the lawyer called by the respondents, had very special experience in maritime law. There again, without considering whether or not the evidence of the respondent’s expert is evidence which we are bound to accept, or ought to accept, I am quite clearly of opinion
- D that the evidence of the appellants’ expert is evidence which cannot be accepted. What he said was that the real liability under the French decree was based upon negligence. He said that *faute* is at the bottom of it, and that it raises a presumption of *faute*. That seems to me to be a thing which it is quite impossible to extract from this provision. There
- E is no conception in it at all of fault on the part of the vessel.

- The result, in my opinion, is, in a sentence, that the very special liability imposed by art. 7 of the French law of Mar. 28, 1928, is not that which, upon the true construction of the running-down clause, falls under the head of a sum which the assured became liable to pay by way
- F of damages in respect of the collision. Whatever else it may be, it is, in its nature, outside the word “damages” as used in the clause. In my opinion, the judge was perfectly right in his conclusion, and the appeal must be dismissed, with costs.

- G MACKINNON, L.J.: I agree. The plaintiffs seek to recover three-quarters of the amount of a certain sum which they have become liable to pay. I entirely agree with SIR WILFRID GREENE, M.R., that they fail under this clause to establish any right to recover that sum, because they fail to establish that that liability was a liability to pay “by way
- H of damages.” That result arises from a consideration of those four words: “by way of damages.” I think that the same result is arrived at by a consideration of three other words in a neighbouring but different part of the clause. Those three other words are the words: “in consequence thereof.” In regard to the construction of marine insurance policies, it has been a well-settled rule for over 70 years that, where, in

an added clause in a policy, there are words like "in consequence thereof," in dealing with causation, one must look at the proximate, and not the remote, cause. I say that that was settled over 70 years ago. It was so settled in *Ionides v. Universal Marine Insurance Co.* (4), where the words were: "in consequence of hostilities." Thus, here, where one has the words "in consequence thereof," they mean: "and the assured shall, in a result proximately caused by the collision, be liable to pay." This liability, in my view, was not proximately caused by the collision, and it was not caused by the collision at all. This liability was caused by the French law, which created a liability on the ship to pay for any damage caused to the pilot-boat by any cause, and, of course, "any cause" included collision. I think that the liability for this expense was not a liability in consequence of the collision, but was a liability in consequence of the French law, even though, by the operation of that law, the damage to the pilot-boat did arise by reason of this collision.

The same sort of conclusion was arrived at in a case which at first sight is not very parallel, but which, I think, does afford a real parallel, and that is the case to which I referred of *Inman S.S. Co. v. Bischoff* (5). There was a claim for loss of freight under an insurance policy against the loss of freight by perils of the sea. It was held that the freight that was lost could not be recovered, because the loss was not caused by perils of the sea, but was caused by the operation of the contractual right of the charterers to stop the payment of freight, even though the exercise of that right by the charterers was made possible by the insured ship having been damaged by perils of the sea. In the result, for these reasons, in addition to those given by SIR WILFRID GREENE, M.R., I think that the appellants fail to establish that the respondent is liable to pay them the sum of 13s. 1d.

FINLAY, L.J.: I agree both with the judgments which have just been delivered and with the judgment which was delivered by GODDARD, J. There is only one passage in his judgment to which I should like to call attention, because I think it accurately deals with the question of what the position was by French law. GODDARD, J., of course, had the advantage of hearing and seeing the experts who were called, and what he says is this, at p. 237:

It seems to me that, certainly so far as it is a matter of coming to a decision upon the evidence of the French lawyers, there is no conception of delict or tort in the cause of action which is given by the French decree to the pilot-boat. It seems to me that the probable theory which underlies the legislation—though it does not matter when it is a matter of policy of law, what theory underlies the legislation—is that the pilot-boat is rendering a service for the benefit of the ship which requires pilotage, and therefore any damage which the pilot-boat may receive in the course of rendering that service is to be regarded as an expense of the pilotage, and is to be paid by the ship, in just the same way as she would have to pay the pilotage due, or whatever is the correct expression used in France, as remuneration for the service which the pilot renders.

Applying that passage, it seems to me clear here, for the reasons which have been given by SIR WILFRID GREENE, M.R., and MACKINNON, L.J.,

that, in the first place, this was not a payment by way of damages in any possible sense in which that word could be used in an English clause of this character, and, in the second place, that it appears to result, as MACKINNON, L.J., has pointed out, that the payment, whatever it was, was not made in consequence of the collision, but was made because the

A French law had imposed a liability—nothing to do with collision, though collision is one of the matters which may arise—to make a payment in case of damage suffered by the pilot-vessel during the pilotage, during the manœuvres necessary for embarking and disembarking the pilot. On all the grounds which have been assigned by SIR WILFRID GREENE, M.R., and by MACKINNON, L.J., as well as for the reasons which were assigned by GODDARD, J., I entirely agree in the result.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Lightbounds, Jones & Co.*, agents for *Ingledew & Co.*, Newcastle-upon-Tyne (for the appellants); *William A. Crump & Son* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), **March 1, 2, 1939.**]

Shipping—Charterparty—Exceptions—Liberty to cancel “if war breaks out involving Japan”—Meaning of “war.”

By a charterparty dated June 2, 1936, the owners of the *Nailsea Meadow* chartered their ship to the plaintiffs on a time charter. The contract contained a clause in the following words: “Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan.” In reliance on this provision, on Sept. 18, 1937, the owners withdrew the ship from service and cancelled the contract, on the ground that war had broken out involving Japan. The charterers contended that the owners were not entitled to do so. They denied that the strained relations between China and Japan amounted to “war” within the meaning of the above clause of the charterparty, and claimed damages for breach of the contract. The position at the date of the cancellation was that very serious fighting was in progress between the regular armed forces of China and Japan, and had been for some time before Sept. 18, involving heavy casualties and very extensive movements of troops. On the other hand, there had been no formal declaration of war, and diplomatic relations between the two countries had not been formally broken off. An inquiry addressed to the British Foreign Office elicited the reply that the position was anomalous and indeterminate, and that the government were not prepared to say that a state of war existed:—

HELD: the interpretation of the charterparty was not controlled by the niceties or refinements of writers on international law, nor by the expression of opinion of the Foreign Office. The document ought to be interpreted in a broad way by ascertaining what commercial men intended by the use of such a term in a commercial document. On the facts, a war had broken out in which Japan was involved, and the owners were entitled to withdraw the vessel.

Decision of GODDARD, J. ([1938] 3 All E. R. 80), affirmed.

[EDITORIAL NOTE.] The point in this case is the short one as to when it can be said, for the purposes of a commercial document, that war has broken out. In the case of the present hostilities between China and Japan, there has been no declaration of war, nor have other governments committed themselves to any decision whether or not the hostilities amount to war. The interpretation of a commercial document is, however, held to be governed, not by the niceties of governments or diplomats, nor by the definitions of writers on international law, **A** but by the broad view of the situation taken by commercial men.

As to "WAR," see HALSBURY, Hailsham Edn., Vol. 30, p. 357, para. 534; and FOR CASES, see DIGEST, Vol. 41, pp. 440, 441, Nos. 2763, 2764.]

Cases referred to :

- (1) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 11 Digest 544, 485; 71 L.J.K.B. 857; 87 L.T. 372; *affg.* [1901] 2 K.B. 419, C.A.; and [1900] 2 Q.B. 339. **B**
- (2) *Thelluson v. Cosling* (1803), 4 Esp. 266; 22 Digest 319, 3127.
- (3) *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K.B. 785; 17 Digest 276, 901; 78 L.J.K.B. 596; 100 L.T. 503.
- (4) *Taylor v. Barclay* (1828), 2 Sim. 213; 22 Digest 148, 1263; 7 L.J.O.S.Ch. 65.
- (5) *Mighell v. Johore (Sultan)*, [1894] 1 Q.B. 149; 22 Digest 318, 3122; 63 L.J.Q.B. 593; 70 L.T. 64. **C**
- (6) *Austria (Emperor) v. Day & Kossuth* (1861), 3 De G.F. & J. 217; 28 Digest 483, 883; 30 L.J.Ch. 690; 4 L.T. 494.
- (7) *Dolder v. Huntingfield (Lord)* (1805), 11 Ves. 283; 22 Digest 148, 1256.
- (8) *Blackburne v. Thompson* (1812), 15 East, 81; 38 Digest 6, 8; *affg.* (1811), 3 Camp. 61. **D**
- (9) *Foster v. Globe Venture Syndicate, Ltd.*, [1900] 1 Ch. 811; 22 Digest 149, 1269; 69 L.J.Ch. 375; 82 L.T. 253.
- (10) *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; Digest Supp.; 93 L.J.Ch. 343; 131 L.T. 676.
- (11) *Engelke v. Musmann*, [1928] A.C. 433; Digest Supp.; 97 L.J.K.B. 789; 139 L.T. 586; *reversg.* [1928] 1 K.B. 90. **E**
- (12) *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Assocn.*, [1921] 1 A.C. 99; 41 Digest 990, 8753; 89 L.J.K.B. 881; 123 L.T. 721.

APPEAL by the plaintiffs from a judgment of GODDARD, J., dated **F** May 26, 1938, and reported [1938] 3 All E.R. 80, where the facts are fully set out. The matter arose on a special case stated by the umpire in an arbitration between the charterers of a vessel and a shipping company, the question turning on the construction of the charterparty and the meaning to be given to the word "war" contained in it. The **G** charterparty contained a clause which read as follows :

Charterers and owners to have the liberty of cancelling this charterparty if war breaks out involving Japan.

The owners cancelled the charterparty on the basis that war involving Japan had broken out on Sept. 18, 1937. **H**

Hon. Sir Stafford Cripps, K.C., P. Devlin and A. L. Macmillan for the appellants.

H. U. Willink, K.C., and Cyril Miller for the respondents.

Cripps, K.C. : It is a matter for the executive to decide as to whether or not a state of war exists between two foreign countries. It would

embarrass the executive if the courts declared that there was a war while the Foreign Office wanted to take the view that there was not. The interpretation of the word "pirates" in *Bolivia Republic v. Indemnity Mutual Marine Assurance Co., Ltd.* (3) does not assist in the present case. GODDARD, J., stated that the only case which contained a definition of war was *Janson's case* (1). There is a question of public policy involved in a state of war between China and Japan, as there was in the war between England and the Transvaal at the time when that case was decided. If, in this charterparty, the word "war" has its ordinary legal meaning, it must be for the state to say whether or not there is war. The sort of matters enquired into in the present case shows that the question whether or not Japan had an *animus belligerendi* might lead to one conclusion on information obtained from newspapers and to another on knowledge acquired from diplomatic sources. The Crown is not at present prepared to say that a state of war exists. *Taylor v. Barclay* (4) and *Mighell v. Johore (Sultan)* (5) depended upon the statement of the British government. In *Austria (Emperor) v. Day & Kossuth* (6), it was stated that prerogative rights of a sovereign stand upon very much the same basis as do acts of state. In *Dolder v. Huntingfield (Lord)* (7), there was a question of a right to maintain an action, and the competence depended upon the question of recognition. In *Thelluson v. Cosling* (2), it was said that the question as to whether or not two countries were at war could not be decided by newspaper reports or other unauthenticated documents. The onus of proving that there is a state of war rests upon the owners, and they cannot satisfy that onus. There is no reason why the word "war" should have given to it a meaning which is different from that given to it by international lawyers. In order that there may be war, there must be an *animus belligerendi*, together with *de facto* hostilities. One of the most important tests of *animus belligerendi* is whether or not diplomatic relations have been severed. The maintenance of diplomatic relations is public evidence that the two countries desire to maintain peaceful relations through diplomatic channels. No country in the world has recognised that there is a state of war, and the two countries themselves are not acting as though there were a state of war, but only as though there were a state of hostilities. [Counsel referred to *Blackburne v. Thompson* (8), *Foster v. Globe Venture Syndicate, Ltd.* (9), *Duff Development Co. v. Kelantan Government* (10) and *Engelke v. Musmann* (11).]

Devlin : If the parties had had in mind injury to trade, they would have used a word wider than the word "war." There may be injury to trade for a reason which can not be said to be war. The vigour and resource with which hostilities may be waged has nothing to do with *animus belligerendi*. *Animus belligerendi* must mean an intention to put an end to a state of peace, with all its consequences, and to replace it by a state of war, with all its consequences. The conception of peace in international law is similar to the idea of possession in English law.

An intent to grasp is not the same thing as an intent to possess. An intent to fight is not the same thing as an intent to make war. In *Janson's* case (1), it was stated by LORD LINDLEY that war produces a state of things giving rise to special rules, and to apply the rules of war to insurances before war breaks out would paralyse commerce, and would often do so without any real necessity. The proof that there is no *animus belligerendi* is the fact that diplomatic relations have not been severed. [Counsel referred to *Britain S.S. Co. v. R.* (12).]

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R. : In my opinion, this is a clear case, and the judgment of GODDARD, J., was manifestly right. The main argument addressed to us by Sir Stafford Cripps, on behalf of the appellants, was, if I rightly appreciated it, of this nature. He said that in all matters of state it is a rule of law in this country that the decision, or statement, of the executive government as to a particular state of facts is not merely conclusive, but also essential, and, as the basis of that rule, he asserted that it was undesirable that the courts should come to a decision which might embarrass the executive with regard to matters of state in which this country is, or might be, concerned. I do not myself find the fear of the embarrassment of the executive a very attractive basis upon which to build a rule of English law, and, in the present case, the argument presents a certain air of unreality, for we find that the executive, when appealed to for a statement with regard to the position at the relevant date as between China and Japan, informed the inquirer :

... the current situation in China is indeterminate and anomalous and His Majesty's government are not at present prepared to say that in their view a state of war exists.

However, the Foreign Office letter went on to suggest :

... the question of the meaning to be attached to the term "war" as used in a charterparty may simply be one of interpreting the relevant clause, and ... the attitude of His Majesty's government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes.

The writer of that letter, which was written with the authority of the Prime Minister, as appears upon its face, does not appear to have realised the supposed unfortunate results, embarrassing to the executive, which might occur if the determination of such a question as the present were to be undertaken by the courts, and, if Sir Stafford Cripps' argument be right, it would appear that the executive is in need of being protected against itself. However, the proposition which Sir Stafford Cripps contended for is one which, on principle, I find quite unacceptable, and for which I can find no sort of authority. He referred, quite properly, to a large number of cases in which the question of judicial notice by the courts of this country of certain matters of state, whether municipal or foreign, is considered. It is perfectly manifest, to take

a simple case, that, if in any particular litigation a question arises whether or not this country is at war with another country, that is a matter of which the courts of this country will take judicial notice, and, if the courts find themselves unable from their own knowledge to take that notice, the source of information to which they must

A address themselves is one, and one only—namely, the executive government, whose function it is to make war or not to make war, and whose decision as to whether or not a state of war exists concludes the matter. That is one example, and that was what took place in *Janson v. Driefontein Consolidated Mines, Ltd.* (1), upon which Sir Stafford Cripps

B relied. That authority seems to me to have nothing at all to do with the present case, nor does it come anywhere near laying down a proposition of the kind asserted by Sir Stafford. Other cases to which he referred, which I do not propose to discuss in detail, were familiar cases, such as those where the question is as to the status of a foreign sovereign

C depending upon his recognition as such by the government of this country. If a litigant in these courts claims that he is not subject to the jurisdiction of these courts because he is a foreign sovereign, the answer to the question whether or not he is a foreign sovereign depends upon his recognition as such by the government of this country. It

D is a matter of which the courts take judicial notice, assisted, in case of necessity, by the answer of the government itself, which is the one way of bringing that matter to the mind of the court. Cases of that kind appear to me to have nothing to do with the present case at all. We are not concerned here with the question whether or not His Majesty's

E government recognises a state of war as existing between China and Japan. If that were the question which had to be decided, the courts would be bound to take judicial notice of the fact of such recognition, and, if the courts were unable to answer that question, they would ascertain from the appropriate government department whether or

F not His Majesty's government had recognised the existence of that state of war. That is not the question with which we are concerned. We are concerned, and concerned only, with the question whether or not, upon the true construction of a particular private document, the owners were entitled to cancel the charterparty, which they are only

G entitled to do if war breaks out involving Japan. In my judgment, it is impossible to assert that, within the meaning of that clause, the words, "if war breaks out," mean, "if war is recognised to have broken out by His Majesty's government." War may break out without His Majesty's government recognising it. If His Majesty's government had

H recognised that war had broken out, it may be—and I say no more—that a statement to that effect by His Majesty's government would be a matter which, even when dealing with a document of this kind, the court would be bound to accept. It is not necessary to decide that question, one way or the other, because that is not the question with which we have to deal. There is one case which Sir Stafford Cripps

relied upon which I think perhaps I should just mention. It is *Thelluson v. Cosling* (2), where the question that arose was whether or not war had been declared by Spain against France on a particular date. The evidence on that matter consisted of a document. The document was a declaration by the Spanish government to the effect that war was declared by Spain against France on Mar. 23. That document had been transmitted by the British Ambassador in Madrid to the Secretary of State in this country, and it was produced in court. Sir Stafford Cripps says that this shows that the proper method of proving a declaration of war is by the production of a statement by the Secretary of State, and that that is the only method of doing it. Assuming, as I do, that the case is accurately and sufficiently reported, it seems to me to prove the exact opposite. First of all, the document produced was not a declaration by His Majesty's government. It was a declaration by the Spanish government relating to the state of affairs between itself and France. The custody from which it was produced was the British Foreign Office, for the very simple reason that it had been communicated to the Foreign Office by the British Ambassador in Madrid. That does not make it a statement by the British government, nor was it tendered as such. It was produced as being exactly what it was—namely, a statement by the Spanish government as to the existence or non-existence of a state of war between Spain and France. It was accepted by LORD ELLENBOROUGH as evidence, not on the ground that it was the only evidence, but on the ground that it was proper evidence, to prove that particular matter of fact as to the date when war was declared between Spain and France. So understood, the case is a perfectly simple one, and it is as far as any case could be, with respect to the argument of Sir Stafford Cripps, from establishing the proposition in support of which he cited it. For these reasons, in addition to those given by the judge, I am of the opinion that the first point put forward by Sir Stafford Cripps is one which has no justification.

His second point was this. He said, with regard to the phrase, "if war breaks out involving Japan," that the word "war" has not a loose or popular meaning, but a technical meaning, and that technical meaning, he said, is to be found in the principles of international law. Where those principles of international law, for this purpose, are to be found I must confess that I remain in complete doubt, since the only source of those principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that those writers do not speak with one voice, and it is possible to extract from their pages definitions of "war" which not only differ from one another but which are also inconsistent with one another in important respects. I asked for any authority in which, for the purpose of the municipal law of this country, "war" is in any way defined. No such authority could be suggested. The nearest authority for that purpose which has been furnished is the observation of MATHEW, J., in the

Driefontein case (1), at p. 343, where he cites, with approval, the passage from HALL ON INTERNATIONAL LAW, 4th Edn., p. 63, referred to in the judgment of GODDARD, J. However, to say that English law recognises some technical and ascertainable description of what is meant by "war" appears to me to be a quite impossible proposition. If the English courts had endeavoured in ancient days to lay down such a definition, no doubt one of the things which in those days they would have regarded as essential to "war" was a declaration of war. Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war. Similarly, recent events in the world have introduced new methods and a new technique, with regard to which I conceive that writers on international law will dispute for many years to come. I do not propose to be the first to lay down a definition of "war" in a so-called technical sense.

Sir Stafford Cripps said that, whatever else "war" may mean, an essential element in it is *animus belligerendi* on the part of both, or at least on the part of one, of the combatants. What precisely *animus belligerendi* means is, again, a matter of great obscurity. In fact, to define "war" as a thing for which it is requisite to have *animus belligerendi* is coming very near defining the thing by itself. I must confess that, at the end of the argument, and with the very skilful assistance that we have had, I am still as doubtful as to the meaning of *animus belligerendi* as I was before the argument began.

There is one matter upon which Sir Stafford Cripps was quite precise, and that was that there cannot be an *animus belligerendi* where diplomatic relations between two countries are still preserved, and he pointed out that in the present case the diplomatic relations between China and Japan had not at the relevant date been severed, and he said that it is impossible, as a matter of English municipal law, for war to exist between two countries which have not severed diplomatic relations with one another. Therefore, he said, the finding of the arbitrator could not stand, because, having found that diplomatic relations had not been severed, he was bound, as a matter of law, as a result of that finding, to find that war had not broken out. There, again, I can find no justification for so extreme a view. There may be very good reasons, and no doubt there are very good reasons, why the parties engaged in these present operations have not recalled their respective Ambassadors. That circumstance, however, appears to me to amount to nothing more than one element to be taken into consideration in answering the question. I cannot find that it is a conclusive element at all. It is one element, and no doubt an important element—in some cases, even a decisive element—but, in the present case, it appears to me that it is an element of no particular importance. If my view is right—namely, that the fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out—then the matter becomes a question of fact, and the arbitrator has found as a fact, in so far as it is a matter of fact, that the

animus belligerendi existed. Sir Stafford Cripps called our attention to various statements, various findings, in the very clear statement made by the arbitrator which he suggested showed that, viewing this question as a matter of fact, there was really no evidence upon which the arbitrator could find that an *animus belligerendi* existed. The matters upon which he particularly relied were statements, in some cases by the Japanese, A and in some cases by the Chinese, commanders in the field in various places in China, and in some cases by members of the executive government of one country or of the other. No doubt the authoritative statements of a government concerned in such a matter as this are matters of importance to which attention must be paid, but acts very often speak more truly than words, and it was perfectly open to the arbitrator, on the facts as found by him as to the state of affairs which preceded the relevant date and was then in existence, to find that war had broken out, notwithstanding that on certain occasions certain individuals had apparently repudiated the idea that there was a war. C Speaking for myself, I find myself happy to be able to avoid coming to a conclusion on this matter which would violate all one's feelings of common sense. To say that the finding of fact of the arbitrator is one upon which there was no evidence seems to me to fly in the face of the manifest realities of the position. D

I am unable to accept the suggestion that there is any technical meaning of the word "war," for the purpose of the construction of this clause. I repeat that, if there is such a technical meaning, I do not know where it is to be found, and, as I have said, I do not propose to attempt to define it. However, even if there be some such technical meaning, it seems to E me that, for the reasons which I have given, the finding of fact of the arbitrator is unassailable, and I can find no trace on the face of his award that he has misdirected himself in law. That, I think, really concludes the matter. However, I must not be taken as in any sense disagreeing with the further view expressed by the judge—namely, that, in the F particular context in which the word "war" is found in this charter-party, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a common sense way. If one had asked the owners of this vessel on the relevant date if this charterparty had never existed, or if one had asked any ship-owner what he thought about the then-existing position between China G and Japan—as to whether or not a war existed—I cannot imagine any commercial person with any common sense answering that question in any way other than that in which the arbitrator has answered it. MAC-KINNON, L.J., suggests that even the most revered names in international law, such as Bynkershoek or Grotius, would have answered that H question in one way, and in one way only. Certainly one modern authority, Professor Westlake, answered it, because he defines "war" as "the state or condition of governments contending by force," a definition which accords with common sense as far as it goes. It seems to me that

to suggest that, within the meaning of this charterparty, war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law, rather than the common sense of business men. I have given these reasons in my own words out of respect to the argument put before us. I might have been content to say, as I do say, that I agree with the reasoning, and with the conclusion, of GODDARD, J., as he then was. The appeal must be dismissed, with costs.

B *MACKINNON*, L.J. : I agree. I am content to say that I agree with the reasoning of GODDARD, J., and SIR WILFRID GREENE, M.R.

FINLAY, L.J. : I also agree.

Appeal dismissed with costs.

C Solicitors : *Thomas Cooper & Co.* (for the appellants) ; *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

D SHENTON v. TYLER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **January 11, 12, 13, March 6, 1939.**]

E *Discovery—Interrogatories—Privilege—Communications between spouses—Privilege claimed by widow in respect of communication during the marriage—Evidence Amendment Act, 1853 (c. 83), s. 3—Criminal Evidence Act, 1898 (c. 36), s. 1 (b).*

F The plaintiff sought to administer certain interrogatories to the defendant in order to establish that the defendant's late husband had created a secret trust in her, the plaintiff's, favour. Owing to these interrogatories being based on communications between the defendant and her late husband during their married life, the defendant contended that she was privileged from answering the interrogatories so administered. On behalf of the plaintiff, it was argued that, as the defendant was now a widow, she could no longer claim the privilege, if there was such a privilege, but that the true view was that there never has been such a privilege.

G HELD : (i) before the passing of the Evidence Act, 1851, there was a rule of the common law that communications between husband and wife were not admissible in evidence, and, therefore, no question of privilege could arise. The question of compellability did not arise until after the passing of that Act, and was met by the Evidence Amendment Act, 1853, s. 3.

H (ii) the privilege being one created by statute, it must be construed according to the plain meaning of the words of the statute, and those words could not be extended to include widowers and widows and divorced persons. The defendant was, therefore, not entitled to refuse to answer the interrogatories.

Decision of SIMONDS, J. ([1938] 4 All E.R. 501) reversed.

EDITORIAL NOTE. The judgments herein include an exhaustive survey of the rules affecting the competence and compellability of husbands and wives as witnesses at common law and under the statutes of 1851 and 1853. The question at issue was whether there is a privilege at common law whereby the one spouse could not be forced to answer questions relating to communications by the other during the coverture, and it is decided that there is no such privilege, and that the only privilege in this regard is that given by the Evidence Amendment Act, 1853, s. 3. A

AS TO COMMUNICATIONS BETWEEN SPOUSES, see HALSBURY, Hailsham Edn., Vol. 13, p. 728, para. 802; and FOR CASES, see DIGEST, Vol. 22, p. 420, Nos. 4307-4311. See also YEARLY SUPREME COURT PRACTICE, 1939, p. 481.]

Cases referred to :

- (1) *Barker v. Dixie* (1736), Lee temp. Hard. 264. B
- (2) *Davis v. Dinwoody* (1792), 4 Term Rep. 678; 14 Digest 450, 4760.
- (3) *Stapleton v. Crofts* (1852), 18 Q.B. 367; 22 Digest 400, 4066; 21 L.J.Q.B. 247; 19 L.T.O.S. 88.
- (4) *Monroe v. Twisleton* (1802), Peake, Add. Cas. 219; 22 Digest 420, 4307.
- (5) *Doker v. Hasler* (1824), Ry. & M. 198; 22 Digest 420, 4308; subsequent proceedings (1825), 2 Bing. 479. C
- (6) *O'Connor v. Marjoribanks* (1842), 4 Man. & G. 435; 22 Digest 420, 4309; 11 L.J.C.P. 267; subsequent proceedings (1843), 12 L.J.C.P. 161.
- (7) *Ivy's (Lady) Trial, Mossam v. Ivy* (1684), 10 State Tr. 555; 22 Digest 384, 3942.
- (8) *Beveridge v. Minter* (1824), 1 C. & P. 364.
- (9) *McCormick v. Grogan* (1869), L.R. 4 H.L. 82; 43 Digest 600, 480.
- (10) *Blackwell v. Blackwell*, [1929] A.C. 318; Digest Supp.; 98 L.J.Ch. 251; 140 L.T. 444. D
- (11) *Gartside v. Outram* (1856), 26 L.J.Ch. 113; 18 Digest 143, 926; 28 L.T.O.S. 120.
- (12) *R. v. Cox & Railton* (1884), 14 Q.B.D. 153; 18 Digest 144, 933; 54 L.J.M.C. 41; 52 L.T. 25.
- (13) *Bullivant v. A.-G. for Victoria*, [1901] A.C. 196; 18 Digest 145, 941; 70 L.J.K.B. 645; 84 L.T. 737; revsg. S.C. sub nom. *R. v. Bullivant*, [1900] 2 Q.B. 163. E
- (14) *Wennhak v. Morgan* (1888), 20 Q.B.D. 635; 17 Digest 158, 591; 57 L.J.Q.B. 241; 59 L.T. 28.
- (15) *Balfour v. Balfour*, [1919] 2 K.B. 571; 27 Digest 210, 1821; 88 L.J.K.B. 1054; 121 L.T. 346. F
- (16) *Wells v. Fisher* (1831), 1 Mood. & R. 99; 22 Digest 420, 4310.
- (17) *Aveson v. Kinnaird (Lord)* (1805), 6 East, 188; 22 Digest 98, 686.
- (18) *Edwards v. Porter*, [1925] A.C. 1; 27 Digest 214, 1851; 94 L.J.K.B. 65; 132 L.T. 496; affg., [1923] 2 K.B. 538.

APPEAL by the plaintiff from an interlocutory decision of SIMONDS, J., dated Nov. 22, 1938, and reported [1938] 4 All E.R. 501. The plaintiff desired to interrogate the defendant, a widow, as to communications which passed between the defendant and her late husband during the marriage. The matter arose out of an action to enforce an alleged secret trust for the benefit of the plaintiff, imposed upon the defendant by her husband. A process summons was taken out, and, on the hearing of it, leave to administer the proposed interrogatories was refused. This being an important matter, the court heard two counsel on either side, contrary to its usual practice in interlocutory appeals. G

J. P. Eddy, K.C., and *Roger W. Turnbull* for the appellant.

C. E. Harman, K.C., and *G. D. Johnston* for the respondent. H

Eddy, K.C. : Equity will give effect to the principle that an individual shall not be benefited by his own personal fraud. In the present case, no confidence would be violated by the defendant answering the interrogatories. If there is a trust, the court would be lending itself to a fraud if it disallowed the interrogatories, and that, it is plain, it cannot do.

- A Relevant communications are not privileged where there is a *prima facie* case of fraud. The common law rule on the matter has been modified by statute, and the defendant is not exempted from answering the interrogatories in this action to which she is a party. There are four cases which support the common law rule: *Monroe v. Twisleton* (4), *Beveridge v.*
- B *Minter* (8), *Doker v. Hasler* (5) and *O'Connor v. Marjoribanks* (6). Cases which deal with the grounds on which breaches of trust are enforced are *McCormick v. Grogan* (9) and *Blackwell v. Blackwell* (10). Cases which deal with the question of privilege are *Gartside v. Outram* (11), *R. v. Cox & Railton* (12) and *Bullivant v. A.-G. for Victoria* (13). There
- C can be no question of privilege where there is a charge of fraud. The interrogatories can be answered either "Yes" or "No." If "Yes," there will be no violation of any confidence, as the defendant will be carrying out her husband's wishes. If the answer be "No," there will not be a violation of any confidence either.
- D *Turnbull* : The interrogatories were disallowed on the ground that there is a common law rule of evidence, which is absolute, that neither the husband nor the wife is a compellable witness to disclose any communication which has passed between them during the marriage, and that this common law rule extends to a widow. No such rule ever
- E existed. SIMONDS, J., came to the conclusion that the rule existed, on the authority of the three cases cited to him. The cases, however, are distinguishable. They relate to competency, and not to compellability. The decisions were in relation to evidence given by a spouse whose husband or wife was a party to the action. In those days, a party
- F to an action was not competent to give evidence on his own behalf. That was the reason why the principle was extended to the spouse of the party. The three cases in question are applicable to that rule, and to nothing more. There never was a rule that, where a husband is not a party to an action, the wife is not a competent witness. The *dicta*
- G in *Stapleton v. Crofts* (3) indicate this clearly. The question in those three cases was not whether or not the wife was compellable to answer, but whether or not she could be called at all. The Evidence Act, 1843, removed the incapacity of certain persons to give evidence, but retained the incapacity of parties to the suit, and the husband or wife of such
- H parties. The Evidence Act, 1851, repealed that exception, not in whole, but only in part. Sect. 2 of that Act directly covers the present case. The privilege of a spouse to refuse to answer questions relating to communications made to her or him by a husband or wife is a privilege that never existed. It is not until the Evidence Amendment Act, 1853, was passed that the word "compellable" is to be found. The question arises

whether sect. 3 of that Act is of general application or whether it is linked up with sect. 1. The only objection taken is on this ground of privilege, and the onus of showing that it exists rests upon the defendant. That onus cannot be discharged. No such privilege ever existed, and it does not exist at the present time.

Harman, K.C.: SIMONDS, J., was perfectly right in his observations. A From time immemorial, a wife or a husband has had a right to say that the secrets of the matrimonial hearth shall not be disclosed to the outside world. That privilege exists because public policy demands it as a proper safeguard to married life. Mr. Turnbull has said that there never was such a privilege at all before the Evidence Amendment Act, 1853, was B passed. That is a most startling proposition. Before the time when a party to a suit could give evidence, it must be very rare to find a case on the matter. The evidence of a spouse was excluded on the same ground. The three cases cited to SIMONDS, J., did not deal with married women at all. In two cases the women were widows, and in one case the woman C had been divorced. *Wennhak v. Morgan* (14) may be cited as an example of the view which the courts have taken. In that case, it was held that the fact that a man had disclosed a libel to his wife was not evidence of publication. The rule is based upon the principle that husband and wife are entitled to communicate freely with each other without one of them D having to disclose later what the other said. If there be this privilege, a wife ought to be able to avail herself of it. This privilege is conferred, or created, by the Act of 1853. The defendant is asked to disclose something concerning which she is entitled to claim that she is privileged not to disclose it. If the privilege is once waived, she will be liable to E have the whole of her married life laid bare at the will of the cross-examiner. The privilege does not cease because the defendant becomes a widow, so long as the communication was made when she was a wife. The plaintiff is unable to say more than that there was a promise made at some time. In *Balfour v. Balfour* (15), it was stated by LORD ATKIN F that promises made between husband and wife were outside the realm of contract. The defendant is protected both by the common law and by the Act of 1853. There is no *prima facie* case of fraud. There is no *prima facie* evidence against the defendant at all. The words of the Evidence Amendment Act, 1853, s. 3, show that the privilege has always G existed, and is being preserved by the Act. Exactly the same words recur in the Criminal Evidence Act, 1898. If the court comes to the conclusion that the privilege did not exist before 1853, it was created by the Act of 1853, and it protects the defendant, although she is now a widow. It would be contrary to public policy that the defendant H should be ordered to answer these interrogatories.

Johnston: In *Wells v. Fisher* (16), a marriage having been declared void, it was held that the woman could be examined regarding the man's declarations to her. The strength of that case is that it was arguable in those days that the rule as to privilege extended to a mistress.

There is, therefore, an implication that there was a strong opinion that the privilege existed as between husband and wife.

- Eddy, K.C.*, in reply: In *COCKLE ON EVIDENCE*, 6th Edn., the privilege is not put on any common law ground at all, but is stated to be statutory. *Wennhak v. Morgan* (14) was a libel case. For the defendant,
- A it is said that if the privilege does not exist, she is protected by the Evidence Amendment Act, 1853, s. 3. The words in the section are: "no husband and no wife." The material time is when the spouse is giving evidence, and the question is whether or not the witness is a husband or wife at that time. If not, no protection is given by sect. 3.
- B The section cannot be read as though it applies also to widows and widowers. The defendant can, therefore, obtain no protection from sect. 3. [Counsel referred to *Aveson v. Kinnaird* (Lord) (17) and *Edwards v. Porter* (18).]

- C SIR WILFRID GREENE, M.R.: This appeal raises a question of general importance. The appellant, the plaintiff in the action, seeks to administer to the respondent certain interrogatories designed to obtain from her admissions to the effect that a secret trust in favour of the appellant was imposed upon the respondent by her late husband before his death,
- D and that the respondent accepted such trust. The respondent objected to the interrogatories, on the ground that she was not bound to answer questions relating to a communication made to her by her husband, and *SIMONDS, J.*, upheld the objection. The appeal, therefore, raises questions as to the nature and extent of the privilege which applies to
- E communications between spouses, and as to whether or not the privilege persists after the marriage has come to an end. In preparing this judgment, I have enjoyed the benefit of the researches of *LUXMOORE, L.J.*, the extent of which appears in his judgment about to be delivered.

- F In considering the questions which fall for decision, it is necessary at the outset to distinguish four rules of evidence. The first is the rule which existed at common law that neither a party nor the spouse of a party was a competent witness on behalf of that party. This rule related to the competence of the witness, and was not a rule of privilege. The second is the rule which existed at common law that a party was not
- G a compellable witness against himself. I say compellable, although it may be that this was also a rule of competence, and not of privilege, a question which, for present purposes, need not be discussed. The third rule is the rule that existed at common law that a spouse was not a competent witness against his or her spouse. I say competent advisedly,
- H since the English authorities appear to have excluded the evidence in such a case on the ground that the witness was incompetent, and not on that of privilege: see, for example, *Barker v. Dixie* (1), *Davis v. Dinwoody* (2) and the second report of the Common Law Commission, 1853, pp. 12, 13, where the rules relating to the competence of spouses are discussed. The reasons given for this third rule were various. For example, in

Barker v. Dixie (1), LORD HARDWICKE said that this rule, and the rule forbidding one spouse to give evidence in favour of the other, existed in order "to preserve the peace of families." In *BULLER'S NISI PRIUS*, p. 286 (cited *arguendo* in *Davis v. Dinwoody* (2)), the reason for the rule is said to lie in "the legal policy of marriage," while the rule forbidding one spouse to give evidence in favour of the other is said to exist "because their interests are absolutely the same." LORD KENYON, C.J., in *Davis v. Dinwoody* (2), said that, quite apart from interest, the ground of both rules was the presumption of bias. Which of these and other reasons from time to time given is the least unsatisfactory (a question which has been much debated) I do not pause to inquire. It is to be observed that this third rule only came into operation in the case where the other spouse was a party. Like the first rule, it was a rule affecting competence, and extended to the whole of the evidence which the witness might be able to give, whether or not it related to marital communications.

In stating the common law rules with which I have dealt, I have not referred to any of the recognised exceptions, since they are not relevant to the matter with which we have to deal. Of the three rules above-mentioned, the first and third were apparently observed in courts of equity as well as in courts of common law, but the second rule was not observed in courts of equity, since in those courts it was from earliest times permissible to interrogate the opposite party.

The fourth rule, which is the rule now in question, is a rule, not of competence or admissibility, but of privilege, which protects marital communications as such. The question whether this privilege existed at common law or is the creature of statute lies at the heart of the present controversy. Whatever the true answer to it may be, the rule has nothing to do with the fact that one of the spouses may be a party to the proceedings. The privilege exists equally whether or not the witness or his or her spouse is a party to the proceedings. Indeed, one of the reasons for the absurdity which surrounds the crucial question is that only in exceptional cases could evidence of a communication between husband and wife be admissible in proceedings in which neither was a party, and the result was that, in the great majority of cases, evidence of such communications was effectively excluded by the rules as to the competence of spouses already discussed.

Before I come to consider the question whether or not any such privilege existed at common law, it will be convenient to summarise the legislative enactments which have dealt with all four rules, so far as they are relevant to the present question. The Evidence Act, 1843, commonly known as Lord Denman's Act, removed the incompetence of witnesses on the ground of interest which had previously existed, but it contained a proviso preserving the incompetence of parties and their husbands or wives. The Evidence Act, 1851, commonly known as Lord Brougham's Act, repealed this proviso save as regards the husbands or wives of parties, and made parties themselves both competent and compellable witnesses,

except in certain cases, particularly criminal matters. It was decided in *Stapleton v. Crofts* (3) that this Act did not render a wife competent to give evidence on behalf of her husband, who was defendant in the action.

A It was at this point in the legislative history that the Common Law Commissioners presented their second report, in which, after examining the reason for the rule making husbands and wives incompetent to give evidence either for or against one another, they recommended (at p. 13) that this rule should be abrogated "but that all communications between them should be held to be privileged." The reason for the latter recommendation is as follows:

C The question how far the communications of married persons *inter se* should be matter of testimony in courts of justice, stands on very different ground. So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the public disclosure of confidential communications between husband and wife, would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute.

D This recommendation was accepted by the legislature and embodied in the Evidence Amendment Act, 1853, also known as Lord Brougham's Act. Sect. 1 of that Act made the husbands and wives of parties competent and compellable witnesses except in criminal proceedings or proceedings instituted in consequence of adultery. Sect. 3 of the Act provides as follows:

E No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

The statutory privilege, therefore, extends only to communications made to the witness, and does not protect those made by the witness.

F I point out here, in passing, two matters which will be found later to be of importance. The first is that the Common Law Commissioners make no reference to any then-existing rule of privilege relating to communications between husband and wife as such. The second is that sect. 3 of the Act of 1853, unlike sect. 2 (which relates to criminal matters and adultery), is in form not a mere proviso upon, or exception from, sect. 1, as it would naturally have been if the legislature had conceived itself to be preserving an existing rule of law. It takes the form of an independent enactment of general application. It is not confined to cases where the witness or his or her spouse is a party, but extends to all cases. Moreover, the privilege is conferred upon the witness alone, with the result that the other spouse has no right to object to the disclosure of the communication.

H I pass over the Evidence Amendment Act, 1869, and come to the Criminal Evidence Act, 1898. That Act made a person charged with an offence and his or her wife or husband competent witnesses for the defence. Sect. 1 (d) provided as follows:

Nothing in this Act shall make a husband compellable to disclose any com-

munication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage.

It is natural to find this paragraph (unlike sect. 3 of the Act of 1853) expressed in the form of a proviso. The effect of making the party charged and his or her wife or husband competent witnesses for the defence was to make them liable to cross-examination. The result would, or at any rate might, have been that the privilege given by sect. 3 of the Act of 1853, although in language applicable to all cases, would have been held to have been taken away, and the witness would have been compelled to answer in cross-examination questions relating to marital communications. The effect of sect. 1 (d) of the Act of 1898 is to preserve, in cases to which that section applies, the privilege conferred by sect. 3 of the Act of 1853.

It is said on behalf of the respondent, and it was held by SIMONDS, J., that there existed, and still exists at common law, independently of sect. 3 of the Act of 1853, a rule of privilege protecting communications between husband and wife during marriage, and that this privilege continues to subsist notwithstanding that the marriage has come to an end through death or dissolution. The appellant, on the other hand, contends that no such privilege ever existed at common law, that the only rule of privilege protecting marital communications is that enacted by sect. 3 of the Act of 1853, and that this section is, by its language, confined to the case of a subsisting marriage, and does not apply where the marriage has come to an end.

It is important to appreciate that the alleged common law rule upon which the respondent relies is admittedly a rule of privilege, and does not make the evidence inadmissible. It is not suggested that the court would refuse to hear evidence of a marital communication if the privilege were to be waived. As a result of this, the alleged rule cannot, I think, be extracted from decisions which merely state or recognise the incompetence of spouses to give evidence for or against one another. It is for this reason that I am unable to find authority for the existence of the alleged rule in any of the three decisions which were particularly relied on by SIMONDS, J., in his judgment and by counsel for the respondent in this court. The first of these decisions is that of LORD ALVANLEY in *Monroe v. Twisleton* (4). In that case, the plaintiff called the divorced wife of the defendant to prove the contract sued upon. Counsel for the defendant objected to her competence. Counsel for the plaintiff contended that she was an admissible witness. LORD ALVANLEY held that the witness was competent to prove "any fact arising after the divorce," but that, notwithstanding the divorce, she was incompetent "to prove a contract or anything else which happened during the coverture." He was thus holding that the evidence of the witness against her late husband was inadmissible, and he states the proposition in terms which include the whole of the evidence which she might give, whether or not it related to marital communications. It does not appear from the report whether

or not the evidence proposed to be given related to any such communication, since the objection was not to any particular question, but to the competence of the witness. Whether or not it related to such communications, the court would not listen to it. The real point decided by this case, in my opinion, was that the incompetence of one spouse to give evidence against the other persisted even after the dissolution of the marriage where the subject-matter of the evidence was "anything which happened during the coverture." It is so treated in *PEAKE'S LAW OF EVIDENCE*, 2nd Edn., p. 174, published in 1804, two years after the decision. I do not myself see that this decision is any authority for the existence at common law of such a rule of privilege as is suggested. It is true that *LORD ALVANLEY* gives as the ground of his decision the fact that during coverture the wife was (p. 220) :

... bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband. . . .

It is also true that he enlarged on the evils which might flow from the disclosure of confidential communications between husband and wife. This appears to me to be merely adding to the many and diverse reasons given in the authorities for the rule under which one spouse was not competent to give evidence against the other, and this appears to be the view taken in *TAYLOR ON EVIDENCE*, 1st Edn., referred to below. Nor do I think that the suggested rule of privilege can be deduced from the reasons given for the decision. If it were possible to deduce from those reasons a general and independent rule relating to marital communications, it would be a rule which would exclude the evidence altogether, and not one of mere privilege.

Monroe v. Twisleton (4) was followed by *BEST*, C.J., in *Doker v. Hasler* (5), where the other spouse was dead. *BEST*, C.J., said, at p. 198 :

... I think that the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable.

That principle, as I have already pointed out, would exclude the evidence altogether.

The third case is *O'Connor v. Marjoribanks* (6). The action was in trover by administratrixes of a deceased person, and related to certain plate in the hands of the defendants, who were bankers. The defence was that the plate had been deposited with the bank by a third person as security for a loan, pursuant to an agreement between the deceased and the third person, and that the loan had not been repaid. The alleged agreement was put in issue by the plaintiffs. It appeared that the agreement, if it existed, was made between the wife of the deceased and the third person, the deceased being at the time in India. The widow's evidence was taken on commission and tendered by the defendants. It was to the effect that she had her husband's authority to pledge the plate. At the trial, *MAULE*, J., admitted the evidence *de bene esse*, but reserved the point, which was afterwards argued in the Common

Pleas before TINDAL, C.J., and COLTMAN and MAULE, JJ. The decision followed that in *Monroe v. Twisleton* (4), and extended the principle of that decision to a case where the personal representatives of a deceased husband were parties to the suit. Thus TINDAL, C.J., says, at pp. 442, 443, that it is a general rule of law "that a wife cannot be admitted as a witness either for or against her husband." He held that this rule A extended to exclude the evidence of both parties to a marriage "as to transactions occurring during their joint lives," and refused to limit this extension to the case of confidential communications. COLTMAN, J., said, at p. 443, that, during the lifetime of the spouses :

... the rule then is, that, with the exception of certain well-known instances, neither husband nor wife can be admitted as a witness for or against the other; and I think that no such distinction as that now attempted to be set up, arises upon the death of one of the parties. B

In the same case, MAULE, J., said, at p. 446 :

... the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no case, shall husband and wife be allowed to give evidence for or against each other. That rule extends to this case; for, though the husband is dead, the reason for the rule applies as strongly as if he were alive. C

What I have said as to the grounds and effect of the decision in *Monroe v. Twisleton* (4) applies equally to this case. It is to be noticed that, if the case had been one of privilege, and if the privilege had been that of the widow, she must have been held to have waived it. D

No authority for the existence of the alleged common law rule of privilege has been discovered by the researches of counsel, or by those of my colleagues and myself. No hint of its existence is given in DUNCOMBE'S TRYALS PER PAIS, published in 1666, where the rule that a wife is an incompetent witness for or against her husband is stated at p. 138, or in GILBERT'S LAW OF EVIDENCE, published in 1760, where the same rule is stated at p. 135, or in PEAKE'S LAW OF EVIDENCE, published in 1804, already referred to, where the same rule is stated at p. 173. In STARKIE'S LAW OF EVIDENCE, 3rd Edn., published in 1842, the rules as to the incompetence of spouses to give evidence for or against one another are discussed in Vol. 2, p. 549 *et seq.* In dealing with the case where neither spouse is a party or interested in the result, the author says, at p. 551 : E

Where neither of them is either a party to the suit or interested in the general result the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate the other or, *as it seems*, involve the disclosure of some communication made by the other. F G

No authority is cited for the *semble* which I have underlined. In BEST ON EVIDENCE, 1st Edn., published in 1849, in a chapter beginning at H p. 455, and headed "Evidence Rejected on Grounds of Public Policy," the author deals under that head with a variety of matters, some of them relating to inadmissible evidence and others to evidence protected by privilege. The principle which he says applies to all these cases is that (at p. 455) the "evidence . . . is rejected on the ground that from its

reception some collateral evil would come to third parties, or to society." At p. 463, he says :

The applications of this principle to social life are few. The principal instance is in the case of communications between husband and wife.

- A As authority for this proposition, he cites nothing but an American book, GREENLEAF ON EVIDENCE, published in 1842. In that work, at p. 289, the author says that such communications are privileged, the reason given being the necessity of preserving confidence between spouses. The English authorities which he cites in support of this are *Monroe v. Twisleton* (4) and *Doker v. Hasler* (5), which, as I have already shown, are concerned with a different rule altogether.

- B In TAYLOR ON EVIDENCE, 1st Edn., Vol. 2, published in 1848, the incompetence of spouses to give evidence for or against one another is discussed at length at p. 898 *et seq.* The unsatisfactory nature of the various reasons given for that incompetence is examined. In particular, the author refers to the suggested reason based on identity of interest and to that based on the necessity of preserving marital confidence. The former of these, he says, is obviously too narrow. Of the latter, he says, at p. 899 :

- D On the other hand, the second ground, which rests on the sacredness of conjugal communications, is too large, since it would exclude all such communications, even where married persons were witnesses in actions between strangers ; whereas it is notorious that in these cases a wife might be called to prove that on a certain occasion she had acted with the consent or by the authority of her husband, and where the husband has been previously examined she has even been asked whether he deserved to be believed on his oath.

- E He cites an interlocutory observation of MAULE, J., in *O'Connor v. Marjoribanks* (6), at p. 440, where the judge said that, the widow in that case might have been called to prove that she had pledged the plate with her husband's consent, if the question had arisen between third parties.

- F In TAYLOR ON EVIDENCE, 1st Edn., Vol. 1, p. 615 *et seq.*, there is a chapter headed "Of Evidence excluded on Grounds of Public Policy," a title similar to that of the chapter in BEST ON EVIDENCE, 1st Edn., p. 455 *et seq.*, already referred to, but Taylor's chapter does not, of course, include the alleged rule. Taylor's view is supported by an observation of G ERLE, J., in *Stapleton v. Crofts* (3). That case was decided after the passing of the Evidence Act, 1851, but before that of the Act of 1853, and it was there held that the Act of 1851 did not render the wife of a party a competent witness. ERLE, J., dissented on this point, but the fact that he dissented does not detract from the value of his examination of the common law rules relating to the evidence of spouses. In the course of that examination, he said, at p. 374 :

With respect to the protection of confidential communications between husband and wife, there seems good reason for such protection at all times : *but no such principle has been brought into practice.*

The italics are mine.

From this review of the English textbooks and the observations of MAULE and ERLE, JJ., I conclude that the alleged common law rule of privilege protecting marital communications as such never existed. This view is confirmed by the language used by the Common Law Commissioners in the passage from their second report already quoted. In that passage, they recommend that marital communications should be protected. They do not suggest that the law as it then stood protected them already. This recommendation was, as I have already said, adopted by the legislature in language apt for the enactment of a new rule, and not for the preservation of an existing one. If the alleged rule of privilege existed, the question would, of course, arise : Whose was the privilege ? Was it that of the spouse who made the communication, or of the spouse to whom it was made, or of both ? If the alleged rule was designed to protect marital confidence, the privilege should apparently have been that of the spouse who made the communication, or perhaps that of both spouses, but not that of the spouse to whom it was made. Yet the legislature has enacted in sect. 3 of the Act of 1853 that the privilege shall be that of the spouse witness, who can, accordingly, if he or she desires, disclose all confidential communications made to him or her by his or her spouse, however unwilling that spouse may be to have the disclosure made. Moreover, the alleged common law rule is said to apply to all marital communications, whereas the statutory privilege conferred by sect. 3 of the Act of 1853 protects only communications made to the witness. It seems to me impossible to reconcile the provisions of sect. 3 with the theory that it was superimposed upon a rule of common law then recognised as existing and envisaged as continuing after the passing of the Act, and co-existing with the new statutory rule.

The authorities and textbooks which I have examined in the course of this judgment are all earlier in date than the Act of 1853. I must confess to feeling some surprise at the result of that examination, since the existence of the alleged rule of common law has, I think, in modern times, been assumed by many lawyers. It is not without significance that the only English textbook earlier in date than the Act of 1853 in which the existence of the alleged rule is asserted is BEST ON EVIDENCE, 1st Edn., quoted above, where the only authority cited is the American work of Professor Greenleaf. In another well-known American textbook, WIGMORE ON EVIDENCE, published in 1904-1905, the alleged rule is discussed at length in Vol. 4, p. 3257 *et seq.* In that work, the privilege is said to exist at common law, and it would appear that its existence has been recognised in the United States. The author gives the history of the alleged privilege in a passage which deserves to be quoted at length (p. 3258) :

The privilege for communications between husband and wife is apparently, in time of origin, the second of such privileges to be enforced at common law, and yet the last to be definitely recognised and distinguished. In the second half of the 1600s an instance of its application is found ; and yet the explicit statement of the privilege, as a distinct one from any other rule, did not come in England until the

statutory reforms of the Common Law Procedure Act, just as the second half of the 1800s was beginning. The explanation of the paradox is that until that time the present privilege for communications between husband and wife had not been plainly separated from the other privilege of husband and wife not to testify to any facts against the other. This latter privilege was fully established by the end of the 1600s. But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures. In other words, the true policy of the present privilege was perceived, and yet it was not enforced in the shape of any rule distinct from the old-established privilege of each not to testify against the other as a party or interested in the suit. That the two are distinct is plain; for the privilege not to testify against the other is broader in the respect that it excludes testimony to any adverse facts even though they have been learned wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony adverse in its tenor and adverse to a party to the cause or to one in an equivalent position. Nevertheless, the privilege against adverse testimony remained for a long time alone in its recognition; and not unnaturally, for two reasons. In the first place, in the great majority of instances in which it was desired to make a wife reveal her husband's communications, he was an adverse party, and his long-established privilege against her adverse testimony served equally to protect him against that sort of her adverse testimony as against any other. In the second place, the other instances where it might be desired that she should reveal his communications would ordinarily be those in which he himself desired her testimony in his behalf, and this was of course prevented by her disqualification. Thus there remained only one situation, and that the least common one, in which the two existing rules of disqualification and privilege did not already suffice to dispose of the evidence, namely, the situation in which the husband was not a party, but an indifferent person, and yet his communications to his wife were material to the cause and were offered to be proved by her. In view of the rarity of this situation under the system of married women's disabilities then prevailing, it is not to be wondered that at common law the question was not forced upon the consideration of the judges, and that the recognition of the present privilege as a rule independent of any other was so belated. Not until the marital disqualification and the marital privilege against adverse testimony were proposed to be abolished or modified did the existence of this third aspect of the subject begin to be perceived. Accordingly, when the legislators in the various jurisdictions took the first steps, in the period from 1840 to 1870, to reform the other two rules, by abolishing or restricting the disqualification and the other privilege, they invariably preserved by express enactment the present privilege for communications. So this privilege, hitherto existing rather in principle than in rule, practically begins its existence and is defined in its terms by the legislation of that period.

The author here refers to the rule making husband and wife incompetent to testify against one another as a rule of privilege, which is not the case in English law, as I have already said. The instance in the second half of the 1600's which the author gives is to be found in *Lady Ivy's Trial* (7), the trial of Lady Ivy before JEFFREYS, C.J. However, this is not really an instance of the application of the alleged rule, since the evidence was evidence which tended to incriminate the husband of the witness, and was apparently rejected on that ground.

It appears from a later passage in WIGMORE ON EVIDENCE, p. 3268, that the privilege which is recognised to exist in the United States is there regarded as belonging to the spouse making the communication, or possibly to both spouses (see note 1 at p. 3269), and not to the witness spouse to whom the communication was made. I have already referred to this aspect of the matter.

I will now refer briefly to the textbooks published since the Act of 1853. In TAYLOR ON EVIDENCE, 4th Edn., published in 1864, the privilege affecting marital communications now appears in the chapter headed (as in the first edition already referred to) "Evidence excluded

on Grounds of Public Policy," and it is treated as being purely statutory. The same treatment is found in the latest, the 12th, edition, Vol. 1, p. 572. In *WILLS ON EVIDENCE*, 2nd Edn., p. 287, published in 1907, it is said that at common law :

... husband and wife were neither compellable *nor competent* to disclose in evidence any communications upon any matter whatsoever which had passed between them during marriage. A

The only authority cited for this proposition is *O'Connor v. Marjoribanks* (6). The authors say, at p. 289 :

With regard to communications between husband and wife during the marriage it would seem that neither husband nor wife is now [since the Act of 1853] incompetent to give evidence ; but each of them is entitled to the privilege of not disclosing such communications in any proceedings whatsoever, although if either of them should waive the privilege and give evidence thereon, they would of course render themselves liable to cross-examination with regard to the same. B

It would appear from these two passages that, in the view of the authors, sect. 3 of the Act of 1853 had impliedly abrogated a pre-existing common law rule affecting, not merely compellability, but competence. I cannot agree with the view that there was a common law rule which made marital communications as such inadmissible, any more than I can agree with the view that there was a common law rule which made them privileged. If there was a common law rule making marital communications as such not merely privileged, but inadmissible, distinct from the rule which made spouses incompetent as witnesses for or against one another, it is impossible to suppose that no single author writing before 1853 would have mentioned it, or that MAULE and ERLE, JJ., would have said what they did. It is not referred to in the second report of the Common Law Commission, and, if it had been thought to exist, sect. 3 of the Act of 1853 would have been worded very differently. It is clearly impossible for a common law rule excluding evidence of marital communications altogether to co-exist with the statutory privilege conferred by sect. 3 of the Act of 1853. If such a common law rule had existed, the only possible result would be that it was impliedly repealed *in toto* by the section. It cannot have been left in part operative. Much less can it have been converted by the section into a rule of privilege, and left to stand as such side by side with the statutory rule, and to supplement it. C
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In *STEPHEN'S DIGEST OF THE LAW OF EVIDENCE*, 12th Edn., p. 146, the only rule referred to is the statutory rule. The same is true of *PHIPSON ON EVIDENCE*, 7th Edn., p. 205, although there is an obscure reference to "the old common law rule," and to *O'Connor v. Marjoribanks* (6) and *Doker v. Hasler* (5). In *COCKLE'S CASES AND STATUTES ON THE LAW OF EVIDENCE*, 6th Edn, p. 321, the privilege is said to be a statutory one under the Act of 1853. The same view appears in *HALSBURY'S LAWS OF ENGLAND*, Hailsham Edn., Vol. 13, p. 728, although reference is made in a footnote to *O'Connor v. Marjoribanks* (6), *Doker v. Hasler* (5) and *Monroe v. Twisleton* (4). *BEST ON EVIDENCE*, 12th Edn., merely repeats the statement based on *GREENLEAF* to which I have already referred, with an added reference to sect. 3 of the Act of 1853. G
H

I have thought it convenient to refer to the views expressed in modern text-books. There is nothing in them which leads me to alter the opinion which I have formed from an examination of the older authorities. Indeed, they confirm it, since they show that the view that there was a rule at common law is based on a misapprehension as to the rule which was applied in *Monroe v. Twisleton* (4), *Doker v. Hasler* (5) and *O'Connor v. Marjoribanks* (6). It may well be that, if the legislative reforms in the middle of the last century had not taken place, the common law might in time have evolved a rule of privilege affecting marital communications as such. Had it done so, the privilege might well have been different from that conferred on the witness by sect. 3 of the Act of 1853. However, that section became law before any such rule was established (see the statement of ERLE, J., in the passage already quoted), and this forestalled a possible development of the common law. After the enactment of that section, all possibility of such a development was removed.

If my view is right—namely, that the only rule that exists is that contained in sect. 3 of the Act of 1853—it remains to consider whether, under that section, upon its true construction, the privilege continues to exist after the marriage has come to an end. In my opinion, it does not. The section in terms relates only to husbands and wives, and no principle of construction known to me entitles me to read into the section a reference to widowers or widows or divorced persons. I am aware that this view is not in agreement with that expressed by some text-book writers, but their view is in most cases based on the false analogy of *Monroe v. Twisleton* (4), *Doker v. Hasler* (5) and *O'Connor v. Marjoribanks* (6). In TAYLOR ON EVIDENCE, 12th Edn., p. 573, the point is left open. BEST ON EVIDENCE, 12th Edn., p. 506, does not refer to the three cases mentioned, but cites the opinion of Greenleaf. PHIPSON ON EVIDENCE, 7th Edn., p. 205, says that the analogy of those cases “probably” applies. STEPHEN’S DIGEST OF THE LAW OF EVIDENCE, 12th Edn., p. 146, note 3, treats the point as doubtful. HALSBURY’S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 728, note (n), and LUSH ON HUSBAND AND WIFE, 4th Edn., p. 599, both say that those cases apply.

In my opinion, it is not legitimate to expand the plain language of a section which confers privilege in all proceedings, whether the witness or the other spouse is a party or not, by applying the analogy of previous cases which dealt, not with privilege, but with competence, and were concerned only with actions in which a former spouse or his legal personal representative was a party to the action. The importance of the question involved, and the obscurity which surrounds it, must be my justification for the length of this judgment. It is based on a quantity of material which was not before SIMONDS, J., and I have, therefore, less hesitation than I otherwise would have had in differing from the view which he took. In the result, the appeal is allowed with costs. The costs below will be costs in the action.

FINLAY, L.J. : I have had an opportunity of reading the judgment which has just been delivered by SIR WILFRID GREENE, M.R., and also the judgment which is about to be delivered by LUXMOORE, L.J., and I have consulted all—to be exact, not all, but all with one single exception—the very numerous authorities to which they have referred. I agree with their judgments, and I have not thought it necessary, in those A circumstances, to prepare a separate judgment of my own.

LUXMOORE, L.J. : This is an appeal from a refusal by SIMONDS, J., to allow the plaintiff in the action to administer certain interrogatories to the defendant in support of allegations made in the statement of claim. The material allegations are to the effect that one, Edmund Deeble Tyler, B who is dead, and who is referred to in the statement of claim as the testator, communicated to his wife, the defendant in the action, his wish that she should pay to the plaintiff, out of the testator's estate, during the residue of the plaintiff's life, the sum of £2 per week ; that the defendant C promised the testator that she would pay that weekly sum ; and that, on the faith of that promise, the testator allowed the defendant to become entitled under his will to his residuary estate. The plaintiff has pleaded that she is unable to give particulars of the promise until after discovery. The defendant by her defence denies that any such wish was expressed D or that any such promise was made.

The plaintiff seeks to establish her case by administering to the defendant the following interrogatories :

(1) Did not your late husband communicate to you during his lifetime his wish that you should during the lifetime of the plaintiff pay to her or to some other and what person for her own use the weekly sum of £2 or some other and what weekly sum ? E

(2) If yea, what was the date of such communication ?

(3) Did you not promise your late husband that you would during the lifetime of the plaintiff pay to her or to some other and what person for her use the weekly sum of £2 or some other and what weekly sum ?

(4) If yea, what was the date of such promise ?

Obviously the interrogatories are relevant to the issues raised by the F pleadings in the action. The sole ground of objection to the interrogatories taken before SIMONDS, J., and in this court is that the defendant cannot be compelled to answer any of the interrogatories because each of them relates to communications passing between the defendant and her deceased husband during the existence of the marriage tie, and there G is, it is said, an absolute and unqualified rule at common law which prevents any communication passing between husband and wife during that period from being divulged, and, consequently, neither spouse is H compellable, by interrogatory or otherwise, to give evidence upon matters which have been so communicated by one to the other. SIMONDS, J., after considering certain reported cases, to which I shall refer later, accepted this argument, and refused to allow the interrogatories, stating the alleged rule substantially in the words used by me in my statement of the defendant's argument. He further held that the alleged rule has not been qualified or limited by the provisions of the Evidence

Amendment Act, 1853, to which also I must refer. The question is one of importance, for, if the defendant's contention is correct, the defendant may be enabled for her own benefit to prevent the establishment of the secret trust alleged by the plaintiff, and, by so doing, frustrate the wishes of her husband. It is to be observed that the rule as stated is in its first

A branch directed to the competency of a spouse to give evidence with regard to communications between the husband and wife, for it states "that no such communication is to be divulged," while in its second branch it is directed to the compellability of a spouse to divulge any such communications, or, to put it in other words, a spouse can claim privilege in respect
B of any such communication if questioned with regard to it, although the evidence may be admissible. It is material to bear these distinctions in mind.

The substantial questions to be determined are (i) what was the common law rule with regard to communications between spouses made during
C coverture and (ii) to what extent has it been affected by statute? The earliest statement I have been able to discover on the subject is to be found in a note which appears in COKE'S COMMENTARY ON LITTLETON, at folio 6 (b), published in 1628:

D It hath been resolved by the justices that a wife cannot be produced either against or for her husband *quia sunt duæ animæ in carne una*; and it might be a cause of implacable discord and dissention between the husband and the wife and a means of great inconvenience.

Apart from this note, the earliest textbook in which I have found any reference to the matter is a work by S. EVER, published in 1666, intituled
E TRIALS PER PAIS BY DUNCOMBE, OR THE LAW CONCERNING JURIES AT NISI PRIUS. It is stated, at pp. 138, 139:

The wife cannot be a witness for or against her husband; but kinsmen never so near, tenants, servants, masters, counsellors and attorneys, etc., may be witnesses.

In GILBERT ON EVIDENCE, 6th Edn., published in 1801, the only
F statement with regard to the matter is that husband and wife cannot be admitted to be witnesses for or against each other (p. 119):

... for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and, therefore, they can gain no more credit when they attest for each other than when any man attests for himself. And it would be very hard that a wife should be allowed as evidence against her own husband when she cannot attest for him. Such a law would occasion implacable divisions and quarrels, and destroy the very legal policy of marriage that has so contrived it that their interest should be but one, which it could never be if wives were admitted to destroy the interest of their husbands, and the peace of families could not easily be maintained if the law admitted any attestation against the husband.
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This passage is followed by the statement of a number of exceptions to the
H rule (pp. 119, 120), but it is immaterial to refer to them.

In STARKIE'S PRACTICAL TREATISE ON THE LAW OF EVIDENCE, published in 1824, under the heading "Competency," pp. 706 *et seq.*, it is stated as follows:

... the husband and wife cannot be witnesses for each other, for their interests are identical, nor against each other on grounds of public policy, for fear of creating

distrust and sowing dissensions between them and occasioning perjury. So important is this rule that the law will not allow it to be violated even by agreement, the wife cannot be examined against the husband, although he consent, and the principle is further preserved by adhering to the rule even after the marriage tie has been dissolved by the death of one of the parties or by a divorce for adultery.

The author considers the application of these principles to three classes of cases—namely, (i) where the husband or wife is a party, (ii) where one of them, not being a party, is interested in the result of a proceeding between others, and (iii) where neither of them is a party to the suit, or interested in the event. In the first class, it is stated that the rule is universal that the husband or wife of a party is altogether incompetent as a witness in either civil or criminal proceedings. In the second class, a distinction is drawn between the giving of evidence for, and the giving it against, the other, and, in the discussion with regard to this class, the author states as follows, at p. 709 :

... the party to whom the testimony of the wife is essential has a legal interest in her evidence, and as he might insist on examining the husband, it would it seems be straining the rule of policy too far to deprive him of the benefit of the wife's testimony.

In dealing with the third class of case, it is stated as follows, at p. 709 :

... the husband or wife is it seems competent to prove any fact, provided the evidence does not directly criminate the other or, as it seems, involve the disclosure of some communication made by the other.

It is further stated as follows, at p. 711 :

... although there does not appear to be any express decision on the subject it seems to be clear in principle that neither party can be examined in a collateral proceeding as to any matter of confidential communication by the other.

It will be observed that in none of the passages which I have quoted is there any reference to compellability as distinguished from competency, and I have been unable to discover any reference to privilege, as distinct from competency, in any of the books named.

Professor Holdsworth, in his *HISTORY OF ENGLISH LAW*, Vol. 9, p. 197, when dealing with the question of competency of parties to a suit and persons interested as witnesses, says that the disqualification of husband and wife to testify on one another's behalf

... is the one case in which relationship is allowed to disqualify, and this fact is quite sufficient to negative any derivation from the civil or canon law which disqualified many other relations and even servants.

He says that historically the disqualification appeared at about the same period as the disqualification of parties and persons interested. In this connection, Professor Holdsworth says that Coke's statement, to which I have already referred, is one of the earliest, and indicates that the law was then new. Although I have made a wide search, I have been unable to find any statement on the subject earlier than the note in COKE. Professor Holdsworth points out that, although at common law a party was incompetent as a witness, and could not be compelled to appear and answer questions addressed to him by his opponent, this rule did not

apply to the Court of Chancery or to the Ecclesiastical Courts. BLACKSTONE'S COMMENTARIES, Vol. 3, p. 382, says :

A It seems the height of judicial absurdity that in the same cause between the same parties in the examination of the same facts a discovery by oath of the parties should be permitted on one side of Westminster Hall and denied on the other, or that the judges of one and the same court should be bound by law to reject such a species of evidence if attempted on a trial at bar but when sitting the next day as a court of equity should be obliged to hear such examination read and to found their decrees upon it.

In 1853, the Commission on Common Law Procedure in their second report stated, at p. 13 :

B The question how far communications of married persons *inter se* should be matter of testimony in courts of justice stands on a very different ground [from that of compelling a husband or wife to testify to matters of fact against the other]. So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on the questions in dispute . . . hence all communications between them should be held privileged.

D It is to be observed that there is no statement to be found in the report that such communications were privileged, nor is there any reference to any existing rule of privilege relating to such communications—a remarkable omission if in fact any such rule was in existence at the date of the report. The signatories to the report are LORD JERVIS, C.J., MARTIN, B., LORD COCKBURN, C.J., LORD BRAMWELL and WILLES, J. A consideration of these names makes the evidential value of the report apparent.

E In WIGMORE ON EVIDENCE, Vol. 1, p. 729 *et seq.*, the well-known American textbook, there is a lengthy discussion with regard to what is there described as testimonial disqualification in the case of husband and wife, while in Vol. 4, p. 3257 *et seq.*, the history of privilege for communications between husband and wife, as distinguished from this testimonial disqualification, is set out at length. The author undoubtedly recognises the existence of the privilege with regard to communications passing between spouses in the United States of America, and explains that in some of the states the privilege rests on express statutory enactment, while in others it rests upon a rule of the law. In tracing the history of the matter, he says, at p. 3258 :

F . . . the explicit statement of the privilege as a distinct one from any other rule did not come in England until the statutory reforms of the Common Law Procedure Act just as the second half of the 1800's was beginning.

G Then he points out that in 1852 ERLE, J., in *Stapleton v. Crofts* (3) stated, at p. 374 :

H . . . as no protection was given to conjugal confidence in respect of the wives of witnesses, not parties . . . I think the rule has not yet been established.

The author goes on to state that the explanation of what he describes as the paradox is that (p. 3258) :

. . . until [the middle of the nineteenth century] the present privilege for com-

communications between husband and wife had not been plainly separated from the other privilege of husband or wife not to testify to any facts against the other.

It is to be noted that the latter was not in England a question of privilege, but of competency.

The cases referred to by SIMONDS, J., as supporting the rule, as enunciated by him, do not, in my opinion, extend so far. *Monroe v. Twisleton* (4) A was decided in 1802. The rule there laid down is that, where a man and wife are divorced, the wife is not competent to prove a contract made by her husband previous to divorce. LORD ALVANLEY said, at pp. 220, 221 :

To prove any fact arising after the divorce, this lady is a competent witness but not to prove a contract or anything else which happened during coverture. She was at that time bound to secrecy. What she did might be in consequence of the trust and confidence reposed in her by her husband; and miserable indeed would the condition of a husband be, if when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice. B C

A consideration of the report shows that the statement of the rule was made with reference to the competency of a husband or wife as a witness for or against the other, and has nothing to do with the question whether, in cases where a husband or wife was a competent witness, he or she could plead privilege with regard to any communication made to him or her during the coverture. In *O'Connor v. Marjoribanks* (6), TINDAL, C.J., D said, at p. 443 :

... we are asked to confine the rule [as to competency] to cases where the communications between the husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character. Upon the whole, I think it better to adopt LORD ALVANLEY'S rule in *Monroe v. Twisleton* (4) . . . E

In *Doker v. Hasler* (5), BEST, C.J., followed the decision of LORD ALVANLEY in *Munroe v. Twisleton* (4), and refused to allow a woman after F divorce to speak of conversations between herself and her husband during the existence of the marriage. Here, also, the question was not one of privilege, but of competency.

In BEST ON EVIDENCE, 2nd Edn., published in 1854, it is stated, at pp. 694, 695, that the evidence of communications between husband G and wife is rejected on grounds of public policy. Again, the statement of the rule is directed to competency, and there is no suggestion that the evidence is admissible, although it may not be compellable. In the Evidence Act, 1843, which removed the incompetency of witnesses on the ground of interest, there is a proviso preserving the incompetency H of parties and their husbands or wives.

In 1851, the Evidence Act, 1851, s. 2, provided that parties to any action, suit, or proceeding, should be competent and compellable witnesses, while sect. 3 provided that nothing contained in the Act should render any person who in any criminal proceeding was charged with the

commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or should render any person compellable to answer any question tending to criminate himself or herself, or should in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The language of the last-mentioned section gave rise to a doubt whether husbands and wives were not thereby by implication rendered competent witnesses for or against each other in civil proceedings. This doubt was determined in the negative in *Stapleton v. Crofts* (3), and, in consequence of this decision and of the second report of the Commissioners on Common Law Procedure, to which I have already referred, the Evidence Amendment Act, 1853, was passed. This Act provided by sect. 1 that husbands and wives of parties were to be admissible witnesses in any suit, action or other proceeding in any court of justice. By sect. 2, it was provided that nothing contained in the Act should render any husband, competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery. By sect. 3, it was provided that no husband should be compellable to disclose any communication made to him by his wife during the marriage and no wife should be compellable to disclose any communication made to her by her husband during the marriage. I have been unable to find, in any reported case decided before the passing of this Act, or in any textbook published before the passing of this Act, any statement that, where a husband or wife is a competent witness, he or she is entitled to refuse to answer any question with regard to communications passing between them.

I should point out that the statements in the most recent textbooks—for example, TAYLOR ON EVIDENCE, 12th Edn., and HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13—with regard to the position of husbands and wives with reference to communications passing between them do not appear to be accurate, for in neither work does it appear that any distinction is recognised between competency and compellability. In TAYLOR ON EVIDENCE, 12th Edn., p. 572, in the chapter dealing with "Evidence excluded on Grounds of Public Policy," it is stated as follows :

... the matters which the law says shall not be the subject of evidence in a court of justice are : (1) communications which have passed between husband and wife during marriage

In para. 909 (A), it is stated as follows :

The first class of subjects which the law protects from disclosure includes all communications between husband and wife. "No husband," says the legislature, "shall be compellable to disclose any communication made to him by his wife during the marriage and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." This enactment [the Evidence

Amendment Act, 1853, s. 3] rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife.

It is to be observed that the author draws no distinction between competency and compellability, and also, that he attributes the protection afforded to communications between husband and wife during marriage to the statute (the Evidence Amendment Act, 1853, s. 3), and not to any rule of common law, while the reasons he gives for the statutory protection are the same somewhat unsatisfactory reasons to be found in the cases decided before the statute was passed. In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 728, it is stated in the text that a husband or wife may refuse to disclose any communication made to him or her during the marriage by the other party to the marriage, while in the note relating to the statement quoted reference is made to the Evidence Amendment Act, 1853, s. 3. The note further states that the rule is not limited to communications of a strictly confidential character, and reference is made to *O'Connor v. Marjoribanks* (6). The note continues :

... and it applies even after the marriage tie has been severed by death or divorce : *Doker v. Hasler* (5) ; *Monroe v. Twistleton* (4).

As I have already pointed out, none of the cases referred to in this note has any reference to compellability (that is, privilege), but all are concerned solely with competency (that is, admissibility).

The conclusion at which I have arrived is that, before the passing of the Evidence Act, 1851, there was a rule of the common law that communications between husband and wife were not admissible in evidence, and, since the evidence was itself inadmissible, no question of privilege arose, and there was, therefore, no rule dealing with this aspect of the case. It was not until the evidence of the husband or wife became admissible by reason of the Evidence Act, 1851, and the Evidence Amendment Act, 1853, that the question of compellability arose, and was met by the express provisions of sect. 3 of the last-mentioned Act. The privilege, therefore, appears to me to rest entirely on the provisions of sect. 3 of the 1853 Act, and I am satisfied that there was, and is, no rule of common law, apart from those provisions, conferring or recognising any such privilege.

The question arises how far this statutory privilege extends. The section is silent as to a widower or widow, or divorced person. None of the cases cited, in my opinion, has any bearing on this question. In STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 12th Edn., p. 146, it is stated that it is doubtful whether sect. 3 of the Act of 1853 has any application to a widower or divorced person questioned after the dissolution of the marriage as to what had been communicated whilst

it lasted—a statement which must apply with equal force to a widow. Plainly, the words of the section do not include the case of any persons other than husbands and wives, and, since I have come to the conclusion that the privilege is statutory, I am unable to find any warrant for extending the words of the section by construction so as to include

- A** widowers and widows and divorced persons. It is for these reasons, the majority of which were not put before the judge, that I have arrived at a different conclusion from that reached by him. I hold that there is no ground on which the defendant, who is a widow, is entitled to refuse to answer all or any of the interrogatories propounded on behalf of the
- B** plaintiff. In the result, I agree that the order of the judge should be reversed, and leave should be given to administer the interrogatories set out in the summons.

Appeal allowed with costs.

- C** Solicitors : *John B. Borer*, agent for *Loseby, Son & Hammond*, Leicester (for the plaintiff); *Robinson & Bradley*, agents for *Evan Barlow, Son & Fordham*, Leicester (for the defendant).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*

Re CHADWICK'S TRUSTS, *SHAW v. WOODWARD*.[CHANCERY DIVISION (Bennett, J.), **January 17, 18, March 2, 1939.**]

Powers—Special power of appointment—Fraudulent exercise of power in favour of two appointees—Severance—Subsequent appointment to same appointees—Freedom from taint of second appointment—Onus of proof.

The second defendant exercised two special powers of appointment, given to her by a settlement and a will respectively, appointing funds, subject to her life interest, as to one moiety thereof to C. absolutely, and as to the other moiety to G. on his attaining the age of 21 with a proviso that if G., who was then about 20 years of age and in feeble health, should die under 21 years of age his moiety should accrue and go over to C. The second defendant and C. then borrowed the sum of £500 upon the security of the trust funds. G. died after attaining his majority. The second defendant later executed a further deed poll of appointment reciting that the earlier appointments were thought to be void as a fraudulent exercise of the power and further that it had been intended to include therein a power of revocation, and then revoked the previous appointments and appointed the funds to C. absolutely :—

HELD : (i) the earlier appointments were void as a fraudulent exercise of the power.

(ii) the appointments to G. were not severable, as those appointments had also been made with the object of securing a benefit to the appointor.

(iii) the later appointment, having appointed the funds to the same appointee as the earlier appointments, was equally invalid, as the onus was on that appointee to prove that the later appointment was not tainted with the same fraud as the earlier ones, and no evidence had been adduced on this point.

[EDITORIAL NOTE.] In order to sever an appointment, the court must be able to sever the intentions of the appointor and to distinguish the good from the bad. In the present case, the appointments to G. were thought to be equally necessary to secure the advance as those to C. The present case reiterates the very great difficulty of sustaining a second appointment to the same appointee as the earlier one, and the necessity for clear evidence by the appointee of freedom from taint.

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-586, paras. 1033-1037; and FOR CASES, see DIGEST, Vol. 37, pp. 504-517, Nos. 972-1084.]

Cases referred to :

(1) *Aleyn v. Belchier* (1758), 1 Eden, 132; 37 Digest 503, 962.

(2) *Topham v. Portland (Duke)* (1863), 1 De G. J. & Sm. 517; 35 Digest 81, 786; 32 L.J.Ch. 257; 8 L.T. 180; on appeal, *sub nom. Portland (Duke) v. Topham (Lady)* (1864), 11 H.L.Cas. 32; subsequent proceedings, *sub nom. Topham v. Portland (Duke)* (1869), 5 Ch. App. 40.

ADJOURNED SUMMONS to determine whether or not two appointments, or either of them, made under a settlement and under a will respectively, were valid. The facts are fully set out in the judgment.

Allan Walmsley for the plaintiffs.

Evelyn Riviere for the first defendant.

S. Pascoe Hayward for the second defendant.

G. D. Johnston for the third defendant.

- BENNETT, J. : By a settlement dated Nov. 15, 1876, made on the occasion of the marriage of Annie Chadwick with William Frederick Woodward, certain investments were assigned to trustees upon trust to pay the income thereof to Annie Chadwick, who became, and who is hereafter referred to as, Mrs. Woodward, during her life and after
- A her death upon trust for all such one or more exclusively of the others of the issue of the marriage to be born during the lives of William Frederick Woodward and Mrs. Woodward or the life of the survivor of them at such age or time or respective ages or times if more than one in such shares and with such future and executory or other trusts for
- B the benefit of the issue of some or one of them and with such provisions for their respective maintenance, education and advancement and upon such conditions and restrictions and in such manner as Mrs. Woodward should by any deed or deeds with or without power of revocation and new appointment appoint and in default of such appointment
- C and so far as no such appointment should extend in trust for all the children or any the child of the intended marriage who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or marry under that age and if more than one in equal shares.
- D By his will, dated July 10, 1885, John Chadwick, the father of Mrs. Woodward, devised and bequeathed to his trustees a portion of his residuary real and personal estate, which, in the events which happened, amounted to 10/94th parts thereof, upon trust to pay the income thereof to Mrs. Woodward during her life without power of anticipation,
- E and directed that after her death the same should be held upon trust for all or any such one or more exclusively of the other or others of the issue of Mrs. Woodward born during her lifetime or within 21 years after her death in such manner in every respect as she should at any time, whether covert or sole, by deed or will or codicil appoint, and,
- F in default of and subject to any such appointment, in trust for all the children or any the child of Mrs. Woodward who being a son or sons should attain the age of 21 years or being daughters or a daughter should attain that age or marry with the consent of her or their parents or parent, guardians or guardian, for the time being, and if more than one
- G in equal shares.

John Chadwick died on Jan. 29, 1892, and his will was proved on Apr. 12, 1892. There were two children only of the marriage of William Frederick Woodward and Mrs. Woodward—namely, the defendant Mr. Claude Hillersden Woodward, who was born on Feb. 3, 1879, and

H Mr. Gerald Hadden Woodward, who was born on Oct. 6, 1882.

On Sept. 30, 1903, Mrs. Woodward executed two deeds poll of appointment, one in execution of the power of appointment given to her by the settlement of Nov. 15, 1876, and the other in execution of the power

of appointment given to her by the will of John Chadwick. The two appointments were to the same effect. The trust funds subject to the trusts of the settlement and will respectively were absolutely and irrevocably appointed from and after the decease of Mrs. Woodward and in the meantime subject and without prejudice to her life interest in the same as to one moiety of the trust premises in trust for the defendant Mr. Claude Hillersden Woodward absolutely, and as to the other moiety in trust for Mr. Gerald Hadden Woodward on his attaining the age of 21 years with a proviso, and Mrs. Woodward did thereby further appoint and direct that, if Gerald Hadden Woodward should die under the age of 21, then the share thereby appointed to him on his attaining the age of 21 years should accrue and go over to the defendant Mr. Claude Hillersden Woodward absolutely. A

On Nov. 18, 1903, the defendant Claude Hillersden Woodward and Mrs. Woodward jointly borrowed from Charles Frederick Knight the sum of £500, which they jointly covenanted to repay to Charles Frederick Knight with interest at the rate of 5 per cent. per annum, and by a mortgage deed dated Nov. 18, 1903, the defendant assigned to Charles Frederick Knight by way of mortgage the moieties of the trust funds respectively appointed to him by the deeds poll of Sept. 30, 1903. On Nov. 19, 1903, Mrs. Woodward gave a written authority to her bankers to pay to Mr. Knight's solicitors the mortgage interest payable under the mortgage, and on Nov. 20, 1903, Mrs. Woodward's bankers by letter informed Mr. Knight's solicitors of this authority. B C D

The first question asked by the originating summons is this :

Whether the plaintiffs as the trustees of the said settlement and the trustees of the said 10/94th parts of the residuary estate of John Chadwick, deceased, ought to act on the footing that (i) an appointment made by Annie Woodward by deed poll dated Sept. 30, 1903, under the power of appointment conferred by the said marriage settlement and (ii) an appointment made by the said Annie Woodward by deed poll dated Sept. 30, 1903, under the power of appointment conferred by the will of the said John Chadwick are or either and if so which of the said appointments is valid and effective ? E F

In my judgment, the answer to this question is that neither of the appointments is valid or effective, for the reason that neither was executed *bona fide* for the end for which the powers were respectively given to Mrs. Woodward. Both appointments were made by Mrs. Woodward with the intention, or for the purpose, of providing her son, the defendant, Claude Hillersden Woodward, with a security upon which money could be borrowed by the defendant, paid over to the appointor, and used by her in discharging her liabilities. Proof that this was the intention of the appointor is afforded by the correspondence exhibited to the affidavit of Mr. T. Baines filed in this matter on Nov. 11, 1938, as well as by the recitals in the deed poll of June 2, 1916, to which I shall have to refer hereafter. G H

The powers were not, nor was either of them, executed fairly and

honestly, without any ulterior object. The evidence to which I have referred proves that the object of Mrs. Woodward was to benefit herself. The deeds, therefore, are both void : *Aleyn v. Belchier* (1).

- It was suggested that it was possible to sever the appointments in favour of Gerald from the appointments in favour of the defendant
- A Mr. Claude Hillersden Woodward and to hold the former good and the latter bad. If it had been possible from the evidence to conclude that Mrs. Woodward would have made the appointments in favour of Gerald independently of the appointments in favour of the defendant Claude Hillersden Woodward, I think it would have been possible, following
- B *Topham v. Portland (Duke)* (2), to sever the appointments in favour of Gerald from those in favour of the defendant Mr. Claude Hillersden Woodward. However, the evidence, I think, all goes to show that Mrs. Woodward's sole object in making the appointments was to benefit herself. The letter exhibited to the affidavit of the defendant Mr.
- C Claude Hillersden Woodward sworn on Aug. 23, 1938, points strongly in this direction, and seems to show that Mrs. Woodward thought (no doubt wrongly) that in some way or another the shares she was proposing to appoint to Gerald would become a security for the money which was to be borrowed and used by her for her own benefit. In my judgment,
- D the evidence shows that the appointments in favour of Gerald as well as those in favour of the defendant Mr. Claude Hillersden Woodward were made because the appointor expected to derive a benefit from them. Accordingly, in my judgment, severance is not possible.

- Gerald Hadden Woodward died on Aug. 4, 1909, and on July 22,
- E 1922, letters of administration to his estate were granted out of the Principal Probate Registry to the defendant Mrs. Selwyn. On May 4, 1915, Mrs. Woodward made her will, the relevant part of which is as follows :

- I appoint my son Claude Woodward a lieutenant-commander in His Majesty's
- F Navy to be sole executor of this my will and I devise and bequeath all my real and personal estate unto my said son absolutely and in exercise of the power vested in me by the will of my father John Chadwick dated July 10, 1885, and proved on Apr. 12, 1892, I appoint and give unto my said son Claude Woodward the whole of the capital to which such power of appointment extends.

- On June 2, 1916, Mrs. Woodward executed another deed poll of
- G appointment, the relevant parts of which begin with a recital of the two deeds poll of Sept. 30, 1903, and continue to the end of the deed, the whole of which it is necessary for me to read :

- And whereas by two deeds poll respectively dated Sept. 30, 1903, under my hand and seal it is expressed that I appointed by way of irrevocable appointment in each
- H case first the said trust fund comprised in my said marriage settlement as to one moiety thereof in favour of the said Claude Hillersden Woodward (then of full age) absolutely and as to the other moiety in favour of the said Gerald Hadden Woodward on his attaining the age of 21 years with a proviso that if he should die under that age then the said moiety should go over to his brother and secondly the said 10/94th parts of the said residuary estate of my father representing my said settled

share in his estate in like manner in favour of my said two sons with a like proviso as to the moiety of my said son Gerald Hadden Woodward in case he should die under the age of 21 years but in neither of the said two deeds poll was power reserved to me to revoke the appointments in favour of my said son Gerald Hadden Woodward and whereas the execution by me of the said 3 deeds poll respectively dated Sept. 29, and Sept. 30, 1903, was made for the purpose of enabling my said son Claude Hillersden Woodward to give adequate security for a loan desired by me of the sum of £500 by my solicitors Messrs. Wetherfield Son & Baines or a client of theirs namely Dr. Knight and it was never my intention at the date of the said deeds poll or at any time to appoint by way of irrevocable appointment a moiety of the capital of the trust funds comprised in the said settlement and of the 10/94th parts of the trust funds representing my settled share under the will of my father John Chadwick in favour of my second son Gerald Hadden Woodward (who was then aged 20 years and suffering from a serious ailment) upon his attaining the age of 21 years and whereas I have recently been advised that the said deeds poll of Sept. 30, 1903, are framed in such a manner that if the same are binding upon me and unless rectified I may be precluded from revoking the appointment purported to be made in favour of my said son Gerald Hadden Woodward and from appointing the moieties thereby purported to be appointed to him unto my said son Claude Hillersden Woodward and whereas it was always my intention to reserve to myself such power of revocation and new appointment respecting the moieties appointed in favour of my said son Gerald Hadden Woodward and whereas a sum of £100 was in fact advanced to me by Messrs. Wetherfield Son & Baines on or about Oct. 5, 1903, and £50 on or about Nov. 10, 1903, and whereas at my request (pursuant to a previous arrangement with him) my said son Claude Hillersden Woodward joined with me in mortgaging his reversionary interest under the said deeds poll of Sept. 30, 1903, to secure the sum of £500 lent to me by Dr. Knight (a client of the said Messrs. Wetherfield Son & Baines) out of which the advances made to me by that firm were paid off and the said mortgage is expressed to be dated Nov. 18, 1903, and made between the said Claude Hillersden Woodward of the first part myself of the second part and the said Dr. Charles Frederick Knight of the third part and whereas the said deeds poll dated Sept. 30, 1903, were executed by me under a mistake and in fact operate contrary to my intention at the time the same were respectively executed in so far as they purport to be irrevocable respecting the interest respectively thereby conferred on my said son Gerald Hadden Woodward who has since died and whereas I am advised that in executing the powers vested in me for the purpose above mentioned the said deeds poll dated Sept. 29 and Sept. 30, 1903, are or are liable to be declared void and ineffectual and whereas I am desirous of rectifying so far as I am able and of remedying the mistake above referred to and also of duly and effectually exercising the powers now remaining vested in me under the said settlement and the said will respectively in manner hereinafter appearing and also with that object of duly and effectually revoking the said deed poll dated Jan. 19, 1894, now these presents witness that pursuant to my said desire and in exercise of the powers vested in me or which were intended and ought to be vested in me under the said deed poll of Jan. 19, 1894, and the said two deeds poll of Sept., 30, 1903, on the footing that the said deeds poll of Sept. 30, 1903, respectively shall hereby be rectified or deemed to be rectified so as to reserve a power of revocation in accordance with my true intention as hereinbefore recited and of every other power me enabling I hereby absolutely revoke the appointments thereby respectively made or purported to have been made in favour of my said son Gerald Hadden Woodward and I hereby in exercise of the powers respectively vested in me under my said marriage settlement and under the said will of my father and of every other power me enabling irrevocably appoint that the moieties respectively purported to have been appointed by me in favour of my said son Gerald Hadden Woodward shall from and after my death and in the meantime subject to my life interest be held in trust for my said son Claude Hillersden Woodward absolutely and these presents also witness that in case and in the event of the said deeds poll of Sept. 29 and Sept. 30, 1903, being in fact or by reason of any rule of law or equity being hereinafter declared to be void and ineffectual I hereby in exercise of the powers respectively vested in me under my said marriage settlement and under the said will of my father and of every other power enabling me irrevocably appoint and direct that the whole of the trust funds comprised in my said marriage settlement and the whole of the 10/94th parts of the residuary estate of my said father or other my settled share under his said will shall respectively from and after my death and in the meantime subject to my life interest be held in trust for my said son

Claude Hillersden Woodward absolutely and if and so far as may be necessary to give full effect to this appointment I hereby revoke the appointment made by the said deed poll dated Jan. 19, 1894.

Mrs. Woodward died on Feb. 28, 1938, and her will was proved in the Principal Probate Registry by the defendant Claude Hillersden Woodward on May 23, 1938. The second and third questions asked by the originating summons are as follow :

(2) If the said appointments are or either of them is valid whether the plaintiffs as such trustees as aforesaid ought to act on the footing that the same were or was validly and effectively revoked by the said Annie Woodward by a deed poll dated June 2, 1916.

(3) Whether the plaintiffs as such trustees as aforesaid ought to act on the footing that the trust funds comprised in the said marriage settlement and the said 10/94th parts of the residuary estate of the said John Chadwick were validly and effectually appointed by the said Annie Woodward in trust for the defendant Claude Hillersden Woodward absolutely either (a) by the said deed poll of June 2, 1916, or (b) by the will of the said Annie Woodward dated May 4, 1915, and proved by the said Claude Hillersden Woodward in the Principal Probate Registry on May 23, 1938.

Since I have decided that both the appointments of Sept. 30, 1903, are invalid, the second question disappears. It is only necessary to answer Question (3).

The sole appointee under the will and under the deed poll of June 2, 1916, is the defendant Mr. Claude Hillersden Woodward. The onus of showing that these appointments were untainted by the fraud which vitiated the two earlier appointments rests upon him. In FARWELL ON POWERS, 3rd Edn., p. 231, the law is stated in the following terms :

But in the case of fraudulent appointments, whether actually set aside by the court or not, if the second appointment is to the same person as the first the difficulty of showing that the second appointment is free from the fraud which vitiated the first is so great as to be almost insuperable. And, "where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first." And, "the burden of proof requisite to support a second appointment in such a case rests on the appointee."

The statement in the text is supported by the authority cited—namely, *Topham v. Portland (Duke)* (2), at pp. 61, 62.

In the present case, I have no evidence at all as to the circumstances in which, or the reasons for which, Mrs. Woodward made her will, and no evidence except that afforded by the recitals as to the circumstances in which, or the reasons for which, the deed poll of June 2, 1916, was executed. The defendant Mr. Claude Hillersden Woodward has certainly not satisfied me that either of the later appointments was free from the taint vitiating the two earlier ones. It seems to me, therefore, that I am bound by the authority to which I have referred to hold in answer to the third question that the plaintiffs ought to act upon the footing that the trust funds comprised in the marriage settlement and

the 10/94th parts of the residuary estate of John Chadwick were not validly or effectively appointed by Mrs. Annie Woodward in trust for the defendant Claude Hillersden Woodward either by deed poll of June 2, or by the will of May 4, 1915, and I answer the third question accordingly. The result seems to be that the trust funds subject to the trusts of the settlement and the will go in default of appointment.

A

Appointments invalid and funds to go in default of appointment. Costs as between solicitor and client to be paid out of trust funds.

Solicitors: *Collyer-Bristow & Co.* (for the plaintiffs); *Boodle, Hatfield & Co.* (for the first defendant); *Bower, Cotton & Bower* (for the second defendant); *Wetherfield, Baines & Baines* (for the third defendant).

B

[Reported by F. HONIG, ESQ., Barrister-at-Law.]



- 4 JUN 1991

